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Commission on
International
Trade Law**

YEARBOOK

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NOTE

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

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

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INTRODUCTION

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

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

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

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

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

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

THE TWENTY-FOURTH SESSION (1991)

A. Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session (Vienna, 10-28 June 1991) [Original: English]^a

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

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INTRODUCTION

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

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

I. ORGANIZATION OF THE SESSION

A. Opening of the session

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

B. Membership and attendance

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

Argentina (1992), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1992), China (1995), Costa Rica

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

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

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

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

(a) *United Nations organs*

International Monetary Fund

(b) *Intergovernmental organizations*

Bank for International Settlements

Commission of the European Communities

Hague Conference on Private International Law

(c) *Other international organizations*

Argentine-Uruguayan Institute of Commercial Law

European Banking Federation

Society for Worldwide Interbank Financial Telecommunication

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

C. Election of officers²**8. The Commission elected the following officers:**

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

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

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

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

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

II. DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS**A. Introduction**

11. The Commission, in conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers (A/CN.9/SER.B/1) as a product of the work of the Secretariat, decided to begin the preparation of model rules on electronic funds transfers and to entrust the task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments.³ The Working Group carried out its work at its sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second sessions. The Working Group completed its work by adopting the draft text of a Model Law on International Credit Transfers at the close of its twenty-second session after a drafting group had established corresponding language versions in the six languages of the Commission.

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

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

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

B. Discussion of articles**Article 1**

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

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

"Article 1. Sphere of application"

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

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

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

Paragraph (1)

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

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

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

19. The Commission did not accept either suggestion. It was noted, however, that it might not be desirable for a State to have two different bodies of law governing credit transfers, one applicable to domestic credit transfers and the Model Law applicable to international credit transfers.

In some countries there were no domestic credit transfers or the domestic elements of international transfers were segregated from purely domestic transfers. In other countries domestic credit transfers and the domestic elements of international transfers were processed through the same banking channels. It was suggested that in those countries it would be desirable for the two sets of legal rules to be reconciled to the greatest extent possible or for the Model Law to be adopted for both domestic and international credit transfers. It was agreed that it should be made clear, by means of a footnote or in a commentary to the Model Law, that countries would have the option to adopt the provisions of the Model Law for both international and domestic credit transfers.

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

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

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

Paragraph (2)

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

Footnote: Consumer transfers

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

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

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

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

Article 2

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

"Article 2. Definitions

"For the purposes of this law:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) "Credit transfer"

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

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

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

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

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

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

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

33. The Commission considered whether to retain the sentence in square brackets at the end of the definition excluding transfers effected through a point-of-sale system. In support of retaining the language, it was stated that such transfers should be excluded because they were debit

transfers and therefore outside the purview of the Model Law. Another reason given for exclusion was that such transfers were essentially utilized for consumer purposes, while the Model Law had been prepared with commercial credit transfers in view.

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

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

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

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

(b) "Payment order"

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

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

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

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

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

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

was proposed that the words "the instruction shall be treated" should be replaced by the words "the instruction shall thereafter be treated".

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

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

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

"(1) When an instruction is not a payment order because it is subject to a condition but a bank that has received the instruction executes it by issuing an unconditional payment order, the sender of the instruction thereafter has the same rights and obligations under this law as the sender of a payment order and the beneficiary designated in the instruction shall be treated as the beneficiary under article 2(d).

"(2) This law does not govern the time of execution of a conditional instruction received by a bank, nor does it affect any right or obligation of the sender of a conditional instruction that depends on whether the condition has been satisfied."

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

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

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

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

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

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

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

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

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

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

(c) "Originator"

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

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

payment order over the telephone or handed a written payment order to the receiving bank.

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

(d) "Beneficiary"

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

(e) "Sender"

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

(f) "Bank"

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

"A bank is defined as an institution that:

"(i) engages in the business of banking;

"(ii) is recognized as a bank by the bank supervisory or monetary authorities of the country of its organization or principal banking operations;

"(iii) receives deposits to a substantial extent in the regular course of business; and

"(iv) has the power to accept demand deposits."

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

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

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

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

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

59. While there was general agreement that message carriers such as the Worldwide Interbank Financial Telecommunication (SWIFT) did not normally engage in executing payment orders and therefore would not be covered by the Model Law, divergent views were expressed as to whether automated clearing houses should be left out of the scope of the Model Law. One view was that automated clearing houses were mere data managers that should not be covered by the Model Law. Another view was that automated clearing houses should be

covered since they were, in some countries, registered as banks, operated under the supervision of bank supervision authorities and were obliged to maintain reserves with the central bank. Some netting systems already performed functions similar to those of central banks and, in the future, automated clearing houses might be expected to perform an increasing number of banking activities in relation to the netting of payment orders issued for the execution of financial agreements such as swap agreements involving different currencies or interest rates. After deliberation, the Commission did not adopt the proposal.

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

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

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

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

(g) "Receiving bank"

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

(h) "Intermediary bank"

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

(i) "Funds" or "money"

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

(j) "Authentication"

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

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

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

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

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

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

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

(k) "Execution date"

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

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

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

(l) "Execution"

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

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

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

78. It was widely felt that the approach proposed by the ad hoc Working Party was problematic in that it defined

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

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

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

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

(m) "Payment date"

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

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

Additional definitions

"Purported sender"

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

"Beneficiary's bank"

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

"Interest"

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

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

accepted by the local banking community of that country. It also contained provisions identifying the account to be credited and defining the period of time for which interest was payable.

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

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

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

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

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

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

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

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

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

Article 3

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

"Article 3. *Variation by agreement*

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

94. Divergent views were expressed as to the appropriateness of the approach taken to the principle of freedom of contract in article 3, which provided that the parties may vary their rights and obligations under the Model Law subject to the exceptions set forth in individual provisions of the Model Law. According to one

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

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

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

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

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

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

*Proposal for an additional article
on interpretation*

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

"Article X. Interpretation

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

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

102. Reservations were expressed as to the advisability of including the proposed provision. In particular, it was stated that such a provision, while appropriate in a convention, could not properly be included in the Model Law, which was destined to be adopted as a piece of national legislation. In a number of countries enactment into national legislation of a provision of this type on interpretation

would not be possible, unless the legislation implemented a convention. It was also suggested that inclusion of a provision of this type in the Model Law would complicate the application of the Model Law to domestic transfers where an enacting State wished to do so.

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

Article 4

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

"Article 4. Obligations of sender

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

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

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

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

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

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

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

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

Paragraph (1)

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

Paragraph (2)

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

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

108. The view was expressed that article 4 should apply in its entirety to authentication by comparison of signatures, in particular because new electronic methods of comparison of handwritten signatures promised to make

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

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

Paragraph (3)

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

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

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

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

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

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

Paragraph (4)

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

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

116. After deliberation, the Commission adopted the above suggestion in substance and agreed that it should

not be limited to situations of "improper" access. Accordingly, it decided to add to the reference to "a present or former employee of the purported sender" wording along the following lines "or other person whose relations with the purported sender enabled it to obtain access to the authentication procedure".

Paragraph (5)

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

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

Paragraph (6)

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

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

Article 5

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

"Article 5. *Payment to receiving bank*

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

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

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

- “(i) when a credit that the sender causes to be entered to an account of the receiving bank with the sender is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or
- “(ii) when a credit that the sender causes to be entered to an account of the receiving bank in another bank is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or
- “(iii) when final settlement is made in favour of the receiving bank at the central bank of the State where the receiving bank is located, or
- “(iv) when final settlement is made in favour of the receiving bank
 - “a. through a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally and the settlement is made in accordance with applicable law and the rules of the system, or
 - “b. in accordance with a bilateral netting agreement with the sender; or
- “(c) if neither subparagraph (a) nor (b) applies, as otherwise provided by law.”

Opening words

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

123. The proposal was objected to on the grounds that the Model Law should indicate the time of payment not

only in the case when acceptance resulted from the failure of the receiving bank to act upon receipt of a payment order but also in the situations where acceptance resulted from a positive act by the receiving bank. It was stated that in all cases it would be useful for the sender to know when payment occurred because the time of payment would be the time when the sender fulfilled its obligation to pay the receiving bank.

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

Subparagraphs (a) to (b)(ii)

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

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

Subparagraph (b)(iii)

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

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

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

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

Subparagraph (b)(iv)

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

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

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

Subparagraph (c)

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

Article 6

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

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

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

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

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

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

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

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

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

Paragraph (1)

135. The Commission adopted the paragraph unchanged.

Paragraph (2)

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

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

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

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

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

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

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

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

Paragraph (3)

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

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

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

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

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

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

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

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

- "(i) where payment is to be made by debiting an account of the sender with the receiving bank, there are insufficient funds available in the account to pay for the payment order; or
- "(ii) where payment is to be made by other means, payment has not been received; or
- "(iii) there is insufficient information to identify the sender.

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

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

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

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

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

Article 7

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

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

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

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

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

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

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

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

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

Paragraph (1)

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

Paragraph (2)

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

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

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

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

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

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

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

Paragraph (3)

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

Paragraph (4)

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

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

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

Paragraph (5)

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

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

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

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

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

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

"(5) When a receiving bank detects that there is an inconsistency in the information relating to the amount of money to be transferred, it shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. If a bank detects such an inconsistency but executes the payment order, it is also in breach of paragraph (2). Any interest payable under article 16(3) for failing to give the notice required by this paragraph shall be deducted from any interest payable under article 16(1) for failing to

comply with paragraph (2). A bank that does not detect such an inconsistency and executes the payment order is not in breach of paragraph (2) if it otherwise complies with that paragraph."

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

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

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

Paragraph (6)

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

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

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

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

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

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

Paragraph (7)

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

Article 8

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

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

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

"(a) when the time for [execution] under article 10 has elapsed without notice of rejection having been given, provided that: (i) where payment is to be made by debiting an account of the sender with the beneficiary's bank, acceptance shall not occur until there are

funds available in the account to be debited sufficient to cover the amount of the payment order; or (ii) where payment is to be made by other means, acceptance shall not occur until the beneficiary's bank has received payment from the sender in accordance with article 5(b) or (c),

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

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

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

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

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

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

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

Paragraph (1)

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

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

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

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

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

Paragraph (2)

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

Article 9

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

"Article 9. Obligations of beneficiary's bank"

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

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

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

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

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

Paragraph (1)

183. A view was expressed that paragraph (1) might need redrafting to avoid conflict with article 8(1). It was

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

Paragraphs (2) and (3)

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

Paragraph (4)

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

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

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

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

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

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

Paragraph (5)

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

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

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

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

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

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

paragraph (5) would be considered in the context of article 16(6).

Article 10

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

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

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

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

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

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

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

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

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

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

Paragraph (1)

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

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

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

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

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

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

201. After deliberation, the Commission adopted the solution according to which the receiving bank should in principle be obligated to execute a payment order on the day the order was received, but that an exception to that

principle should allow execution of an order on the following day. Furthermore, it was decided that the bank executing an order on the following day should be obligated to enter the transaction in its books in such a way that the bank would not have the benefit of the use of the funds for an extra day without crediting interest for that day.

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

"(1) The receiving bank is required to execute the payment order on the business day it is received or, if not, at the latest on the business day after it is received, unless

"(a) . . .

"(b) . . .

"(1 *bis*) When the receiving bank executes the payment order on the business day after it is received, otherwise than pursuant to subparagraph (1)(a) or (b), the receiving bank must do so for value on the date of receipt."

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

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

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

Paragraphs (2) and (3)

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

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

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

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

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

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

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

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

Paragraph (4)

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

Paragraph (5)

212. The Commission adopted paragraph (5).

Paragraph (6)

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

Article 11

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

"Article 11. Revocation

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

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

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

"(4) A revocation order must be authenticated.

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

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

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

"(8) The death, bankruptcy, or incapacity of either the sender or the originator does not of itself, operate

to revoke a payment order or terminate the authority of the sender. The word "bankruptcy" includes all forms of personal, corporate and other insolvency.

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

Paragraphs (1) and (2)

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

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

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

dealt with by agreement between the parties to a credit transfer.

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

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

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

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

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

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

Paragraph (3)

223. The Commission adopted paragraph (3).

Paragraph (4)

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

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

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

Paragraph (5)

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

Paragraph (6)

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

New paragraph (6 bis)

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

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

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

230. It was noted that the scope of the proposed text was limited in two directions. First, the opening phrase made it clear that the skip-rule did not operate when it was inconsistent with any bilateral or multilateral agreement through which banks netted their obligations arising out of payment orders. Secondly, the rule did not constitute a

general authorization for a refund to a sender other than the previous sender; the rule merely provided that, when a bank chose to skip a sender, which the bank would do taking into account the circumstances of the case and its obligations towards the participants in the particular credit transfer chain, the bank would be discharged from its obligation to make the refund.

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

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

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

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

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

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

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

Paragraph (7)

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

Paragraph (8)

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

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

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

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

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

Paragraph (9)

242. A view was expressed that the paragraph was drafted in an overly broad fashion. In particular, it was suggested that the scope of the rule that branches and separate offices of a bank were to be considered separate

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

Article 12

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

"Article 12. Duty to assist"

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

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

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

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

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

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

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

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

Article 13

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

"Article 13. *Duty to refund*

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

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

by law from making the refund. The sender that first specified the use of that intermediary bank shall have the right to obtain the refund from the intermediary bank."

Article as a whole

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

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

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

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

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

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

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

256. A concern was expressed that the proposed modification might create uncertainty in interpreting the concepts of "prudent bank" and "significant risk". Furthermore,

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

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

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

Second sentence of paragraph (1)

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

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

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

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

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

Second sentence of paragraph (2)

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

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

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

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

Proposal for including "skip-rule"

266. It was recalled that the Commission had decided to include in article 11 a skip-rule, according to which a

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

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

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

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

Article 14

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

"Article 14. Correction of underpayment"

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

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

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

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

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

Article 15

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

"Article 15. *Restitution of overpayment*

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

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

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

276. It was proposed that article 15 should be narrowed so that restitution would be obligatory only if the

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

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

Article 16

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

"Article 16. *Liability for interest*

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

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

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

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

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

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

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

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

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

Article 17

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

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

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

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

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

Paragraph (1)

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

282. It was suggested that the first sentence needed to be modified to make clear that a credit transfer was to be

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

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

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

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

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

Payment orders for illicit purposes

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

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

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

C. Report of Drafting Group

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

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

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

III. PROCUREMENT

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

292. At its eleventh session, held in New York from 5 to 16 February 1990, the Working Group considered the draft of a model law on procurement (A/CN.9/331) and, at the close of that session, requested the Secretariat to prepare for the twelfth session a revised draft of the model

law based on the discussions during its eleventh session. The Working Group also requested the Secretariat to prepare draft provisions dealing with redress for actions and decisions taken by the procuring entity contrary to the provisions of the model law (A/CN.9/331, para. 222).

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

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

IV. GUARANTEES AND STAND-BY LETTERS OF CREDIT

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

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

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

⁴Ibid., para. 243.

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

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

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

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

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

V. INTERNATIONAL COUNTERTRADE

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

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

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

303. At its twenty-third session, in 1990, the Commission had before it a report entitled "Draft legal guide on drawing up contracts in international countertrade transactions: sample chapters" (A/CN.9/332 and Add.1-7). The report contained a proposed structure of the legal guide (A/CN.9/332, para. 6), an outline of the chapter entitled "Introduction to legal guide" (A/CN.9/332/Add.1), and the following draft chapters: "II. Scope and terminology of legal guide" (A/CN.9/332/Add.1); "III. Contracting

approach" (A/CN.9/332/Add.2); "IV. General remarks on drafting" (A/CN.9/332/Add.3); "V. Type, quality and quantity of goods" (A/CN.9/332/Add.4); "VI. Pricing of goods" (A/CN.9/332/Add.5); "IX. Payment" (A/CN.9/332/Add.6); and "XII. Security for performance" (A/CN.9/332/Add.7). Draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), was submitted to but not considered by the Commission. There was general agreement in the Commission with the overall approach taken in preparing the draft chapters, both as to the structure of the legal guide and as to the nature of the description and advice contained therein. The Commission decided that the remaining draft chapters should be discussed by the Working Group on International Payments at its twenty-fifth session, to be held in New York from 3 to 13 September 1991.¹⁰

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

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

VI. LEGAL PROBLEMS OF ELECTRONIC DATA INTERCHANGE

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

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

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

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

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

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

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

value of computer records" (A/CN.9/265). The report came to the conclusion that, on a global level, there were fewer problems in the use of data stored in computers as evidence in litigation than might have been expected. It noted that a more serious legal obstacle to the use of computers and computer-to-computer telecommunications in international trade arose out of requirements that documents had to be signed or be in paper form. At that session, the Commission recommended to Governments, *inter alia*, that they should eliminate unnecessary obstacles to the use of computers in trade, and recommended to international organizations elaborating legal texts related to trade that they take account of the need to eliminate unnecessary obstacles to the use of computers in trade.¹² That recommendation was endorsed by the General Assembly in its resolution 40/71 of 11 December 1985.¹³

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

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

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

view to recommending whether a model agreement should be available for world-wide use and, if so, whether the Commission should undertake its preparation. The Commission expressed the wish that the report would give it the basis on which to decide what work might be undertaken by the Commission in the field.¹⁵

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

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

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

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

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

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

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

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

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

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

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

VII. COORDINATION OF WORK

318. The Commission had before it a note by the Secretariat on current activities of international organizations

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

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

VIII. STATUS OF CONVENTIONS

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

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

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

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

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

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

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

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

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

IX. TRAINING AND ASSISTANCE

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

of the training and assistance activities should be the promotion of the texts that had been prepared by the Commission.¹⁷

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

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

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

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

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

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

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

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

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

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

337. The Commission was informed that the Secretariat expected to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade law, especially for developing countries. In view of the

interest in the Symposium held during the current session and of the advantages of holding symposia in connection with the sessions of the Commission when they were held at the location of the Commission's Secretariat at Vienna, it was intended to organize a symposium on the occasion of the twenty-sixth session of the Commission, in 1993.

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

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

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

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

X. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS

A. General Assembly resolution on the work of the Commission

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

B. Decade of International Law

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

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

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

346. The Commission welcomed the proposal that it would be useful to organize a Congress on International

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

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

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

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

¹⁹Ibid., para. 74.

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

C. INCOTERMS 1990

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

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

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

D. Bibliography

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

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

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

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

F. Sessions of the working groups

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

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

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

G. Retirement of Secretary of Commission

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

ANNEX I

Draft UNCITRAL Model Law on International Credit Transfers

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

ANNEX II

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

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

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

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

Commission on International Trade Law on its twenty-fourth session (A/46/17), which was before the Board under cover of a note by the UNCTAD secretariat (TD/B/1303)."

Action by the Board

425. At its 791st meeting, on 25 September 1991, the Board took note of the report of the United Nations

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

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

I. INTRODUCTION

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

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

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

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

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

contain the views of the representatives who spoke on the item.

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

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

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

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

**III. RECOMMENDATION OF THE SIXTH
COMMITTEE**

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

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

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

I. INTERNATIONAL PAYMENTS

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

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INTRODUCTION

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

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

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

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

5. This report contains a commentary on the draft articles of the Model Law as they were adopted by the Working Group at its twenty-second session and presented to the Commission for its consideration at the current session (A/CN.9/344, annex). The commentary indicates the history of the provisions and its relationship to other provisions. Similar commentaries were prepared for the

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

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

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

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

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

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Title of the Model Law

Prior discussion

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

Comments

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

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

3. The word "electronic" is not used in the title as a result of the decision that the Model Law would be applicable to paper-based credit transfers as well as to those made by electronic means (A/CN.9/318, paras. 15 to 17). At the twenty-first session, while no suggestion was made that the Model Law should not apply to paper-based credit transfers, there was general agreement that the Model Law should be drafted so as to meet the operating needs of high speed electronic credit transfers (A/CN.9/341, para. 28; see also paras. 24 to 27 and 56).

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

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

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

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

CHAPTER I. GENERAL PROVISIONS

*Article 1. Sphere of application**

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

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

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

Prior discussion

A/CN.9/297, paras. 12 to 23 and 29 to 31 (sixteenth session, 1987)

A/CN.9/317, paras. 16 to 24, 30 and 95 to 97 (seventh session, 1988)

A/CN.9/318, paras. 20 to 34, 53 and 54 (eighteenth session, 1988)

A/CN.9/329, paras. 12 to 25 and 194 (twentieth session, 1989)

A/CN.9/341, paras. 57 to 65 (twenty-first session, 1990)

A/CN.9/344, para. 129 (twenty-second, 1990)

Comments

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

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

Internationality of a transfer

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

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

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

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

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

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

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

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

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

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

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

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

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

13. Restricting application of the Model Law to international credit transfers means that a State that adopts the

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

Territorial scope of application

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

Consumer transfers

15. The Working Group decided at its eighteenth session that the Model Law should apply to all international credit transfers, including transfers made for consumer purposes. Not only would that preserve the basic unity of the law, it would avoid the difficult task of determining what would be a credit transfer for consumer purposes. That was also thought to be of importance since special consumer protection legislation affecting credit transfers currently exists, and could be envisaged in the future, in only some of the countries that might consider adopting the Model Law.

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

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

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

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

Article 2. Definitions

For the purposes of this law:

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

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

- (i) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and
- (ii) the instruction does not provide that payment is to be made at the request of the beneficiary.

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

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

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

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

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

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

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

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

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

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

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

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

Prior discussion

A/CN.9/297, paras. 24 to 28 (sixteenth session, 1987)
A/CN.9/317, paras. 26 to 47 (seventeenth session, 1988)

A/CN.9/318, paras. 35 to 59, 75, 76, 94 and 106 (eighteenth session, 1988)

A/CN.9/328, paras. 79 and 88 (nineteenth session, 1989)

A/CN.9/329, paras. 26 and 82 (twentieth session, 1989)

A/CN.9/341, paras. 66 to 84 (twenty-first session, 1990)

A/CN.9/344, paras. 130 to 135 (twenty-second session, 1990)

Comments

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

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

Chapeau

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

"Credit transfer"

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

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

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

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

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

9. *Comparison with Article 4A.* Except for the sentence in square brackets, the definition of "credit transfer"

is almost identical to the definition of "funds transfer" in Article 4A-104. Point-of-sale payment transactions are excluded from the application of Article 4A because they are subject to the Electronic Fund Transfer Act of 1978.

"Payment order"

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

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

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

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

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

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

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

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

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

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

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

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

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

20. At the twenty-first session deletion of what is currently subparagraph (i) was suggested on the grounds that the question of reimbursement of the receiving bank should be left for the originator and its bank to agree upon on a contractual basis. However, the subparagraph was

retained on the grounds that it was necessary in order to exclude debit transfers from the scope of the Model Law (A/CN.9/341, para. 76).

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

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

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

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

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

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

"Originator"

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

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

"Beneficiary"

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

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

"Sender"

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

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

"Bank"

31. The Working Group at its eighteenth session agreed to use the word "bank" since it was short, well-known and covered the core concept of what was intended (A/CN.9/318, para. 46; but see comments 37 and 38). The definition in the Model Law will necessarily differ from that used in national legislation since there are different definitions in various countries and in some countries there are two or more definitions for different purposes.

32. The definition in ISO 7982-1 is that a bank is "a depository financial institution". The Working Group at its eighteenth session was of the view that the test as to whether a financial institution should have the rights and obligations of a bank under the Model Law should depend on whether "as an ordinary part of its business it engaged in credit transfers for others", rather than whether it engaged in the totally unrelated activity of taking deposits

(A/CN.9/318, para. 50). As a result, some individual financial institutions that would not normally be considered to be banks, such as dealers in securities that engage in credit transfers for their customers as an ordinary part of their business, would have been considered to be banks for the purposes of the Model Law under the definition adopted at the eighteenth session.

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

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

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

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

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

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

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

Whether the term "bank" should be replaced

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

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

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

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

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

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

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

"Receiving bank"

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

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

"Intermediary bank"

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

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

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

"Beneficiary's bank"

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

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

"Funds" or "money"

51. The definition is modelled on the definition of "money" or "currency" contained in article 5(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/318, para. 59). However, it specifies that the term includes credit in an account, as is proper in the context of the Model Law. The definition was modified by the drafting group at the nineteenth session in accordance with the suggestion contained in A/CN.9/WG.IV/WP.41, article 2, comment 16. At the twentieth session it was noted that the definition included the ECU (A/CN.9/329, para. 73).

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

"Authentication"

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

54. The definition makes it clear that an authentication of a payment order does not refer to formal authentication by notarial seal or the equivalent, as it might be understood in some legal systems.

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

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

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

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

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

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

"Execution date"

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

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

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

"Execution"

63. Although the term "execution" has been used throughout the drafting history of the Model Law, until the

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

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

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

"Payment date"

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

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

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

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

69. The definition of "payment date" differs from pay date in ISO 7982-1 in that in the latter the pay date is the "date on which the funds are to be available to the beneficiary for withdrawal in cash". In the Model Law definition the payment date is the date "when the funds are to be placed at the disposal of the beneficiary". (See A/CN.9/317, para. 43 and A/CN.9/341, para. 83.) The definition leaves open the question when and under what circumstances funds that are placed at the disposal of the beneficiary are not available for withdrawal in cash. The most obvious example is when the transfer is in a unit of account that may be at the disposal of the beneficiary for further transfer in that form but not available in cash either as a unit of account or, perhaps, even in the local currency.

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

71. *Comparison with Article 4A.* Article 4A-401 defines "payment date" as "the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank". The official comments say that the payment date applies to the payment order issued to the beneficiary's bank, but that a payment order issued to a receiving bank other than the beneficiary's bank may also state a date for payment to the beneficiary. The comments go on to say that the payment date may be expressed to the

beneficiary's bank in various ways, including the use of a type of credit transfer system that has a fixed time schedule of a certain number of days to process payment orders.

Article 3. *Variation by agreement*

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

Prior discussion

A/CN.9/318, para. 34 (eighteenth session, 1988)

A/CN.9/WG.IV/WP.47 (submitted to twenty-first session, 1990)

A/CN.9/341, paras. 50 to 52 (twenty-first session, 1990)

A/CN.9/344, para. 141 (twenty-second session, 1990)

Comments

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

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

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

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

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

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

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

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

(b) the receiving bank complied with the authentication.

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

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

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

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

Prior discussion

A/CN.9/297, paras. 39 to 45 and 69 (sixteenth session, 1987)

A/CN.9/317, paras. 57, 69 to 79 and 84 (seventeenth session, 1988)

A/CN.9/318, paras. 70 to 109 (eighteenth session, 1988)

A/CN.9/329, paras. 94 to 111 (twentieth session, 1989)

A/CN.9/341, paras. 86 to 103 (twenty-first session, 1990)

A/CN.9/344, paras. 121 to 126 (twenty-second session, 1990)

Comments

1. Paragraphs (1) to (4) set forth the situations in which a purported sender of a payment order is bound by the order. Paragraph (5) sets forth the extent to which the sender is bound by the terms of the payment order. Paragraph (6) sets forth the only obligation of the sender in regard to a payment order on which it is bound, i.e. to pay the receiving bank for it.

Paragraph (1)

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

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

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

Paragraph (2)

5. Paragraph (2) has been drafted as an exception to paragraph (1), but from the viewpoint of banking operations it provides the basic rule. In almost all cases a payment order must be authenticated. Proper authentication indicates proper authorization and the receiving bank will act on the payment order. Even if the payment order was not properly authorized under paragraph (1), the purported sender is bound by the order if the requirements of paragraph (2) are met (see A/CN.9/341, para. 86).

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

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

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

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

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

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

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

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

Paragraph (3)

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

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

Paragraph (4)

15. The paragraph was prepared in two versions at the eighteenth session of the Working Group (A/CN.9/318, paras. 88 to 90). In general, those who were in favour of placing on the receiving bank the major risk that an authentication had been falsified by a known or unknown third person favoured variant A. Placing the major risk on the receiving bank was said to be appropriate because it was the receiving bank that usually designed the authentication procedure (see comment 7). In general, those who were in favour of placing the major risk on the sender favoured variant B. Placing the major risk on the sender was said to be appropriate because it was the sender who chose the means of transmission of the particular payment order. Moreover, variant B would act as an incentive to senders to protect the authentication or encryption key in their possession.

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

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

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

19. After an extensive discussion at the twenty-first session the Working Group decided that it would leave the parties free to vary the provisions of paragraph (4) by agreement, as provided in what is currently article 3. A suggestion was made that it should not be possible to vary the provisions to the detriment of non-bank senders. Another suggestion was that there should be no limitation on the extent to which paragraph (4) could be modified by

agreement, but that the agreement could not be in the general conditions of the receiving bank; the agreement would have to be in an individual contract between the purported sender and the receiving bank. The delegations that expressed strong reservations to the decision leaving the parties free to vary the provisions of paragraph (4) by agreement were concerned that the likelihood that the Model Law would be found acceptable by national legislatures would be seriously reduced.

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

Paragraph (5)

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

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

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

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

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

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

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

Paragraph (6)

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

i.e. the next bank in the credit transfer chain when the receiving bank is not the beneficiary's bank or the beneficiary when the receiving bank is the beneficiary's bank.

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

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

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

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

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

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

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

Article 5. *Payment to receiving bank*

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

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

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

- (i) when a credit that the sender causes to be entered to an account of the receiving bank with the sender is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or
- (ii) when a credit that the sender causes to be entered to an account of the receiving bank in another bank is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or
- (iii) when final settlement is made in favour of the receiving bank at the central bank of the State where the receiving bank is located, or
- (iv) when final settlement is made in favour of the receiving bank

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

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

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

Prior discussion

A/CN.9/WG.IV/WP.42, paras. 47 to 57 (submitted to the nineteenth session, 1989)

A/CN.9/328, paras. 61 to 65 (nineteenth session, 1989)

A/CN.9/341, para. 53 (twenty-first session, 1990)

A/CN.9/WG.IV/WP.49, article 4, comments 31 to 45 (submitted to twenty-second session, 1990)

A/CN.9/344, paras. 59 to 85 (twenty-second session, 1990)

Comments

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

2. At the nineteenth session in July 1989 the Working Group engaged in a preliminary discussion of the desirability of introducing a provision on netting into the Model Law. The Working Group noted that important studies on this issue were taking place elsewhere, and particularly in a committee of the central banks of the Group of Ten, presided by the General Manager of the Bank for International Settlements (BIS). Therefore, the Secretariat was requested to follow those developments and to report to the Working Group on the conclusions that had been reached, including the submission of a draft text for possible inclusion in the Model Law if that seemed appropriate (A/CN.9/328, paras. 61 to 65; see A/CN.9/WG.IV/WP.42, paras. 47 to 57). At the twenty-first session in July 1990 the Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not available soon (A/CN.9/341, para. 53).

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

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

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

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

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

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

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

8. The decision of the Working Group was that payment should be considered to be made only when the account is debited. The act of debiting the account manifests the decision of the receiving bank that it is able and willing to receive payment in that manner. This is of particular importance when the debit results in a debit balance in the account. Even though the payment to the receiving bank in such a case is in the nature of the substitution of one form of a claim against the sender for another, and even

though the bank may discover only after the debit has been entered that there had been no withdrawable credit in the account or that credit had not been sufficient, the bank should not be later permitted to assert that its action in debiting the account did not constitute payment to it (A/CN.9/344, para. 67). Even if the account is debited by a computer without human intervention, it would have been programmed to do so only under certain conditions, thereby manifesting the decision of the receiving bank that the debit of the account under those conditions constituted payment to it (A/CN.9/344, para. 65).

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

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

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

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

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

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

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

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

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

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

17. Another point raised at the Working Group, a point which probably had the agreement of all the participants, was that the receiving bank should not be considered to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Whether some or all of the payment orders that have been sent subject to the netting agreement can be reversed, or are to be reversed, in case one of the participating banks is unable to meet its obligations in the settlement.

(c) The time when payment is considered to have been made to the receiving bank by the sender of any given payment order.

27. The Working Group at its twenty-second session decided that the preparation of a legislative provision on netting for use in the Model Law should be restricted in its scope since the legal issues involved in assuring the existence of a well-founded legal basis for bilateral and multilateral netting schemes had not yet been completely examined. It was said that those issues would be further studied in the work of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries (comments 2 and 3).

28. Consequently, subparagraph (b)(iv) does not specifically validate netting agreements, whether bilateral or multilateral. The validity of a netting agreement is to be determined by the applicable law, which, as pointed out in comment 3, may include (a) the law of each of the parties to the netting scheme, (b) the law that governs the individual transactions subject to the netting scheme, and (c) the law that governs any contract or agreement necessary to effect the netting scheme. Nevertheless, the recognition in the Model Law that successful implementation of the netting scheme will have positive legal consequences will give netting schemes a certain efficacy that they may not currently have (see the comment made in A/CN.9/344, para. 107).

29. Subparagraph (b)(iv) also does not indicate the consequences for the netting scheme if any participant should be declared insolvent or otherwise become unable to fulfil its obligations prior to settlement of the net or if any participant with a net debit in the netting scheme is unable to settle for that debit. No indication is given whether the debits and credits arising out of the payment orders sent subject to the netting scheme are to be treated as gross amounts owing between the participants or whether only the net amounts of debits and credits are to be considered. Similarly, no indication is given whether payment orders from or to the party that is unable to fulfil its obligations are or can be withdrawn from the net prior to settlement.

30. The only specific rule given in subparagraph (b)(iv), and the reason for the rule being in article 5, is that the sender of every individual payment order that was sent subject to the netting scheme pays the receiving bank of that payment order when final settlement in favour of the

receiving bank is made. By the nature of a netting scheme, final settlement is made in favour of those receiving banks that receive the amount of the net credit due to them as well as in favour of those receiving banks that must pay the amount of the net debit that they owe.

Other means for the sender to pay the receiving bank, subparagraph (c)

31. While the situations specifically mentioned in subparagraphs (a) and (b) cover all the usual means for a sender to pay the receiving bank, other means of payment are possible. The sender might, for example, pay the receiving bank by negotiating to it discounted bills of exchange. For all such cases subparagraph (c) simply refers to the otherwise applicable law.

32. *Comparison with Article 4A.* Article 4A-403 is similar to article 5. When the payment is made by crediting the receiving bank's account with the sending bank or with a third bank, payment by passage of time takes place at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact, instead of the next business day as under subparagraph (b)(i). The only central bank mentioned is the Federal Reserve Bank. Therefore, payment by credit in an account with any other central bank, including the central bank of the State of the receiving bank, is treated the same as credit in an account with any other third bank. The provisions on bilateral and multilateral netting provide for the same time of payment as does the Model Law. Those provisions are more complete in recognizing the validity of netting schemes and providing particular rules considered necessary to overcome doctrines of the law of set-off in the United States that were thought to call in question the efficacy of a netting scheme in case of insolvency.

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

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

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

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

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

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

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

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

Prior discussion

A/CN.9/297, paras. 46 to 51 (sixteenth session, 1987)

A/CN.9/317, paras. 80 to 84 (seventeenth session, 1988)

A/CN.9/318, paras. 110 to 120 and 126 to 134 (eighteenth session, 1988)

A/CN.9/WG.IV/WP.42, paras. 7 to 16 (submitted to the nineteenth session, 1989)

A/CN.9/328, paras. 12 to 16 (nineteenth session, 1989)

A/CN.9/329, paras. 112 to 127 (twentieth session, 1989)

A/CN.9/341, para. 53 (twenty-first session, 1990)

A/CN.9/344, para. 68 (twenty-second session, 1990)

Comments

1. The drafting group at the nineteenth session substantially restructured the portion of the draft Model Law dealing with acceptance of a payment order by a receiving bank and the statement of the obligations of a receiving bank. Under the new structure articles 6 and 7 deal with a receiving bank that is not the beneficiary's bank while articles 8 and 9 deal with the beneficiary's bank. Since a "receiving bank" is defined in article 2(g) in such a way as to include a "beneficiary's bank", it was necessary to include paragraph (1) in this article to make it clear that article 6 does not apply to a beneficiary's bank.

Concept of acceptance

2. In the draft prepared by the Secretariat for the eighteenth session of the Working Group a number of the substantive rules depended on the acceptance of a payment order by the receiving bank. Discussion at that session showed that the Working Group was strongly divided on the desirability of using such a concept (A/CN.9/318, paras. 127 to 130). Its use was advocated as a convenient means to describe in a single word a number of different actions of different receiving banks that should have the same legal consequences, making it possible to use the word in various substantive provisions. In response, it was said that use of the term "acceptance" was not necessary and that it would cause difficulties in many legal systems because it seemed to suggest that a contract was created as a result of the receiving bank's actions.

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

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

Paragraph (2)

5. At the twenty-first session, when it made its decision that the credit transfer was completed when the beneficiary's bank accepted the payment order addressed to it, with the legal consequences that followed, "the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in what are now articles 6 and 8 . . ." (A/CN.9/341, para. 17).

Subparagraph (a)

6. The current text of subparagraph (a) was adopted at the twenty-second session (see comment 10), based upon the text previously adopted at the twentieth session (A/CN.9/329, paras. 123 and 175). It is fundamentally a combination of paragraphs (1) and (2)(a) of the text as it emerged from the nineteenth session (A/CN.9/328, Annex). Paragraph (1) of that text was in turn composed of elements that had been in articles 5(1) and 7(1) of the text that had emerged from the eighteenth session (A/CN.9/318, annex). Throughout these various forms of presentation the basic policy, first established at the eighteenth session, has remained unchanged.

7. Except for certain obligations of notification of error set out in articles 7 and 9, the receiving bank is normally not required to act upon a payment order it receives unless it accepts the order. Nevertheless, the expectation is that a receiving bank will execute a payment order it has received. Therefore, if the receiving bank does not accept the order, paragraph (3) provides that it is required to notify the sender of the rejection. (See comments 16 to 20.) If the required notice of rejection is not given, paragraph (2)(a) provides that the payment order is accepted.

8. One of the most difficult issues has been whether the receiving bank should have an obligation to give a notice of rejection when the reason that it has not accepted the payment order is that it has not as yet received payment for it from the sender. In favour of such an obligation it is pointed out that a notice of rejection informs a good faith sender that there is a problem that needs to be rectified, a problem that otherwise may be unknown. Failure to rectify the problem may have adverse consequences for the sender, for the originator, if the sender is not the originator, and for the beneficiary. Opposed to such an obligation of notification is the fact that in most cases the failure to receive payment is in fact only a technical delay that is automatically rectified. A notification of rejection, or even of non-receipt of payment without specifying that rejection will follow, will merely add to the message flow between banks and will itself lead to additional confusion. In any case, a sender is expected to know whether it has made adequate provision for paying the receiving bank, whether by debit of an account of the sender with the receiving bank or by credit of an account of the receiving bank with the sender or with a third bank.

9. The Working Group decided at the eighteenth session that the receiving bank should have no obligation to give the notice of rejection (the notice now called for by paragraph (3)) if one of its reasons for rejecting the payment order was insufficient funds (A/CN.9/318, para. 119). That led to discussions at the nineteenth and twentieth sessions as to what constituted insufficient funds, and whether any distinctions should be made between the different reasons why the funds were insufficient (A/CN.9/328, para. 15, and A/CN.9/329, paras. 119 to 122). The result was that the reference to insufficient funds was deleted from what is now paragraph (3) (A/CN.9/329, paras. 123 and 175). Paragraph (2)(a) was amended to provide that even if a required notice of rejection was not given, the payment order is not accepted "until the receiving bank has received payment from the sender in accordance with article 4(4)". See comments 17 to 19 as to when a notice of rejection is required and article 5 as to when payment has been received.

10. During the discussions at the twenty-second session of the Working Group that led to the preparation of article 5 on when the sender pays the receiving bank, it was noted that one of the ways in which the receiving bank might be paid was by debiting the sender's account with the receiving bank. Since what is now article 6(2)(a) provided that the receiving bank was deemed to accept a payment order by failing to give notice of rejection where the receiving bank had been paid for the order, it would be possible for the receiving bank to avoid the effects of its failure to give notice of rejection by simply failing to debit the sender's account and therefore failing to receive payment. That result was thought to be improper (A/CN.9/344, para. 68). Therefore, subparagraph (2)(a) was redrafted to provide that acceptance would occur if there were funds available in the account to be debited sufficient to cover the amount of the payment order.

Subparagraph (b)

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

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

Subparagraph (c)

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

Subparagraph (d)

14. Paragraph 2(d) provides for the normal way in which a receiving bank that is not the beneficiary's bank would accept a payment order it had received, i.e., by sending its own payment order intended to carry out the payment order received. If the payment order sent is consistent with the payment order received, the undertaking of obligations by the receiving bank and the execution of the most important of those obligations under article 7(2) are simultaneous. However, a receiving bank accepts a payment order even though the order it has sent is for the wrong amount, to an inappropriate bank or for credit to the account of the wrong beneficiary, so long as the payment order sent was intended to carry out the payment order received. If such an inconsistent payment order is sent, the undertaking of obligations and the failure to carry out those obligations are also simultaneous.

15. *Comparison with Article 4A.* Article 4A-209 provides that "a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order". Such a receiving bank executes the order, according to Article 4A-301(a) "when it issues a payment order intended to carry out the payment order received by the bank." That is the only way in which such a receiving bank can accept a payment order. If a notice of rejection is not given "despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order", Article 4A-210(b) provides that the bank is obliged to pay interest to the sender on the amount of the order, but that failure to give notice of rejection does not constitute acceptance of the order. Article 4A-211(d) provides that "An unaccepted payment order is cancelled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order." If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, Article 4A-212 provides that it is liable for breach of the agreement.

Paragraph (3)

16. The text of article 7(4) following the eighteenth session of the Working Group provided that "a notice that

a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order" (A/CN.9/318, annex). The drafting group at the nineteenth session moved the rule as to when the notice must be given by a receiving bank that is not the beneficiary's bank to article 5(1). In conformity with a decision of the Working Group it deleted the requirement that the notice must be given on the day the decision is made (A/CN.9/328, para. 86). At the twentieth session the requirement that a notice of rejection must be given was moved by the drafting group to article 5(3), i.e. current article 6(3).

17. Paragraph (3) now provides that, if the receiving bank does not accept the payment order under paragraph 2(b), (c) or (d), it must give a notice of rejection and that notice of rejection must be given by the execution date. The provision should be understood to require the notice to be given by an expeditious means, which would normally mean by telecommunications.

18. The need to give notice of rejection exists even if the sender has no account relationship with the receiving bank or has even had no prior dealings with it of any kind (A/CN.9/318, paras. 114 to 116; A/CN.9/329, para. 118). There is no requirement that the notification give any reason for the rejection of the payment order (A/CN.9/297, para. 51). However, no notice of rejection need be given if there is insufficient information to identify the sender (A/CN.9/329, para. 117).

19. It was decided at the twentieth session of the Working Group that paragraph (3) would apply even though the receiving bank had not received payment for the payment order from the sender (A/CN.9/329, para. 123). It should be noted that if the receiving bank has received payment, the failure to give the notice required by paragraph (3) results in acceptance of the payment order by the receiving bank.

20. At the twenty-second session of the Working Group a proposal was made that where a receiving bank did not receive payment from the sender and failed to give a required notice of rejection, the bank would be obliged to compensate for loss of interest for a maximum of 7 days or for the period during which it held the funds, whichever was longer (A/CN.9/344, paras. 23 and 24). The proposal for the payment of interest was consistent with the consequences arising out of other failures to give notice covered by the same proposal. Since by hypothesis there would have been no funds in the possession of the receiving bank, unless they were received after the time when the notice of rejection should have been sent, the proposed sanction was effectively 7 days interest for failure to give the required notice of rejection. The proposed sanction was supported on the grounds that the duty to notify rejection of the payment order should be maintained as a matter of public policy so as to protect the sender, for example in the situation where a bank would unduly delay payment by refusing to make the appropriate entries in an account (A/CN.9/344, para. 31). In response, it was stated that where funds had effectively been sent to the receiving bank, the sender was sufficiently protected by the fact that the receiving bank would be regarded as having accepted

the payment order. As a result, the proposal was not adopted and no consequences are stated in the Model Law for the failure to give the required notice of rejection where the receiving bank has not received payment from the sender. However, the failure to give the required notice of rejection may have consequences for the receiving bank if its good faith or its care in handling the payment order is otherwise in question.

21. The text of article 5(1) (current article 6(1)) following the eighteenth session of the Working Group stated that the obligation of the receiving bank to notify the sender of its decision that it would not comply with the sender's payment order was subject to the contrary agreement of the sender and receiving bank. Although the drafting group at the nineteenth session deleted those words from the text, the deletion did not indicate a change in policy on the part of the Working Group. At the twentieth session the Working Group took note of the above statement, which had originally been made in A/CN.9/WG.IV/WP.44, comment 9 to article 5 (A/CN.9/329, para. 124). At the twenty-first session the Working Group adopted what is currently article 3, which gives the parties the power to vary any provision of the Model Law, unless specifically provided otherwise in the provision itself.

22. *Comparison with Article 4A.* As indicated in comment 15, although Article 4A does not require a notice of rejection, Article 4A-210(b) requires the receiving bank to pay interest to the sender if the bank fails to execute the order or give notice of rejection "despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order." While the provision applies whether the sender is a bank or not, it seems to be intended to apply primarily when the sender is a non-bank originator. No rule is given when the receiving bank has received payment in some other way but fails either to execute the order or to give notice of rejection.

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

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

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

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

(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but

the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10.

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

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

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

Prior discussion

A/CN.9/317, paras. 62 to 67 and 88 (seventeenth session, 1988)

A/CN.9/318, paras. 60 to 69, 121, 122 and 144 to 154 (eighteenth session, 1988)

A/CN.9/328, paras. 17 to 20 and 75 (nineteenth session, 1989)

A/CN.9/329, paras. 128 to 141 (twentieth session, 1989)

A/CN.9/344, paras. 26 to 35 (twenty-second session, 1990)

Comments

Paragraph (2)

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

2. *Comparison with Article 4A.* Article 4A-302(a)(1) is essentially the same in substance.

Paragraph (3)

3. Paragraph (3) is based on paragraph (2) as it emerged from the nineteenth session (A/CN.9/328, annex),

which in turn was based on the first sentence of article 5(1 *bis*) as it was adopted at the eighteenth session (A/CN.9/318, annex).

4. The Working Group decided at its eighteenth session that a receiving bank should be required to notify the sender when the payment order received indicated that it had been misdirected to the incorrect bank. (Problems of misidentification of the beneficiary are considered in article 9(4).) The imposition of such a duty will help assure that the funds transfer system will function as intended (A/CN.9/318, para. 122). Although it was argued at the twenty-second session that there was no need for the Model Law to deal with misdirected payment orders since they were so rare in practice, it was replied that however rare misdirected payment orders might be, it was appropriate for the Model Law, as a matter of public policy, to protect the sender against the consequences of a misdirected payment order (A/CN.9/344, para. 26). Furthermore, it was said, misdirected payment orders were not that rare in international credit transfers, particularly when two banks had similar names.

5. The duty to notify the sender of a misdirection applies whether or not the sender and the receiving bank have had any prior relationship, whether or not the receiving bank accepted the order and whether or not the bank recognized that the payment order had been misdirected (see A/CN.9/328, para. 18 and A/CN.9/344, para. 27). The duty to notify of a misdirection is, therefore, an objective duty arising out of the fact of misdirection and that the misdirection could be determined from the payment order.

6. As the result of a concern expressed at the nineteenth session that the bank might not be able to fulfil its obligation even if it wished to, paragraph (3) was modified to provide that the receiving bank is required to notify the sender only if the payment order "contains sufficient information to identify and trace the sender" (A/CN.9/328, para. 20). The words "and trace" were deleted at the twentieth session (A/CN.9/329, annex).

7. Paragraph (3) was retained at the twentieth session in spite of the argument that an excessive burden was being placed on the receiving bank, especially when the error was that of the sender (A/CN.9/329, paras. 129 to 131; see also A/CN.9/344, para. 32). In particular, it was said that when modern means of transmitting payment orders were used, the addressing of the payment order was done primarily by bank identification number and not by name.

8. The draft text of the Model Law prior to the twenty-second session contained a provision on misdirected payment orders received by the beneficiary's bank that was identical to article 7(3), except that the reference was to the beneficiary's bank. At the twenty-second session that provision in what is currently article 9 was deleted (A/CN.9/344, para. 120). It was noted that, although the term "beneficiary's bank" was not defined, it could refer only to the bank of the person designated in the originator's payment order (see definition of "beneficiary" in article 2(d); but see comment 49 to article 2 and comments 4 to 6 to article 17). A bank to which a payment order was sent as the beneficiary's bank but that was not

in fact the bank of the beneficiary as defined would have obligations under article 7(3) and not under article 9.

9. *Comparison with Article 4A.* Article 4A-208(b)(4) provides that "if the receiving bank knows that the name and number identify different persons", (person here means intermediary or beneficiary's bank) reliance on either one is a breach of the bank's obligations. However, Article 4A is more positive than is the Model Law in authorizing a receiving bank to rely on identification of another bank by number alone.

Paragraph (4)

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

11. *Comparison with Article 4A.* There is no equivalent provision in Article 4A, but the same result might be reached in some instances through Article 4A-208(b).

Paragraph (5)

12. Paragraph (5) as adopted at the twentieth session (A/CN.9/329, annex) is essentially the same as paragraph (3) as adopted at the nineteenth session (A/CN.9/328, annex), which in turn was identical to article 3(1) as it was adopted at the eighteenth session (A/CN.9/318, paras. 60 to 69). If the amount is expressed in both words and figures and there is a discrepancy, the receiving bank is required to notify the sender. The obligation to notify exists whether or not the receiving bank has accepted the payment order. If the receiving bank does not give the required notice and it acts upon the incorrect amount, it is responsible for the consequences, even if it had no knowledge of the discrepancy.

13. At the twentieth session arguments were presented in favour of the rule that, in case of discrepancy, the traditional banking rule should be applied that words controlled over numbers (A/CN.9/329, paras. 133 to 135). Other arguments were presented in favour of the opposite rule that, in regard to modern electronic means of transmitting payment orders where the orders were processed by number, the numbers should control the words. Both arguments were rejected on the grounds that the current rule was a compromise and if a bank did process payment orders by number only, it could contract with its customers to that effect.

14. The rule is expressed in general terms to apply to payment orders between any sender and receiving bank. However, it was the expectation in the Working Group that paragraph (5) would apply in fact only between the originator and the originator's bank, since interbank payment orders in electronic form transmit the amount of the transfer in numbers only (A/CN.9/318, paras. 61 and 63).

15. The view was expressed in the twentieth session that the paragraph was too restricted in that the amount might be represented in clear text by numbers but might also be

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

16. *Comparison with Article 4A.* There is no equivalent provision in Article 4A. In some cases Article 4A-205 governing the security procedure for the detection of error would be applicable.

Paragraph (6)

17. Although a receiving bank is normally bound to follow any instruction in the payment order specifying an intermediary bank, funds transfer system or means of transmission, it may appear to the receiving bank that it is not feasible to follow the instruction or that doing so would cause excessive costs or delay in completing the transfer (A/CN.9/328, para. 75). This paragraph gives the receiving bank an opportunity to make such a determination, so long as it does so in good faith. As an alternative, the receiving bank can enquire of the sender as to the actions it should take, but it must do so within the time required by article 10.

18. Several more restrictive provisions were suggested at the twentieth session of the Working Group (A/CN.9/329, para. 139). One suggestion was that a receiving bank that had accepted a payment order that contained instructions should be required to follow those instructions unless it was impossible to do so. Another suggestion was that the receiving bank should be permitted to use a different funds transfer system or communications system under the conditions described in paragraph (6), but should be bound to use any intermediary bank specified by the sender. The reason given was that the sender was more apt to have reasons of its own, unknown to the receiving bank, for specifying an intermediary bank than for specifying a funds transfer system or communications system.

19. *Comparison with Article 4A.* Article 4A-302(b) contains essentially the same rule as does paragraph (6), except that a receiving bank may not choose an intermediary bank other than the one specified in the payment order received. The reason given in the Official Comments is that "The sender's designation of that intermediary bank may mean that the beneficiary's bank is expecting to obtain a credit from that intermediary bank and may have relied on that anticipated credit. If the receiving bank uses another intermediary bank, the expectations of the beneficiary's bank may not be realized. The receiving bank could choose to route the transfer to another intermediary bank and then to the designated intermediary bank if there were some reason such as a lack of correspondent bank relationship or a bilateral credit limitation, but the designated intermediary bank cannot be circumvented."

Article 8. Acceptance or rejection by beneficiary's bank

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

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

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

(c) when it notifies the sender of acceptance,

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

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

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

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

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

Prior discussion

A/CN.9/297, paras. 46 to 51 (sixteenth session, 1987)
A/CN.9/317, paras. 80 to 84 (seventeenth session, 1988)
A/CN.9/318, paras. 110 to 120 and 135 to 143 (eighteenth session, 1988)
A/CN.9/WG.IV/WP.42, paras. 32 to 42 and 59 to 65 (submitted to the nineteenth session, 1989)
A/CN.9/328, 44 to 51, 59 and 60 (nineteenth session, 1989)
A/CN.9/329, paras. 142 to 147 (twentieth session, 1989)
A/CN.9/341, para. 53 (twenty-first session, 1990)
A/CN.9/344, para. 68 (twenty-second session, 1990)

Comments

1. As a result of the restructuring of the draft Model Law by the drafting group at the nineteenth session of the Working Group, the provisions on the acceptance or rejection of a payment order by the beneficiary's bank were placed in an article separate from that containing similar provisions in respect of a receiving bank that is not the beneficiary's bank. The changes made to article 5, currently article 6, at the twentieth session were also introduced into article 7, currently article 8. Consequently, the majority of the provisions are identical, with the exception of the way in which the bank is referred to, and the

comments to article 6 relative to use of the concept of acceptance and to paragraphs (2)(a), (b), (c) and (3) are applicable to article 8(1)(a), (b), (c) and (2). In particular, at the twenty-first session, when it made its decision that the credit transfer was completed when the beneficiary's bank accepted the payment order addressed to it, with the legal consequences that followed, "the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in [what are now] articles 6 and 8 . . ." (A/CN.9/341, para. 17).

2. Paragraph 1(c), (d), (e), (f) and (g) represents various forms of volitional act by the beneficiary's bank to accept the payment order received by it. Subparagraphs (d) to (g) were carried over from article 6(2) as adopted at the eighteenth session (A/CN.9/318, annex). At the twentieth session a suggestion was made, but was not acted upon, that subparagraphs (d) to (g) could be replaced by words to the effect "when the beneficiary's bank placed the funds at the disposal of the beneficiary" (A/CN.9/329, paras. 143 and 147).

3. At the nineteenth session the Working Group deleted from what is currently paragraph (1)(d) the words that had been in square brackets "[without reserving a right to reverse the credit if cover is not furnished]" (A/CN.9/328, para. 49). Those words recognized a practice in some countries to allow a receiving bank, including a beneficiary's bank, to give the credit party provisional credit awaiting the receipt of cover from the sending bank. (Compare last sentence of comment 7.)

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

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

6. At the twenty-second session the Working Group partially reversed its prior decision by which it did not approve of the granting of provisional credit when it recognized that a central bank might reverse a provisional

credit (see article 5(b)(iii) and comment 21 to article 5). When the central bank is the beneficiary's bank, article 5(b)(iii) and article 8(1)(d) may be in conflict.

7. *Comparison with Article 4A.* Article 4A-209 makes a larger distinction than does the Model Law between the events leading to acceptance of a payment order by the beneficiary's bank and the events leading to acceptance of an order by any other receiving bank. Article 4A-209(b)(1) is substantially equivalent to subparagraphs (c) through (g) of this article. Article 4A-209(b)(2) and (3) base the acceptance of a payment order on when the beneficiary's bank is paid for the order, i.e., when it receives credit in its account at the Federal Reserve Bank, receives final settlement through a funds transfer system (e.g., CHIPS) or "the opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless . . ." The "unless" clause introduces the possibility of rejection of a payment order by the beneficiary's bank. Rejection of a payment order by the beneficiary's bank is not possible when the bank receives the order through FEDWIRE. In the case of CHIPS and as far as Article 4A is concerned, the beneficiary's bank can reject a payment order until it has accepted the order in one of the ways indicated above. Under Article 4A-405(d) and (e) it is possible for a beneficiary's bank to reverse its acceptance of a payment order under certain circumstances if a net settlement system is unable to complete the settlement.

Article 9. *Obligations of beneficiary's bank*

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

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

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

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

(5) The beneficiary's bank shall on the [execution date] give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for

his benefit, if the bank has sufficient information to give such notice.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 89 to 92 (seventeenth session, 1988)

A/CN.9/318, paras. 64, 66 and 156 to 159 (eighteenth session, 1988)

A/CN.9/328, paras. 17 to 20 (nineteenth session, 1989)

A/CN.9/329, paras. 148 to 167 (twentieth session, 1989)

A/CN.9/344, paras. 26 and 27 (twenty-second session, 1990)

Comments

Paragraph (1)

1. The Working Group discussed at its nineteenth and twentieth sessions the issue of the extent to which the Model Law should be concerned with the relationship between the beneficiary and the beneficiary's bank (A/CN.9/328, paras. 37 to 43; A/CN.9/329, paras. 151 to 159; see A/CN.9/WG.IV/WP.42, paras. 58 to 68). The majority of the discussion at the nineteenth session related to the extent to which the Model Law should contain rules in respect of the civil consequences of the credit transfer as in current article 17, but the discussion was generally relevant to the question as to whether the Model Law should include rules on the obligation of the beneficiary's bank to the beneficiary in respect of the credit transfer. At the conclusion of the discussion at the nineteenth session the Working Group decided to defer any decision on the question until it had discussed the time when acceptance took place. It returned to the question at the twentieth session at which time the current text was adopted.

2. Paragraph (1) provides only that the funds must be placed at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary. The paragraph serves primarily as a reminder that the ultimate purpose of a credit transfer is to make funds available to the beneficiary.

3. A proposal to include a more detailed statement of the obligations of the beneficiary's bank to the beneficiary was rejected at the twentieth session (A/CN.9/329, paras. 151 to 153). The limited approach taken in paragraph (1) conformed to the general policy that the Model Law should set forth the rights and obligations of the parties up to the moment when the beneficiary's bank accepted the payment order. However, the Model Law should not enter into the account relationship between the beneficiary and the beneficiary's bank, including in respect of issues that are closely related to the credit transfer, such as whether the bank must give the beneficiary notice of receipt of the credit (A/CN.9/329, paras. 165 and 166; see comments 13 and 14 for the notice requirement when there is no account relationship and article 17(1), and comment 3 to that article, in respect of the relationship between beneficiary and beneficiary's bank on completion of the credit transfer).

4. Notice by the beneficiary's bank to the beneficiary that it has the right to withdraw the funds or use the credit (or any of the other actions set out in article 8(1)(c) to (g)) would constitute acceptance of the payment order, if the payment order had not already been accepted in some other manner. To that extent the Model Law gives legal significance to the notice, in addition to any legal significance it may have under other applicable rules of law. However, the Model Law leaves it to those other applicable rules of law to determine the circumstances when notice might be required. (Compare article 9(5) and comments 13 to 15 to that article.)

5. *Comparison with Article 4A.* Article 4A-404 specifies the obligation of the beneficiary's bank to pay to the beneficiary the amount of an order it has accepted. If the United States were to adopt the Model Law, Article 4A-404 would be the applicable law referred to in article 9(1).

Paragraphs (2) and (3)

6. The restructuring of the text by the drafting group at the nineteenth and twentieth sessions of the Working Group led to the duplication in article 9(2), and (3) of the text of article 7(4) and (5) with appropriate changes in the references to the relevant banks. Therefore, the comments to those paragraphs, including the references to Article 4A, are relevant to the corresponding paragraphs of article 9.

7. The word "executed" is placed in square brackets because as defined in article 2(1) it is not applicable to the actions of the beneficiary's bank. In this context the words "acted upon" might be appropriate. Furthermore, as to the time when the notice must be given, see comment 11 below and article 10, comment 15.

Misdirected payment orders

8. The draft text of article 8 (current article 9) prior to the twenty-second session contained a provision on misdirected payment orders that was identical to article 7(3), except that the reference was to the beneficiary's bank. At the twenty-second session the paragraph was deleted (A/CN.9/344, para. 120). It was noted that, although the term "beneficiary's bank" was not defined, it could refer only to the bank of the person designated in the originator's payment order (see definition of "beneficiary" in article 2(d)). The view was taken that a bank to which a payment order was sent with an indication that it was the beneficiary's bank even though it was not in fact the bank of the beneficiary as defined in article 2(d) would have obligations as a receiving bank to which a payment order had been misdirected under article 7(3) but would have no obligations under article 9. For further discussion of the question whether a definition of beneficiary's bank would be useful, see article 2, comments 49 and 50; article 7, comment 8; articles 12 to 15, comment 2 and article 17, comments 4 to 6.

Paragraph (4)

9. Paragraph (4) applies only to a payment order received by the beneficiary's bank containing a discrepancy between the identification of the beneficiary in words and its identification in figures. There is no equivalent

provision in article 7 since no bank prior to the beneficiary's bank can be expected to have the information to be able to determine that such a discrepancy exists.

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

11. In order to reduce to a minimum the time during which the transfer is suspended, the notification to both the sender and the originator's bank must be done within the time specified in article 10(3), i.e., on or before the payment date. (For the meaning of "payment date" in this context, see article 10, comment 15.) It is anticipated that within a reasonable time the beneficiary's bank would receive further instructions as to the proper identification of the beneficiary, or an indication that the transfer was fraudulent.

12. *Comparison with Article 4A.* Article 4A-207 governs the problems covered in article 9(4). The provision is too complex to be summarized adequately here, but in general the beneficiary's bank is permitted to rely upon the number alone.

Paragraph (5)

13. Any duty to notify a beneficiary that had an account with the beneficiary's bank that a credit had been entered to its account could be left to their agreement or to the law applicable to the account relationship (comment 4). Although the originator or the sender may have an interest that the beneficiary's bank notify the beneficiary of the credit, that interest is not recognized in the Model Law (A/CN.9/329, para. 165).

14. However, there is unlikely to be a rule in the law applicable to the account relationship as to the obligation of the beneficiary's bank to notify a beneficiary who had no account relationship with the bank that the funds were available. Such a duty is set out in paragraph (5). The duty is owed to the sender and not to the beneficiary, since the Model Law does not in general enter into the relationship between the sender and the beneficiary (A/CN.9/329, paras. 165 and 166). Although paragraph (5) does not say so explicitly, the duty applies only if the beneficiary's bank has accepted the payment order. Furthermore, the duty applies only if the bank has sufficient information to give such notice. Contrary to the rule in article 10(3) in respect of the time when other required notices must be given, the notice specified in this paragraph must be given on the execution date (A/CN.9/329, para. 172). However, the words "execution date" are in square brackets since that date does not apply to a beneficiary's bank (A/CN.9/344, para. 116).

15. *Comparison with Article 4A.* Article 4A-404(b) provides that notice of receipt of a payment order instructing payment to an account of the beneficiary must be

given by midnight of the next day but that "If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order." In both cases the obligation to give notice can be varied by agreement of the beneficiary or by a rule of a funds transfer system that is used in the transfer.

Beneficiary's right to reject credit transfer

16. At the twentieth session the Working Group decided that in principle the Model Law should provide that the beneficiary would have a right to reject the credit transfer (A/CN.9/329, para. 164). One of the participants was requested to prepare a text, which would deal with the time within which the beneficiary would be permitted to act and the costs of any credit transfer returning the funds. Although the participant did not submit a proposal, the Secretariat prepared the following provision for the consideration of the Working Group on the basis of an informal draft supplied by him. This proposal was not considered by the Working Group at either its twenty-first or twenty-second session. It is submitted for the possible consideration of the Commission.

"The beneficiary has the right to reject a credit transfer [even though the beneficiary's bank has accepted the payment order and even though the transfer was made to an appropriate account of the beneficiary] by notice to the beneficiary's bank before the close of the banking day following the day when the bank accepted the payment order, if

(a) the beneficiary's bank has not applied the credit in conformity with article 8(1)(f) or (g),

(b) the beneficiary's bank has not applied the credit to an obligation owed by the beneficiary to the bank,

(c) when the beneficiary rejects the transfer, there is a credit balance in the account of an amount at least as much as the amount of the transfer, and

(d) the beneficiary's bank is not precluded by reason of insolvency or otherwise from repaying the amount of the transfer to its sender."

17. The rejection of the credit by the beneficiary should take place as soon as is feasible so as to reduce the risk to the originator. The beginning of the period during which the beneficiary might be permitted to reject the credit could be when the beneficiary's bank accepts the payment order, when the beneficiary's bank credits the beneficiary's account or otherwise applies the credit, or when the beneficiary receives notice of the transfer. Although the most logical time from the point of view of the beneficiary would be when notice of the transfer is received, the Model Law does not require that notice be given and banking law and practice vary greatly as to when notice might be given, or even whether notice of credit to an account is given. The proposal suggests that the rejection should have to be given by the end of the banking day following the day the beneficiary bank accepts the payment order. That is a very long period of time for high-speed, high-value credit transfers, but it is difficult to decide what might be an appropriate shorter time.

18. The proposal places several limitations on the beneficiary's right to reject the credit. The credit must not already have been specifically applied. The credit must still be available in the sense that there is a sufficient credit balance in the account. There might be a sufficient credit balance in the account when the payment order is rejected even though there had earlier not been a sufficient balance because in the meantime other credits have been made to the account. Unless the credit has been specifically applied, the proposal does not attempt to trace the credit on a first-in, first-out or other such basis. The credit must still be available only in the sense that the beneficiary's bank is in a position to repay the amount of the transfer to the sender. (Compare article 5, comment 11 in respect of the use of first-in first-out.) The beneficiary should not be able to place on the originator the risk that the beneficiary's bank became insolvent after it accepted a payment order for the beneficiary's benefit or that the outbreak of war or similar event reduced the value of the credit to the beneficiary's account.

19. Under article 13 the beneficiary's bank, like all receiving banks in the chain of the failed credit transfer, will have to refund to its sender the funds received from its sender.

20. *Comparison with Article 4A.* Article 4A has no provision allowing the beneficiary to reject a payment order by notifying the beneficiary's bank. Compare Article 4A-406(b) on the right of the beneficiary to refuse payment from the originator when the payment was made by a means prohibited by the contract of the beneficiary with respect to the obligation.

Obligation to make funds available on payment date

21. At the twentieth session the Working Group considered, but did not decide, the issue of whether the beneficiary's bank should have a duty either to its sender or to the originator to make funds available on a payment date specified in the payment order (A/CN.9/329, para. 167). Such a provision might be appropriate in spite of the general position taken in the Model Law that it does not concern itself with the relationship between the beneficiary and the beneficiary's bank. The duty to place the funds at the disposal of the beneficiary on a payment date specified in the payment order would seem to be owed to the sender of the payment order rather than, or in addition to any duty owed, to the beneficiary. Compare the duty owed to the sender to give notice to a beneficiary that does not have an account at the beneficiary's bank that funds have arrived (article 9(5) and comment 14).

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

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

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

(b) the order specifies a payment date and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment

order and place the funds at the disposal of the beneficiary on the payment date.

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

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

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

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

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

Prior discussion

A/CN.9/297, paras. 65 to 68 (sixteenth session, 1987)
A/CN.9/317, paras. 94 to 107 (seventeenth session, 1988)

A/CN.9/328, paras. 76 to 91 (nineteenth session, 1989)
A/CN.9/329, paras. 168 to 183 (twentieth session, 1989)
A/CN.9/344, paras. 117 to 119 (twenty-second session, 1990)

Comments

1. Following the discussion at the nineteenth session of the Working Group of the draft of prior article 7, which had been prepared by the Secretariat for the eighteenth session, a new draft was prepared by a small group (A/CN.9/328, para. 88). Following discussion of the draft late in the nineteenth session, the small group further revised the draft article for discussion at the twentieth session, taking into account the restructuring of the draft Model Law being undertaken by the drafting group (A/CN.9/328, paras. 89 to 91). Article 9 was further revised at the twentieth session (A/CN.9/329, paras. 168 to 183) and at the twenty-second session (A/CN.9/344, paras. 117 to 119).

Title of article

2. The word "execute" has been placed in square brackets because the article may refer to the actions to be taken by the beneficiary's bank to implement the payment order received (see comment 3).

Purpose of paragraph (1)

3. The purpose of paragraph (1) is to state the time within which a receiving bank must execute a payment order; it is not intended to state an obligation to execute the order. By use of the word "execute", paragraph (1) is restricted to stating a time limit for action by all receiving banks other than the beneficiary's bank. That may be

appropriate in view of article 9(1), which provides that the extent to which the beneficiary's bank has an obligation to place the funds at the disposal of the beneficiary is determined by the applicable law governing the relationship between the bank and the beneficiary. However, if the Commission were to decide that the Model Law should have a provision stating a duty of the beneficiary's bank to the sender to place the funds at the disposal of the beneficiary on a payment date specified on the payment order, as suggested in comment 21 to article 9, it might be appropriate for article 10 to have a provision in respect of the time limit within which the beneficiary's bank would have to act.

Same day execution

4. The general rule stated in the *chapeau* to paragraph (1) is that a payment order is to be executed on the day the payment order is received. The Working Group has at all times accepted the appropriateness of the general rule. Such a rule might not have been appropriate when credit transfers, including international credit transfers, were paper based. However, the vast majority of international credit transfers are currently transmitted by electronic means, and especially by on-line data transfer. In such an environment rapid execution by the receiving bank should normally be expected (A/CN.9/329, paras. 176 and 177). The appropriateness of this short period of time for execution of a payment order was again questioned at the twenty-second session where it was said that such a general rule would put an excessive burden on the banks. It was also stated that there might be good reasons why payment orders would not be executed on the day when they had been received, particularly in the case of paper-based payment orders. However, the general rule of same-day execution was maintained (A/CN.9/344, para. 117).

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

6. The second is the general rule that a receiving bank is not required to execute any payment order it receives simply by virtue of its reception (article 6, comment 7). Therefore, the obligation to execute the payment order by a certain time arises only if the receiving bank has accepted the order pursuant to article 6(2) or, if a requirement to make the funds available on a payment date specified in the payment order received by the beneficiary's bank is included in the Model Law, pursuant to article 9(1). A particularly important application of this rule is that, since a bank does not accept a payment order for failure to give notice of rejection under article 6(2)(a) or 8(1)(a) until the bank has received payment from the sender (even though article 4(6) does not require the sender to pay the receiving bank for the payment order until the receiving bank accepts it), a receiving bank that receives sufficient funds on a day later than the day the order is received and executes the payment order on that

day is not in breach of its obligations under article 10(1). It would be in breach of those obligations if it had agreed with the sender that it would execute payment orders from the sender upon receipt, since in such situations the receiving bank would have accepted the payment order when the order was received (articles 6(2)(b) and 8(1)(b)).

7. The third mitigating rule, which is found in paragraph (4), recognizes that banks establish cut-off times for the processing of payment orders for same-day execution. There may be different cut-off times for different types of payment orders, and a bank might establish its cut-off time for certain types of payment orders by adhering to the rules of a funds transfer system. Any order received after the cut-off time is treated as having been received the following day the bank executes that type of payment order. There is no limit on the discretion of a bank (or funds transfer system) in establishing a cut-off time, and it is not unusual for cut-off times to be as early as noon (A/CN.9/329, para. 178), and it might be as early as the opening of the funds transfer day. Such an early cut-off time might be reasonable where the bank's computer, or that of a funds transfer system, had been open all night to receive payment orders.

8. The fourth mitigating rule, which is found in paragraph (6), is that a branch or separate office of a bank, even if in the same State, is treated as being a separate bank for the purposes of article 10. Where the branches of a bank process payment orders on a decentralized basis, a payment order that is sent from one branch to a second branch might require the same amount of time to be executed at the branch as if the order was to be sent to a different bank (A/CN.9/328, para. 82).

9. Although the general rule requires the receiving bank to execute the payment order on the day it was received, subject to the mitigating rules mentioned above, there are two special cases in which the receiving bank is required to or permitted to execute the payment order on a different date. In the first case mentioned in paragraph (1)(a), the payment order specifies a later date as the execution date. It should be noted that the provision is quite clear in saying that the payment order is to be executed on the date specified and not before that date, since the sender may have strong reasons for not wishing earlier execution (A/CN.9/328, para. 78). If the word "executed" continues to be used, the provision applies only to a receiving bank that is not the beneficiary's bank. However, it would seem that the rule in paragraph (1)(a) should also apply to the beneficiary's bank.

10. The second special case set forth in subparagraph (1)(b) is when a receiving bank that is not the beneficiary's bank receives a payment order specifying a payment date. That payment date tells the receiving bank how much time it has to be sure that the beneficiary's bank will receive the payment order in time to accept it and place the funds at the disposal of the beneficiary on the payment date. In some cases, the payment date may be so soon that it requires the receiving bank to take special care that the means of transmission of the payment order to the beneficiary's bank is such that the payment date can

be respected. In other cases the payment date will be far enough in the future that the receiving bank need not execute the order on the day it was received.

Derogation by contract

11. In response to a suggestion made at the twentieth session that the sender and the receiving bank should be able to derogate from the provisions of paragraph (1) by agreement, it was stated that such a possibility would make it impossible for originator's banks to predict how long international credit transfers would take when they had to go through several intermediary banks (A/CN.9/329, para. 180). However, with the adoption of what is currently article 3 at the twenty-first session, the parties are free to derogate from any provision of article 10. Consequently, at the twenty-second session the same concern that the originator's bank could not know what agreements there might be between subsequent banks in the credit transfer chain derogating from the general rules stated in current article 10(1) led to a suggestion that the provisions of article 10(1) should be mandatory (A/CN.9/344, para. 119). Another suggestion was that derogation from the provisions of article 10(1) should be possible only between the originator and the originator's bank. Finally, however, no change was made in the general policy of freedom of contract as applied to article 10(1).

Paragraphs (2) and (3)

12. Prior to the twenty-second session, article 9(2) provided the general rule as to when all receiving banks, including the beneficiary's bank, had to give required notices; the notice had to be given the day the payment order was received.

13. Former article 9(2), as well as current article 10(2) and (3), made an exception for two cases: (i) the notice of rejection of a payment order required by current articles 6(3) and 8(2), and (ii) the notice by the beneficiary's bank to a beneficiary that does not maintain an account at the bank that the bank is holding funds for its benefit required by current article 9(5). Those provisions contain their own time limits.

14. At the twenty-second session the drafting group separated the former paragraph (2) into two provisions. The current paragraph (2) applies only to a receiving bank that is not the beneficiary's bank. The drafting group, implementing a decision of the Working Group, also changed the date when notices had to be given by such a receiving bank to "on or before the day the payment order is required to be executed". This change is particularly applicable when the payment order contains an execution date that is in the future, since the receiving bank should have no obligation to examine or process payment orders for the purpose of giving timely notice under the Model Law earlier than the bank would be obliged to examine or process those payment orders for the purpose of executing them (A/CN.9/344, para. 118).

15. In respect of the beneficiary's bank in paragraph (3), the same reasoning led the drafting group to make the deadline the "payment date". However, it is clear that the

payment date as defined in article 2(m) is not the correct term to be used. Therefore, the Working Group left the term in square brackets.

Paragraph (4)

16. As noted in comment 7, banks often establish a cut-off time after which a payment order received is considered to have been received on the following day. The cut-off time may differ for different types of payment orders. They may be established by unilateral action by the bank or by interbank agreements, and especially by the rules of a clearing-house or other funds transfer system. Paragraph (4) places no limitation on how early in the day the cut-off time can be.

17. Since paragraph (4) is intended to apply to beneficiary's banks as well as to other receiving banks, the word "executes" is not appropriate. One possibility would be to substitute the words "acts upon".

Paragraph (5)

18. The use of the word "executes" is also not completely appropriate in paragraph (5), which is also intended to apply to beneficiary's banks. As in paragraph (4), it would be possible to use the correct grammatical form of the words "acts upon".

19. *Comparison with Article 4A.* Articles 4A-301(b) and 4A-302(a) in combination are substantially the same as paragraph (1). Since there are no notice requirements that are the equivalent of the ones referred to in paragraphs (2) and (3), there are no time limits equivalent to paragraphs (2) and (3). Article 4A-106 is substantially the same as paragraphs (4) and (5).

Article 11. Revocation

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

(2) A payment order may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner sufficient to afford the bank a reasonable opportunity to act before the later of the time it accepts the payment order or the beginning of the payment date.

(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received by an earlier point of time than provided in paragraphs (1) and (2).

(4) A revocation order must be authenticated.

(5) A receiving bank other than the beneficiary's bank that executes or a beneficiary's bank that accepts a payment order that has been revoked is not entitled to payment for that payment order and, if the credit

transfer is completed in accordance with article 17(1), shall refund any payment received by it.

(6) If the recipient of a refund under paragraph (5) is not the originator of the transfer, it shall pass on the refund to the previous sender.

(7) If the credit transfer is completed in accordance with article 17(1) but a receiving bank [executed] a revoked payment order, the receiving bank has such rights to recover from the beneficiary the amount of the credit transfer as are otherwise provided by law.

(8) The death, bankruptcy, or incapacity of either the sender or the originator does not of itself, operate to revoke a payment order or terminate the authority of the sender. The word "bankruptcy" includes all forms of personal, corporate and other insolvency.

(9) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

Prior discussion

A/CN.9/297, paras. 79 and 92 to 95 (sixteenth session, 1987)

A/CN.9/317, paras. 68 and 120 to 133 (seventeenth session, 1988)

A/CN.9/328, paras. 92 to 116 (nineteenth session, 1989)

A/CN.9/329, paras. 184 to 186 (twentieth session, 1989)

A/CN.9/344, paras. 86 to 101 (twenty-second session, 1990)

Comments

1. Article 11 provides a framework for the revocation of payment orders after they have been received by the receiving bank. At the nineteenth session of the Working Group it was suggested that, since international credit transfers are almost always sent by on-line telecommunications and are processed by computer, there would be little opportunity for the sender to revoke the payment order before the order was executed by the receiving bank and that it was, therefore, unnecessary to have any provision on the subject. The reply was given that a revocation that did not arrive in time because of the use of high-speed electronic systems would not be effective. That was not, however, considered to be sufficient reason to preclude the originator or other sender from having the opportunity to attempt to revoke the order (A/CN.9/328, paras. 93 and 94).

2. A further discussion took place at the twenty-second session as to whether, as a matter of principle, payment orders should be revocable or irrevocable (A/CN.9/344, paras. 86 and 87). Besides the arguments based on the ease or difficulty of operating a modern credit transfer system when payment orders were revocable, the Working Group considered certain legal effects of adopting one principle or the other. It noted that in either case a number of exceptions to the general principle would be necessary, rendering the practical results similar in the two cases. However, under several legal systems, exceptions to a general rule are construed restrictively by the courts. Furthermore, the general rule might determine, in the case of litigation, whether the sender of a revocation order or

the receiving bank would bear the burden of proof as regards, for example, the time when the revocation order was received. At the end of the discussion the Working Group decided to adopt the principle of irrevocability, which is expressed by paragraphs (1) and (2) (A/CN.9/344, para. 89). At the end of its discussion of the entire article it noted that a new text of article 11 would be necessary in the light of the numerous decisions it had taken and referred the matter to the drafting group, which prepared the current text (A/CN.9/344, para. 99).

3. The text presented to the nineteenth session of the Working Group had one set of rules that covered both the revocation and the amendment of payment orders. At the nineteenth session it was noted that the amendment of payment orders might raise additional policy issues to those raised by the revocation of orders (A/CN.9/328, para. 100). As a result article 11 refers only to the revocation of payment orders and no provision is made for their amendment. The Working Group did not consider a suggestion made in the working paper submitted to the twenty-second session that the text was not clear that revocation of a part of a payment order would not be effective (A/CN.9/WG.IV/WP.49, article 10, comment 3).

4. At the twentieth session the Working Group took note of a proposal that would terminate the right to revoke a payment order once it had been received by the receiving bank, but which would also have permitted a receiving bank that was not the beneficiary's bank to cooperate with the request of the sender, regardless of whether or not the payment order had been accepted, and would have permitted a beneficiary's bank to so cooperate if it had not already accepted the payment order (A/CN.9/329, paras. 184 to 186). No action was taken at the twentieth session, since it had been agreed that the discussion of what is currently article 11 at that session was to be only exploratory. The proposal was resubmitted to the twenty-second session, but was rejected because it would have stated the principle of irrevocability of payment orders in a more radical manner than was desired (A/CN.9/344, para. 88).

Paragraphs (1) and (2)

5. Paragraphs (1) and (2) provide essentially the same rules for the revocation of a payment order sent to a receiving bank that is not a beneficiary's bank and to a receiving bank that is a beneficiary's bank. In both cases the revocation can be sent only by the sender of the payment order in question; neither the originator nor an earlier bank in the credit transfer chain can revoke the order even though it may be the party interested in having the order revoked.

6. In both cases the payment order can be revoked only if the revocation is received by the receiving bank in time. In the case of a receiving bank that is not the beneficiary's bank, the event that marks the termination of the right to revoke is the execution of the order by the receiving bank. While sending its own order would also constitute acceptance of the order received, other forms of acceptance under article 6(2) would not constitute execution of the order received. In the case of the beneficiary's bank, the

event that marks the termination of the right to revoke is the acceptance of the order by the bank in any of the ways described in article 8(1) (A/CN.9/344, para. 89).

7. The receiving bank is given a certain period of time to act upon the revocation received. This period must "afford the receiving bank a reasonable opportunity to act" before the cut-off event (A/CN.9/328, paras. 96 and 116; A/CN.9/344, para. 90). The length of the period as so defined is by its nature indefinite, since it depends on the ability of the receiving bank to act. The time required will vary from one bank to another, indeed from one branch of a bank to another, and depend on the nature of the payment order and the means of communication of the revocation.

8. A concern that had been expressed at the nineteenth and twentieth sessions, and that was repeated at the twenty-second session, was that a sender of a payment order with a future execution date should not lose any right of revocation that it might have by the premature execution of the payment order (A/CN.9/328, para. 78; A/CN.9/329, paras. 168 and 169; A/CN.9/344, para. 91). Therefore, in the revision of the article at the twenty-second session the cut-off event became the "later of the actual time of execution and the beginning of the execution date" in the case of a receiving bank that is not the beneficiary's bank and the "later of the time [the bank] accepts the payment order or the beginning of the payment date" in the case of the beneficiary's bank. In this case the term "payment order" is used as defined in article 2(m).

Paragraph (3)

9. Paragraph (3) was introduced into the draft Model Law at the nineteenth session of the Working Group (A/CN.9/328, para. 98). Agreements restricting the right of a sender to revoke a payment order are common in multi-lateral payment arrangements, especially where there is delayed net settlement, and in batch processing systems where it may be difficult, if not impossible, to extract a single payment order from the batch. Paragraph (3) would apply to the rules of a clearing-house that prohibited revocation of a payment order once sent to the clearing-house if, under the applicable law, the rules of the clearing-house were considered to be an agreement between the sender and the receiving bank. Paragraph (3) does not apply to a restriction in a telecommunications message system, such as SWIFT, that prohibits the withdrawal of a message once sent. Even a telex cannot be withdrawn as a message from the public telecommunications system once it has been sent; however, the order contained in the message can be revoked under paragraph (1) or (2).

10. When paragraph (3) was introduced at the nineteenth session of the Working Group, what is currently article 11 contained a paragraph (4) that allowed a sender whose revocation had arrived too late to require its receiving bank to attempt to revoke the receiving bank's payment order sent in execution of the payment order received. The introduction of paragraph (3) caused concern since the originator might not know that there were agreements between particular banks through which the credit transfer might pass that made a payment order

between those banks irrevocable (A/CN.9/328, para. 115). An agreement of a clearing-house, for example, through which the originator's bank sent the payment order to an intermediary bank that restricted the right to revoke the order would preclude the originator from revoking the credit transfer even though the beneficiary's bank had not yet accepted an order to carry out the transfer. Although former paragraph (4) was deleted at the twenty-second session, a receiving bank that received a late revocation could still endeavor to revoke its own payment order if it wished (A/CN.9/344, para. 94). Since an originator no longer has the right to have the different receiving banks in the credit transfer chain attempt to revoke their own payment orders until either a relevant payment order is revoked or until the beneficiary's bank accepts an order completing the credit transfer, the concern expressed at the nineteenth session in regard to paragraph (3) is currently of less importance.

11. At the twenty-first session the Working Group adopted what is currently article 3, which provides for a general freedom of contract "except as otherwise provided in this law". Although article 3 would seem to render paragraph (3) redundant, it was retained by the Working Group at the twenty-second session (A/CN.9/344, para. 93).

12. *Comparison with Article 4A.* Article 4A-211 permits cancellation of a payment order, as well as its amendment, until the order has been accepted. A receiving bank that is not the beneficiary's bank can agree to cancel or amend an order it has received even after it has accepted the order, or can be bound to do so by a funds transfer system rule, but the bank must be able to cancel any order it has issued in execution of the order it received. A beneficiary's bank can agree, or be required by a funds transfer system rule, to cancel or amend an order that was issued in execution of an unauthorized payment order or was issued as a result of one of several types of error by the sender. Article 4A-211(h) places a minor restriction on the general right to vary by agreement all rights and obligations, which is otherwise available under Article 4A-501. Article 4A-209(d) provides that a payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or until the execution date if the bank is not the beneficiary's bank; therefore, until the payment date or execution date, the payment order can be cancelled. Those provisions in Article 4A cover essentially the problems covered in paragraphs (1) to (3) of article 11.

Paragraph (4)

13. Prior to the twenty-second session paragraphs (1)(c) and 2(c) provided that the revocation had to be authenticated in the same manner as the payment order. That implied that the revocation had to be sent by the same means of communication as was the payment order. When that wording was questioned at the nineteenth session of the Working Group, citing the case of a paper-based payment order that was revoked by a tested telex, the reply was given that an attempt had been made to draft a requirement that the authentication had to be as good as or better than the authentication of the payment order being

revoked, but that it had not proven possible to do so (A/CN.9/328, para. 114).

14. At the twenty-second session the paragraph was changed to indicate simply that the revocation must be authenticated (A/CN.9/344, para. 95).

Paragraph (5)

15. Paragraph (5) provides that a sender who has sent a revocation that was or should have been effective is not obligated to pay for the payment order, as it would otherwise be under article 4(6), and is entitled to recover any funds paid. At the nineteenth session it was suggested that the sender should be entitled to receive back the original amount of the transfer less costs. This was said to be a question that arose in respect of the reimbursement of the funds in case of an unsuccessful credit transfer as well and that it would need to be addressed at a later stage (A/CN.9/328, para. 115; see article 13, comment 16 and article 17, comments 17 to 19). It may be thought that a sender who has a right to a refund under paragraph (5) should also have a right to interest on the funds for the period of time the sender was deprived of the use of those funds, as it would for a refund under article 13 (see article 13, comment 15).

16. At the twenty-second session a question was raised whether paragraph (5) was necessary since the sender would be refunded any payment it had already made to the receiving bank under article 13 (A/CN.9/344, para. 96). Although no reason was given in the report of the session for the retention of the paragraph, it may be noted that article 13(1) applies only if the credit transfer is not completed under article 17(1). The Working Group was of the view that the credit transfer is completed when the conditions of article 17(1) are met, even though an instruction to revoke one of the payment orders in the credit transfer chain was received in time but was not acted upon by the receiving bank (see paragraph (7)). Paragraph (5) was, therefore, necessary.

Paragraph (6)

17. Once it is decided that the refund arising out of a revocation under article 11 is not to be governed by article 13, it is also necessary to provide a mechanism to pass the benefit of the refund received under paragraph (5) to the previous sender and ultimately to the originator in those cases when the revoking sender of the payment order in question is not the originator.

18. The provisions of paragraph (6) cannot be applied where the sender revoked its payment order because it realized that it had made a mistake by sending the order to the incorrect bank or for the credit of an incorrect beneficiary. Assuming that the bank sent a second and correct payment order, it would be authorized to keep the refund it received under paragraph (5).

Paragraph (7)

19. In the normal case when a credit transfer is completed but a receiving bank has to make a refund to its sender under paragraph (5), the amount of the credit transfer

should be recoverable from the beneficiary (A/CN.9/344, para. 97). The rightful claimant would be the bank that failed to act on the revocation order. That bank might be the beneficiary's bank or any prior receiving bank, including the originator's bank. However, there may be valid reasons why the beneficiary should be able to retain the funds received. One such reason might be that the originator owed the beneficiary an amount of money that the credit transfer was originally intended to discharge. Since the subject raises difficult questions that go beyond the law of credit transfers, and those questions are solved quite differently in various legal systems, paragraph (7) simply refers the receiving bank to "such rights to recover from the beneficiary the amount of the credit transfer as are otherwise provided by law" (compare articles 12 to 15, comment 27).

20. A receiving bank that has had to refund the amount of the credit transfer to its sender under paragraph (5) but is not able to recover the amount of the transfer from the beneficiary, may have a claim against its sender or the originator for reimbursement of the refund. That might especially be the case where the beneficiary was able to retain the credit in discharge of an obligation owed to it by the originator. However, the Model Law leaves any such questions to the rules of law outside the Model Law itself.

21. The word "executed" has been placed in square brackets because, in the light of paragraph (5), it seems clear that paragraph (7) is meant to apply to the beneficiary's bank as well. Paragraph (7) might be amended to be parallel to paragraph (5), i.e. "If the credit transfer is completed in accordance with article 17(1) but a receiving bank other than the beneficiary's bank executed or the beneficiary's bank accepted a payment order that had been revoked, the bank has such rights . . ."

22. To some degree paragraph (7) is a replacement for article 8(7) as it was adopted at the eighteenth session (A/CN.9/318, annex), which was subsequently deleted by the Working Group at its nineteenth session (A/CN.9/328, para. 106). That provision would have given the beneficiary's bank a right to reverse a credit entered to the beneficiary's account that met certain objective criteria of being the result of an error or fraud. For the origin of prior article 8 see A/CN.9/297, para. 79 and A/CN.9/317, para. 68. The current text of paragraph (7) is severely restricted in its field of application compared to the earlier provision.

23. *Comparison with Article 4A.* If the revocation is acted upon so that the credit transfer is not completed, Article 4A-402(c) and (d) (the equivalent of article 13 of the Model Law) requires the refund to the sender of any payment received. Article 4A-211(c)(2) provides that a beneficiary's bank that accepts a cancelled payment order is authorized "to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution", that is, the same reference to the law outside the statute governing the credit transfer is made in Article 4A as is made in the Model Law. No similar right seems to accrue to a receiving bank other than the beneficiary's bank if the credit transfer is

completed, although such a right may be available anyway under the "law governing mistake and restitution".

Paragraph (8)

24. In order to make the provision clearer and to assure that the word "bankruptcy" is not understood in a restricted sense (as in English law where it is restricted to personal insolvency), the second sentence was added at the twenty-second session. See the proposal of the United Kingdom in the working paper submitted to the twenty-second session, A/CN.9/WG.IV/WP.49, article 10, comments 28 and 29.

25. *Comparison with Article 4A.* Article 4A-211(g) provides as follows:

"A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order."

Rejected proposal

26. Former article 8(8) provided that a bank has no obligation to release the funds received if ordered by a competent court not to do so. When it deleted that paragraph at its nineteenth session the Working Group decided that it would consider a proposal that was to be presented authorizing courts to restrain a bank from acting on a payment order if proper cause was shown (A/CN.9/328, para. 109).

27. Such a proposal was originally presented to the nineteenth session but was considered and rejected only at the twenty-second session (A/CN.9/344, paras. 100 and 101). The proposal was as follows:

"For proper cause and in compliance with applicable law, a court may restrain:

(a) a person from issuing a payment order to initiate a funds transfer;

(b) an originator's bank from executing the payment order of the originator, or

(c) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing funds.

A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a credit transfer, but a bank has no obligation if it acts in accordance with the order of a court of competent jurisdiction."

28. In support of the proposal, it was stated that considerable disruption of the banking system might result from the execution of court orders that attempted to affect a credit transfer in process. Therefore, it was considered important to restrict the possibility of executing a court order to the two ends of the credit transfer and to state that no action would be available against an intermediary bank. In reply it was stated that it would be improper for the Model Law to include rules governing judicial

procedure. It was also stated that there was no reason why the sender of an unsuccessful revocation order should be prevented from using any means that might be available under the applicable law to stop the execution of the credit transfer.

29. *Comparison with Article 4A.* The proposal is identical to Article 4A-503, except for the last clause which is not found in article 4A.

CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS

Article 12. Duty to assist

If the credit transfer is not completed in accordance with article 17(1), each receiving bank is obligated to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the credit transfer.

Article 13. Duty to refund

(1) If the credit transfer is not completed in accordance with article 17(1), the originator's bank is obligated to refund to the originator any payment received from it, with interest from the day of payment to the day of refund. The originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund.

(2) The provisions of paragraph (1) may not be varied by agreement. However, a receiving bank shall not be required to make a refund under paragraph (1) if it is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund. The sender that first specified the use of that intermediary bank shall have the right to obtain the refund from the intermediary bank.

Article 14. Correction of underpayment

If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted, it is obligated to issue a payment order for the difference between the amounts of the payment orders.

Article 15. Restitution of overpayment

If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is greater than the amount of the payment order it accepted, it has such rights to recover from the beneficiary the difference between the amounts of the payment orders as are otherwise provided by law.

Prior discussion

A/CN.9/318, paras. 151 to 154 (eighteenth session, 1988)

A/CN.9/328, paras. 54 to 58 (nineteenth session, 1989)

A/CN.9/341, para. 56 (twenty-first session, 1990)
 A/CN.9/344, paras. 44, 45 and 102 to 111 (twenty-second session, 1990)

Comments

1. Articles 12 to 15 set forth the basic obligations of a receiving bank to rectify the situation if problems arise in the implementation of a credit transfer. The original formulation of the obligations was set out in article 5(3)(b) and (c) as it was drafted during the eighteenth session (A/CN.9/318, para. 154). At the nineteenth session the text was transferred to article 11 (A/CN.9/328, annex). At the twenty-second session the original two paragraphs of article 11 were divided by the drafting group into four separate articles (A/CN.9/344, annex).

2. Articles 14 and 15 are applicable only if the credit transfer is completed in accordance with article 17(1) while articles 12 and 13 are applicable only if the credit transfer is not completed in accordance with article 17(1). Article 17(1) gives a clear rule as to when a credit transfer is completed in the normal case, i.e. when the beneficiary's bank accepts the payment order. Therefore article 17(1) also gives a clear rule in the normal case as to whether a credit transfer has not been completed. However, there are certain types of errors that can be committed by the originator or by one of the banks in the credit transfer chain that raise a question as to whether the payment order has been accepted by the "beneficiary's bank" (see article 17, comments 4 to 6) and, therefore, whether the credit transfer has been completed.

Article 12

3. The context of article 12 makes it clear that the duty to assist arises when the credit transfer has not yet been completed, although it should have been, and the originator still expects the transfer to be carried out.

4. The first obligation of a receiving bank when the credit transfer has not been successfully carried out is to take the necessary steps to cause it to be carried out. If the receiving bank is the cause of the difficulties, it would carry out its obligation under article 12 by taking the necessary actions itself, although in such a case resort to article 12 might not be necessary. For example, if a receiving bank had misdirected its own payment order, it would continue to be obligated under article 7(2) to send a payment order consistent with the order it had received (A/CN.9/344, para. 103). The receiving bank would fulfil that duty only by sending a new payment order. Article 12 on the other hand is primarily directed to the situation where the credit transfer has been delayed or an error has been made at another bank in the credit transfer chain and the originator or the sender have requested the assistance of the receiving bank. Article 12 might, for example, require the receiving bank to find out where the problem had occurred or to send new instructions to the subsequent bank.

5. An objection was raised at the twenty-second session that the duty the article sought to create was unclear in content and of uncertain utility since no remedy had been

proposed by which the breach of the duty might be appropriately redressed (A/CN.9/344, para. 104). In reply it was said that even if the duty was not specifically enforceable by a clear sanction, it would establish a norm for conduct and might, in egregious cases, be enforced by a court's application of general principles of law concerning the breach of a statutory duty. (See, however, article 16(8), which provides that the remedies in article 16 are exclusive, with an exception that would not normally apply to the failure to act in accordance with article 12.)

6. *Comparison with Article 4A.* There is no equivalent provision in Article 4A.

Article 13

7. Article 13 sets forth one of the most important rules in the draft Model Law; if the credit transfer is not completed in accordance with article 17(1), the originator has a right to a refund of any payment it has made to the originator's bank under article 4(6). A consequential rule is that the originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank.

8. The context of article 13 makes it clear that the duty to refund arises only when it is evident that the credit transfer will never be completed.

9. The most typical reason a credit transfer is not completed is that one of the senders in the credit transfer chain has revoked the payment order under article 11 (A/CN.9/344, para. 96). Other reasons why a credit transfer is not completed successfully are (1) that the identification of the beneficiary or of the beneficiary's bank is incorrect on one of the payment orders in the credit transfer chain by reason of error or fraud, (2) that the imposition of currency restrictions prevents the transfer from being made, (3) that for some reason a transfer cannot be made to the beneficiary's bank or to the country where the beneficiary's bank is located, (4) that the beneficiary's bank refuses to accept the payment order addressed to it or (5) that the account of the beneficiary is no longer open to receive credit transfers. In most cases where the indication of the incorrect beneficiary or beneficiary's bank was the result of an error, it could be expected that the error would be corrected and the credit transfer would be carried out as directed, though perhaps late.

10. The obligation of the originator's bank to the originator and the obligation of each receiving bank to its sender to return the payment received if the credit transfer is not completed is absolute. At the eighteenth session the Working Group rejected a suggestion that the obligation of a receiving bank should be to assign to its sender the right of reimbursement it would have from its receiving bank (A/CN.9/318, para. 153). The result of that suggestion would have been to place on the originator the obligation to pursue its claim for reimbursement from a subsequent bank in the credit transfer chain and to bear the risk that the reimbursement could not be fully recovered. As it is, under article 13 if a credit transfer is not completed and any receiving bank is not able to reimburse its sending bank promptly, perhaps because of the

insolvency of the receiving bank or because of the cessation of payments between the two States concerned, the sending bank to that non-reimbursing receiving bank would bear the loss or suffer the delay in reimbursement. Such a non-reimbursing receiving bank would normally be an intermediary bank, and that is the case envisaged in article 13. It would be the beneficiary's bank only if the bank had received payment for the order from its sender but had not accepted the payment order, a situation that would rarely arise.

11. The policy that lies behind article 13 was reaffirmed at the twenty-second session after long discussion (A/CN.9/344, paras. 105 to 108). In opposition to the policy it was said that the risk that was placed on the originator's bank and on each intermediary bank in the credit transfer chain that it might have to reimburse its sender even though it could not get reimbursement from its receiving bank was a new risk for banks, since in certain countries it had been borne in the past by the customers. It was said that the new risk would not be overly burdensome to large banks with foreign branches; those banks would route most international credit transfers through their branches. The banks that would most often have to run the risk would be small and middle-sized banks that had to route international credit transfers through correspondent banks in foreign countries. It was said that this would be of particular concern for banks in developing countries.

12. It was also stated that the increased risk for an originator's bank might give rise to new concerns by banking regulators who were increasingly aware of, and interested in, reducing systemic risk. Examples given raised the possibility that deposit insurance or reserve requirements might be changed to address risks such as that which article 13 placed upon banks. It was also questioned whether banks might be required to provide capital support for that risk under the Basle Accord. In response, it was stated that at least one country that operated large value credit transfer systems had implemented a rule equivalent to article 13 without serious repercussions. The analysis carried out in that country by the bank supervisory authorities had led to the conclusion that the duty to refund to the originator did not raise issues under the Basle Accord, or serious risks of new contingent liabilities threatening the banks.

13. As a further argument in support of article 13, it was pointed out that the adoption of the provisions in article 5(b)(iv) recognizing bilateral and multilateral netting agreements, an action that had been taken earlier in the twenty-second session, would lead to a significant reduction in the credit risk that otherwise would exist in respect of those transactions (A/CN.9/344, para. 107). It was said that the reduction in risk that would result from the implementation of such agreements had been estimated to be between 50 and 80 per cent. As a result, even with the increased risk for banks that might arise out of article 13, the general effect of the Model Law would be to decrease risks to banks rather than to increase them.

14. At the close of the discussion, when the decision to maintain article 13 was taken, the Secretariat was requested to send a copy of the report of the twenty-second

session of the Working Group to the Bank for International Settlements (BIS) for its information (A/CN.9/344, para. 108). The Secretariat has sent a copy of the report as requested.

15. Article 13 as adopted at the twenty-second session provides that the refund from the originator's bank to the originator and from a receiving bank to its sender shall be "with interest from the day of payment to the day of refund". The day of payment is the day the sender, whether originator or sending bank, paid its receiving bank. Similarly, the day of refund is the day the receiving bank, whether the originator's bank, an intermediary bank or the beneficiary's bank, refunded to its receiving bank. As a result, the interest received by a bank from its receiving bank will almost always be less than the interest it is obligated to refund to its sender. The difference between the two is the interest on the funds for the amount of time the funds were in the possession of that bank. This accords with the theory of the provisions in article 16 on the payment of interest for late payment, i.e. that neither the banking system as a whole nor any individual bank in the credit transfer chain should profit from the use of customer's funds arising from inefficiencies or from errors in that or in any other bank (A/CN.9/341, para. 118; A/CN.9/344, paras. 44 and 45).

16. At the nineteenth session a suggestion was made that the amount of the funds to be returned should be the original amount of the transfer less costs. It was said that this issue would have to be addressed at a later time (A/CN.9/328, para. 115). At the twenty-first session it was decided that current article 17 should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20; see article 17, comments 17 to 19). The issue as to whether the costs of the transfer and of the refund should be borne by the originator were not discussed at the twenty-second session when article 13 was adopted in its current form. However, the fact that the issue was before the twenty-second session of the Working Group in the working paper submitted by the Secretariat (A/CN.9/WG.IV/WP.49, article 11, comment 11) would suggest that the failure to discuss the question of costs was done knowingly.

Paragraph (2)

17. It was decided at the twenty-second session that the provisions of article 13 should be mandatory (A/CN.9/344, paras. 109 and 110). During the discussion leading to that decision the concerns that had previously been expressed about the very principle of article 13 were reiterated. In particular, it was pointed out that the originator might specify that the credit transfer was to be carried out through a particularly unreliable intermediary bank or a particularly unstable country. One suggestion was that, since the refund mechanism set forth in article 13 could be compared to insurance or a guarantee that the credit transfer would be completed, it would create a cost for the bank for which the bank should be able to charge. An originator might then wish to choose a less expensive method of transfer in which the risk that the credit transfer could not be completed and the principal amount of the transfer

could not be recovered would be knowingly borne by the originator. That suggestion, which would have been contrary to the principle that article 13 should be mandatory, was not implemented.

18. Another suggestion was that, where the originator specified that the credit transfer was to be carried out through a particularly unreliable intermediary bank or a particularly unstable country, the originator's bank should have the possibility to conclude a special agreement shifting the responsibility of the transfer to the originator (A/CN.9/344, para. 109). In reply it was stated that the Model Law should not allow easy derogation of the refund obligation, especially by means of a bank's standard terms of dealing.

19. Paragraph (2) as formulated by the drafting group at the twenty-second session, implementing the decision of the Working Group (A/CN.9/344, para. 110), states that the refund provided in paragraph (1) need not be made if the bank "is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund". The use of the word "directed" seems to cover every case in which the payment order received by the bank specified use of the intermediary bank in question.

20. Such an interpretation would seem to lead to the result that no refund need be given in some cases beyond those that had been envisaged in the Working Group. One such case would be where the choice of the intermediary bank that failed was contained in the originator's payment order but that bank had originally been chosen by the beneficiary's bank, which had informed the beneficiary of the bank to be used. The beneficiary's bank might have indicated the intermediary bank in question because it wished to receive all payment orders of a particular type through that bank or because it wished to receive credit at that bank (see article 7(6) and comments 19 and 20 to article 7). As far as article 13 would be concerned, no refund would be due to the originator, since the originator would have specified to the originator's bank the intermediary bank to be used. The originator would have to claim against the beneficiary, who in turn would have to claim against the beneficiary's bank as the original source of the decision to use the intermediary bank that failed.

21. The duty to make a refund might also be excluded in a case where an originator's bank systematically caused all or the majority of its customers to "direct" the bank as to the routing to be used to effect the credit transfer. There are a number of ways in which an originator's bank might act to cause its customers to give it directions systematically. Such a practice would seem to be against the policy expressed in the Working Group that a derogation from the obligation to make a refund should not be easy, especially by means of a bank's standard terms of dealing (A/CN.9/344, para. 109).

22. If the Commission is in agreement, it might wish to consider adding a new sentence between the second and third sentences of paragraph (2) as follows:

"A receiving bank is not considered to have been directed to use the intermediary bank unless the receiving bank proves that it does not systematically cause the type of senders or payment orders involved in the transfer to instruct it as to the intermediary bank or banks to be used."

23. If relatively few of the payment orders that the bank receives from its customers designate an intermediary bank, the receiving bank would normally have carried its burden of proof. However, the bank may cause only certain customers, such as originators, to name the intermediary bank to be used or it may cause its senders to name the intermediary bank to be used only in respect of certain types of payment orders, such as those over a certain amount. If the sender claimed that the receiving bank systematically did so, under the proposed sentence the receiving bank would have to prove that it did not.

24. *Comparison with Article 4A.* Article 4A-402(c), (d) and (e) are essentially equivalent to article 13.

Article 14

25. Articles 14 and 15 make it clear that at least in some cases a credit transfer can be completed under article 17(1) when a payment order is accepted by the beneficiary's bank even though the payment order is inconsistent with the originator's order in some respect. Article 14 deals with the situation where the payment order is for too small an amount. In such a case, the receiving bank where the error occurred is obligated to issue a payment order for the difference between the amounts of the two orders.

26. Article 14 does not provide that the bank is to pay interest to its receiving bank or to the beneficiary on the underpayment. Article 16(5) does provide for such interest, but only to the extent that the late payment "is caused by the receiving bank's improper action" (see article 16, comment 32).

Article 15

27. In most cases where the amount of the payment order accepted by the beneficiary's bank is greater than the amount of the originator's payment order, the beneficiary's bank will be authorized by the beneficiary to debit its account for the overpayment and to return the funds to the bank that made the error. Where the beneficiary does not authorize the debit to its account, article 15 gives the bank that made the error the right to recover from the beneficiary the difference between the amounts of the two payment orders. However, since the beneficiary may have valid reasons to keep the entire amount that was credited to its account, article 15 gives the bank the right to recover only as "otherwise provided by law" (compare article 11, comments 19 and 20).

Article 16. *Liability and damages*

(1) A receiving bank other than the beneficiary's bank is liable to the beneficiary for its failure to execute its sender's payment order in the time required by article 10(1), if the credit transfer is completed under article 17(1). The liability of the receiving bank shall

be to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure. Such liability may be discharged by payment to its receiving bank or by direct payment to the beneficiary.

(2) If a receiving bank that is the recipient of interest under paragraph (1) is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to the next receiving bank or, if it is the beneficiary's bank, to the beneficiary.

(3) A receiving bank other than the beneficiary's bank that does not give a notice required under article 7(3), (4) or (5) shall pay interest to the sender on any payment that it has received from the sender under article 4(6) for the period during which it retains the payment.

(4) A beneficiary's bank that does not give a notice required under article 9(2) or (3) shall pay interest to the sender on any payment that it has received from the sender under article 4(6), from the day of payment until the day that it provides the required notice.

(5) A receiving bank that issues a payment order in an amount less than the amount of the payment order it accepted shall, if the credit transfer is completed under article 17(1), be liable to the beneficiary for interest on any part of the difference that is not placed at the disposal of the beneficiary on the payment date, for the period of time after the payment date until the full amount is placed at the disposal of the beneficiary. This liability applies only to the extent that the late payment is caused by the receiving bank's improper action.

(6) The beneficiary's bank is liable to the beneficiary to the extent provided by the law governing the relationship between the beneficiary and the bank for its failure to perform one of the obligations under article 9(1) or (5).

(7) The provisions of this article may be varied by agreement to the extent that the liability of one bank to another bank is increased or reduced. Such an agreement to reduce liability may be contained in a bank's standard terms of dealing. A bank may agree to increase its liability to an originator or beneficiary that is not a bank, but may not reduce its liability to such an originator or beneficiary.

(8) The remedies provided in this law do not depend on the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive, and no other remedy arising out of other doctrines of law shall be available except any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order (a) with the intent to cause loss, or (b) recklessly and with knowledge that loss might result.

Prior discussion

A/CN.9/297, paras. 55 to 63 and 70 to 72 (sixteenth session, 1987)

A/CN.9/317, paras. 137 to 150 (seventeenth session, 1988)

A/CN.9/328, paras. 66 to 74 and 117 to 144 (nineteenth session, 1989)

A/CN.9/329, paras. 187 and 188 (twentieth session, 1989)

A/CN.9/341, paras. 105 to 131 (twenty-first session, 1990)

A/CN.9/344, paras. 11 to 57 (twenty-second session, 1990)

Comments

1. Article 16 was completely redrafted at the twenty-second session on the basis of prior article 12 (A/CN.9/344, paras. 11 to 57). Prior article 12 was essentially the text as prepared by the Secretariat for the eighteenth session in A/CN.9/WG.IV/WP.39 on the basis of the discussion at the seventeenth session (A/CN.9/317). Certain amendments to the Secretariat's draft were introduced at the nineteenth session (A/CN.9/328). At the twentieth session a small group consisting of four delegations was asked to consider the liability provisions in general and to attempt to formulate an agreed position that might be considered by the Working Group, but they were unable to reach such an agreed position. Instead they identified four major issues and each of the delegations submitted their separate views for the consideration of the Working Group (A/CN.9/329, paras. 187 and 188).

2. At the twenty-first session the Working Group had before it a complete redraft of the article that had been proposed by the delegation of the United Kingdom in a communication to the Secretariat (A/CN.9/WG.IV/WP.46, comment 28 to article 12). However, "the Working Group decided that it would be a more appropriate procedure to discuss the original text of article 12, including paragraph (2), and to use the suggested redraft as a source of ideas for improving the text" (A/CN.9/341, para. 106). Certain changes were made in the text at the twenty-first session, and the consideration of the problem of liability continued at the twenty-second session, when the current text was adopted. While the current text is the result of the entire series of discussions, the extent of the redrafting at the twenty-second session makes it more difficult to follow the development of the ideas represented by the current text than it is for the majority of the other articles in the draft Model Law.

3. The general system of liability in the draft Model Law prior to the twenty-second session was that the originator could hold the originator's bank liable for the proper performance of the credit transfer. That meant that the bank would be responsible to the originator for loss wherever the loss occurred. The types and extent of the losses for which the originator's bank would be liable were those set forth in paragraph (5) of former article 12. In order to avoid liability, the originator's bank would have had to show that one of the exempting conditions in former article 13 was relevant, an article that was deleted at the twenty-second session as no longer necessary in the light of the changes in the general regime of liability at that session (A/CN.9/344, para. 58; comments 47 and 48, below). If the loss for which the originator's bank was liable to the originator had been caused by events that had occurred at a subsequent bank in the credit transfer chain,

the originator's bank would have been able to recover the loss from its receiving bank and each bank in turn would have been able to recover from its receiving bank until, under paragraph (3), a bank would have shown that the payment order received by the beneficiary's bank was consistent with the payment order received by the bank in question.

4. That system of liability was based on the idea that the originator's bank provided a service to the originator that depended on it having established correspondent relations with other banks. It is a system of liability that is well known in other similar types of economic activity, such as the international transport of goods, where it is common for the carriage to be effected by several different carriers. Under some, though not all, conventions on international carriage of goods the claim might be made either against the original contracting carrier or against the carrier where the damage occurred. The procedure envisaged by former paragraph (2), similar to the procedure used in those conventions, would have eased the procedural problems for the originator since he would not have had to claim against a bank in a foreign country with which he had no business relationship. At the same time, it would have allowed the originator's bank to have recourse against its receiving bank, a bank with which it normally had a continuing business relationship (A/CN.9/341, para. 111).

5. Against that system of liability was the concept that no one should be responsible for the errors of third parties. The originator's bank is not always in a position to know, much less to control, the route that an international credit transfer will take on its way to the beneficiary's bank. In some cases the originator specifies some or all of the intermediary banks to be used. In any case, when the originator requests its bank to transfer funds to a foreign country, it should know that its bank is likely to use independent intermediary banks (A/CN.9/341, para. 108).

6. At the twenty-first session there were contradictory statements as to the standard of care for which the originator's bank would be held liable when the loss occurred because of the acts of an intermediary bank in a foreign country. Under one view the originator's bank would be responsible if the intermediary bank did not act in accord with the performance standards of the Model Law. The example given was that the intermediary bank did not execute the payment order on the day it was received because the standard in that country was next day execution. Under another view, under what is currently article 18(1) the actions of the receiving bank, i.e. of the intermediary bank, and therefore the standard of care of the originator's bank, would be measured by the rules in force in the State of the receiving bank (A/CN.9/341, paras. 109 and 110). Therefore, the applicable standard of care would be that prescribed by the Model Law only if the State where the receiving bank was located had adopted the Model Law.

7. The types of damages that could be recovered under paragraph (5) of former article 12 were gradually reduced during the preparation of the Model Law (see A/CN.9/WG.IV/WP.49, comments 8 to 10). In particular, any recovery for indirect (consequential) damages was all but

eliminated (see comments 41 to 46 below). By the time current article 16 was considered at the twenty-second session, the originator's bank was liable to the originator only for loss of interest and for expenses incurred for a new payment order, expenses that were considered to be of minor importance. Furthermore, it had already been decided that interest for delay should be passed to the beneficiary (see comments 13 to 21). Therefore, it was concluded that there was little justification left for holding the originator's bank liable to the originator for the proper completion of the credit transfer and the original system of liability was deleted from the Model Law (A/CN.9/344, para. 43).

Relation of article 16 to other remedial provisions

8. Article 16 is only one of several provisions that afford relief to a party when the credit transfer is not carried out as it should be. In particular, article 16 must be read in the light of articles 13 to 15, which provide a form of monetary relief, but which the Model Law does not treat as liability or damages provisions. Articles 12, 6(2)(a) and 8(1)(a) also specify certain consequences when the credit transfer has not been carried out properly or when certain obligations under the Model Law have not been fulfilled.

Paragraphs (1) and (2)

9. Paragraph (1), contains the core concept in respect of the liability of a receiving bank when there is a failure to execute its sender's payment order in the time required by article 10(1), i.e. "to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure". The payment of interest is also required in several other provisions (i.e. articles 11(5), 12(1), 16(3), (4) and (5)) where the circumstances are not considered to fall under paragraph (1). With the exception of the unlikely availability of consequential damages under paragraph (8), the extent of a bank's liability under the Model Law is limited to payment of the applicable amount of interest.

10. Interest losses may be suffered in several different ways as a result of a credit transfer that does not work as intended. If a receiving bank receives funds from its sender but delays execution of the payment order, the sender (who may be either the originator or a sending bank) may be said to have suffered a loss of interest because it has been deprived of funds earlier than was necessary for the bank to execute the payment order. If the receiving bank receives funds late from its sender but executes the order without waiting for the funds, the receiving bank suffers a loss of interest but no subsequent party, including the beneficiary, suffers any loss. If the result of a delay or error of any kind at a receiving bank is that the entire credit transfer is delayed, the beneficiary could be said to have suffered the loss of interest.

11. If the beneficiary (as creditor of the underlying obligation) could recover loss of interest from the originator (as debtor of the underlying obligation) because of late payment of the underlying obligation, the originator might claim for the interest it had paid to the beneficiary from the bank where the delay occurred or from the originator's

bank. In many cases the amount of interest the beneficiary could claim from the originator because of late payment of the underlying obligation would be more than the amount of interest due from the bank because of delayed performance of the credit transfer. At the twenty-first session, when it was suggested that the bank that had caused the delay should have to pay to the beneficiary or to the originator (if the originator had reimbursed the beneficiary) an additional amount equal to the interest due as a result of the late payment of the underlying obligation, less the amount already paid for the delay in the credit transfer, it was stated that such an additional amount was in the nature of indirect (consequential) damages and should be treated as such under the Model Law (A/CN.9/341, para. 120). Under the current text of article 16(8), the originator would almost assuredly be unable to pursue any such claim.

12. At the twenty-second session there was a discussion as to whether interest should be due merely because of a delay in the execution of a payment order or whether it should arise only if there was a delay in the completion of the credit transfer (A/CN.9/344, para. 54). A delay in the execution of a payment order, it was stated, should give no claim to the beneficiary if the delay was made up at a later point in the credit transfer chain and the credit transfer was completed by the payment date that had been stipulated. In reply it was said that a rule that relied on a delay in the completion of the credit transfer would be difficult to administer. Such a rule would mean that the intermediary bank would not know whether it was liable to pay interest until it had notice as to whether the credit transfer had been completed on time or not. It may also be said that it would be possible to complete a credit transfer by the payment date only when a payment date had been stipulated in the originator's payment order. Where no payment date has been stipulated, in all but the rarest of cases a delay in execution by any of the banks in the credit transfer chain will necessarily delay the completion of the credit transfer from the time when it would otherwise have been completed. Consequently, under paragraph (1) interest is due from a receiving bank by virtue of its delay in executing the payment order it has received without regard to whether that delay caused a delay in the completion of the credit transfer itself.

13. The most controversial question that arose during the preparation of what is currently article 16(1) was whether the originator or the beneficiary should receive the interest due for the delay. The original text of paragraph (1) provided that the originator was the party who had the right to damages when the credit transfer was not completed as required, including that it was completed late. Such a rule seemed to be logical, since it was the originator who gave the instructions that resulted in the credit transfer. Furthermore, whether or not the originator is seen to be in privity of contract with subsequent receiving banks, a question that the Working Group avoided because of the different doctrinal solutions to that question in various legal systems, it is evident that there is a contractual chain reaching from the originator to the receiving bank that caused the delay. No such contractual chain reaches back from the beneficiary to any bank prior to the

beneficiary's bank. Finally, in the original draft of article 12, the predecessor to the current article 16, significant damages beyond the payment of interest were available. In most cases it was the originator that would have suffered the losses for which those damages could be claimed.

14. The question as to whether the originator or the beneficiary should receive the interest for delayed completion of a credit transfer was discussed by the Working Group at its nineteenth, twenty-first and twenty-second sessions (A/CN.9/328, paras. 122 to 131; A/CN.9/341, paras. 118 to 123; A/CN.9/344, paras. 44 to 57). The Working Group agreed that, in any case where the beneficiary had been credited later than it should have been because of a delay in the transfer, the receiving bank causing the delay should not benefit from the use of the funds during the period of the delay (A/CN.9/328, para. 122). It noted that it was current banking practice in many important banking centres for a bank at which a transfer was delayed to add an appropriate amount of interest to the amount being transferred. As a result, the bank that received the transfer late would automatically receive the interest. This was said to be efficient and expeditious, not requiring any inquiry into the facts of the underlying transaction but giving a remedy that would normally be approximately equal to the loss suffered, and a practice that the legal system should recognize (A/CN.9/328, para. 126).

15. At the conclusion of the discussion at the nineteenth session the Working Group decided that it would be useful to consider providing in the Model Law that the beneficiary would have a direct right to recover interest resulting from the delay against the bank that caused the delay. Since the proposal raised a number of questions that required consultation, the Working Group requested the Secretariat to prepare a draft of a provision for its consideration at a later session (A/CN.9/328, para. 131).

16. At the twenty-first session it was stated that where the credit transfer was not completed and the originator had the right to get its funds back under what is currently article 13, the originator should also be entitled to receive the interest (A/CN.9/341, para. 118; see article 13 and comments thereto). The relationship between the right of the originator to receive interest on the amount refunded under article 13 and the right of the beneficiary to receive interest on the amount of the credit transfer as damages for the period of any delay was noted at the twenty-second session (A/CN.9/344, paras. 44 and 45).

17. The Working Group also noted at the twenty-first session that the typical way in which banks compensated one another for interest due was to adjust the date of the credit to the account so that it showed "as of" the date on which the credit should have been entered (A/CN.9/341, para. 119; A/CN.9/344, para. 53). By changing the date of the credit, appropriate interest would normally be given automatically to the bank receiving the credit. It was stated that, in practice, delay in executing a payment order was almost always because the payment order had been executed improperly. As soon as the error was brought to the attention of the bank, it would immediately execute

the order correctly for the original amount. Interest adjustments would be made later, usually by way of an "as of" adjustment, although that method was less often used where the person receiving the adjustment did not maintain an account with the bank.

18. An interest rate adjustment between banks would automatically be at the interbank rate in the currency concerned when it was effected by means of an "as of" adjustment of the date on which the account was credited. An "as of" adjustment of the date of crediting a non-bank beneficiary's account would not have the same automatic effect. The effective amount of interest a non-bank beneficiary would receive would depend on whether the account was in debit or in credit during that period of time, since the rate charged on a debit balance is always higher than the rate the beneficiary would receive if the account was in credit.

19. As a result, even though it was suggested that the Model Law should indicate the appropriate rate of interest to be paid, and that the interest should be calculated at the interbank rate in the currency in which the payment order was expressed, the Working Group decided at its twenty-first session that it would provide only that interest was payable without indicating how that interest should be calculated (A/CN.9/341, paras. 121 and 123).

20. At the twenty-second session the question was raised whether the Model Law should specifically state that one way for a sending bank to pay interest to its receiving bank was to make an appropriate adjustment in the date of the credit (A/CN.9/344, para. 53). An objection was raised that the date of the credit might be adjusted in an account that did not bear interest, thereby being of no benefit to the receiving bank. As a consequence, paragraph (1) indicates only that interest is to be paid; an "as of" adjustment may be one way to pay the interest, but any other method that achieves the desired result is acceptable.

21. At the twenty-second session it was decided that the beneficiary should have a direct right to recover the interest against the receiving bank that had delayed the credit transfer even though there was no contractual relationship between the beneficiary and the bank where the delay occurred (A/CN.9/344, paras. 49 and 50). Furthermore, it was decided that the beneficiary's right should be only against the bank where the delay occurred. That decision, reflected in the language of paragraph (1), was in line with the general decision taken at the twenty-second session that a bank should be liable only for the consequences of its own acts (see comment 7).

22. In the light of the discussion as to how banks often reimbursed one another for a delay, it was decided to provide in paragraph (1) that the receiving bank could discharge its obligation to the beneficiary by payment of the amount of the interest to its receiving bank. In order to ensure that the benefit of the interest is passed on to the beneficiary, paragraph (2) requires the receiving bank that receives the interest to pass it on to the next receiving bank. The last receiving bank in the credit transfer chain, which is the beneficiary's bank, is then required to pass it on to the beneficiary. This is one of the few occasions in

the Model Law where the relationship between the beneficiary and the beneficiary's bank is regulated. The result of paragraphs (1) and (2) taken together is that the beneficiary is expected to receive the interest for delay in the credit transfer from the beneficiary's bank, even though the beneficiary's only right to recover arising out of the delay itself is against the bank where the delay occurred. Naturally, the beneficiary would also have a right against a bank that did not pass on the interest it received from a prior bank; that right is implicit in paragraph (2), which speaks of the obligation of the receiving bank to pass on the interest, but does not state to whom that duty is owed.

23. It should be pointed out that paragraphs (1) and (2) govern only the situation where a receiving bank has delayed executing the payment order received. According to article 2(1), "Execution" means . . . the issue of a payment order intended to carry out the payment order received by the receiving bank." At the twenty-second session it was suggested that it should be clear in the Model Law that the failure of a sending bank to furnish cover to its receiving bank, as a result of which the receiving bank delayed its execution of the payment order, was one failure for which the sending bank should be liable for interest (A/CN.9/344, para. 48). In reply it was said that the duties of the sending bank, in its capacity as receiving bank of the order it had received, should be set forth in article 7 and not in article 16. In any case, its obligation as a sending bank under article 4(6) was to pay its receiving bank for the payment order when that receiving bank accepted it. It was agreed that further study of the question was needed.

24. In most cases a receiving bank will accept and execute a payment order received from another bank (or if it is the beneficiary's bank, it will accept the payment order received and credit the beneficiary's account) without verifying that it has received payment. Where that occurs, there is no delay in the credit transfer arising out of the fact that payment has not yet been made, and paragraph (1) does not apply. Where a sending bank does delay making the payment called for by article 4(6), the sending bank will pay interest to the receiving bank for the delay in payment, either directly or in the form of an "as of" adjustment as described in comments 17 and 18. Such interest for delay in payment is not covered by any provision in article 16, and paragraph (8) might be considered to preclude the application of any doctrine outside of the Model Law to enforce the obligations of article 4(6) (see comment 39). Banks could, however, agree under paragraph (7) to make such payments of interest to one another. Since the delay in paying for the payment order as required by article 4(6) is not a delay in executing a payment order, the bank that receives the interest would not be obligated by paragraph (2) to pass it on to the next receiving bank.

25. The suggestion was made at the twenty-second session that, even if the beneficiary would have the primary right to receive interest for a delayed transfer, the originator should have a residual right to recover the interest (A/CN.9/344, para. 47). The example was given of a beneficiary that did not receive the interest due from the delay in the transfer and that, as a result, recovered

interest from the originator because of a delay in payment of the underlying obligation. The reply was given that, although the originator should undoubtedly be able to recover the interest in such a case, such a right should not be available under the Model Law. Instead, it was said, the originator's right to exercise the claim of the beneficiary should be left to the otherwise applicable law of subrogation or other appropriate doctrine. It should be noted again, however, that article 16(8) says that the remedies in this law are "exclusive, and no other remedy arising out of other doctrines of law shall be available . . ."

26. Another suggestion made at the twenty-second session was that where a bank was obligated to pay interest to its sender or to its receiving bank for which the bank had a right of reimbursement from a third party, but the bank could not recover the reimbursement because the third party had become insolvent, the bank should be entitled to recover the reimbursement from any other party that itself had an obligation to reimburse the insolvent bank (A/CN.9/344, paras. 56 and 57; see A/CN.9/WG.IV/WP.49, article 12, comment 49). The suggestion was rejected on the grounds that, although such a rule appeared on first analysis to be a fair rule, a thorough economic analysis would show that it was incompatible with a bilateral or multilateral netting scheme such as that recognized by article 5(b)(iv). The Working Group did not consider the question as to whether it would be appropriate to have such a rule for those credit transfers that were carried out completely by correspondent banking relations or whether the importance for international credit transfers of such netting schemes as CHAPS in London and CHIPS in New York would render inappropriate any such a rule for correspondent banking alone.

Paragraphs (3) and (4)

27. When the Working Group adopted the provision requiring a receiving bank to notify its sender of a misdirected payment order, current article 7(3), it noted that the harm suffered might not always be easy to measure. Nevertheless, it was of the view that there should be a sanction for a bank's failure to notify the sender where that failure to notify delayed the transfer (A/CN.9/318, para. 122; A/CN.9/344, paras. 26 to 29). Therefore, from the eighteenth to the twenty-first sessions draft article 12(6) provided that if a receiving bank failed to notify of a misdirected payment order, and the credit transfer was delayed, the bank was liable:

"(a) if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank, or

(b) if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days."

28. At the twenty-second session the sanctions under what are currently paragraphs (3) and (4) were extended to a failure to give any of the notices required by the Model Law, except for the failure to give notice of rejection (A/CN.9/344, paras. 30 to 32). The reason for the exclusion of the failure to give a required notice of rejection

from the operation of article 16(3) and (4) is that the consequence of such a failure, when payment has been made to the receiving bank, is that the payment order is accepted under article 6(2)(a) or 8(1)(a) (A/CN.9/344, para. 31). At the same time that it was decided to extend the liability for interest to a failure to give any of the other required notices, it was decided that the duty to pay interest would arise only if the receiving bank that failed to give the notice had been paid for the payment order (A/CN.9/344, paras. 30, 32 and 33).

29. Paragraphs (3) and (4) both provide that the interest is to be paid to the sender. In effect, the payment of interest by the receiving bank to the sender because of the failure to give notice reimburses the sender a portion of the interest it owes to the beneficiary for the delay in the credit transfer caused by the sender's (i) misdirection of the payment order, (ii) sending of a payment order that cannot be executed or (iii) sending of a payment order that contains an inconsistency between the words and figures that describe the amount of money to be paid. It was noted at the twenty-second session that where the receiving bank had received funds with the misdirected payment order, article 13 would require it to return the funds with interest (A/CN.9/344, para. 29). However the Working Group decided that article 16 should contain a provision in respect of misdirected payment orders so as to prevent unjustified enrichment of the receiving bank.

Paragraph (5)

30. Paragraph (5), requiring interest on the amount of an underpayment, was added to the text of the Model Law by the drafting group at the twenty-second session (A/CN.9/344). There was no discussion in the Working Group as a whole in regard to this issue.

31. Paragraph (5) should be read in conjunction with article 14, which requires a receiving bank that has executed the payment order it received by issuing its own payment order, but for a smaller amount, "to issue a payment order for the difference between the amounts of the payment orders". Article 14 does not require the payment of any interest on the amount of the underpayment; that is left to article 16(5).

32. Paragraph (5) requires the payment of interest "only to the extent that the late payment [of the deficiency] is caused by the receiving bank's improper action". (The Commission may wish to add the words "of the deficiency" to make the provision clearer.) It is unclear why this limitation was added to paragraph (5), since it does not appear in either paragraph (1) or in articles 13 or 15. In all those provisions the receiving bank that had funds for a period of time because the credit transfer had not been completed correctly is required to pay interest on those funds whether or not the bank had acted improperly.

Paragraph (6)

33. The beneficiary's bank might cause loss to the beneficiary by such actions as failing to fulfil its obligations under article 9(4), by failing to accept a payment order it is obligated by contract with the beneficiary to

accept or by accepting a payment order the beneficiary has instructed it not to accept.

34. It is a matter of judgment whether the Model Law should contain provisions covering such losses. On the one hand the losses would arise out of the failure in respect of the credit transfer. On the other hand it may be thought that it is not necessary to establish rules on the liability of the beneficiary's bank to the beneficiary, especially when those rules might differ from the domestic rules governing liability for an otherwise identical failure by the bank. Paragraph (6) takes a middle position by referring to the existence of such liability but leaves the substance of the rules governing the liability to the law that governs the relationship between the beneficiary and the bank.

35. For the drafting history of paragraph (6) prior to the twenty-second session, see A/CN.9/WG.IV/WP.49, article 12, comments 16 to 22. There was no discussion of the problem by the Working Group at the twenty-second session and the current draft was prepared by the drafting group in its general revision of article 16.

Paragraph (7)

36. Paragraph (7) provides an important rule setting forth the extent to which the provisions of this article can be varied by agreement of the parties. The provision was contained in article 9(6) of the draft of the Model Law prepared by the Secretariat for the eighteenth session of the Working Group (A/CN.9/WG.IV/WP.39). It was not discussed by the Working Group until the twenty-second session (A/CN.9/344, paras. 36 to 39). Between the drafting of the original provision and the discussion at the twenty-second session, the Working Group at its twenty-first session had adopted what is currently article 3, giving a general freedom to the parties to vary their rights and obligations by agreement (A/CN.9/341, para. 52).

37. Paragraph (7) constitutes a limitation on the general right of the parties under article 3 to vary their rights and obligations by contract. Deletion of paragraph (7) was proposed at the twenty-second session on the grounds that the Model Law should not attempt to give special protection to bank customers, since their bargaining power might well be equal or superior to that of the banks. The Working Group was of the view that there existed a need to set a minimum standard in regard to the liability of a bank for the protection of bank customers. Therefore, paragraph (7) provides that, while two banks can agree to any modification of the liability regime between themselves and a bank can agree to a greater measure of liability to a non-bank customer than is provided in the Model Law, a bank cannot reduce its liability to a non-bank customer by agreement.

38. Since paragraph (7) permits an agreement of non-responsibility of one bank to another, it was decided at the twenty-second session that it should be stated clearly that any such agreement could be contained in a bank's standard terms (A/CN.9/344, para. 39). This was considered necessary because in certain States it is not possible to modify the legal regime of responsibility except by an express contract and clauses of non-responsibility found in

standard form contracts are not enforceable. The location of the sentence makes it clear that the Model Law contains no rule as to whether a bank can undertake a higher level of liability to non-bank customers by means of its general conditions or whether such an undertaking would have to be in a special contract.

Paragraph (8)

39. Paragraph (8), making the liability provisions of this law not dependent on a contractual relationship and making them exclusive, was added at the suggestion of the Working Group at its seventeenth session (A/CN.9/317, para. 119). Without such a provision some legal systems might permit other remedies based on general theories of obligation, thereby destroying the uniformity of law the Model Law seeks to achieve.

40. In several comments throughout this report mention has been made of arguments raised in the Working Group that would either call for additional remedies to be added to the text of article 16 or that would call for the application of remedies generally available in the legal system (see article 4, comment 29; article 12, comment 5 and article 16, comments 24 and 25). The Commission may wish to consider how those issues might best be solved.

41. The last clause of the second sentence of paragraph (8) makes an exception to the exclusivity of the liability provisions of this law "when a bank has improperly executed a payment order or failed to execute a payment order (a) with the intent to cause loss, or (b) recklessly and with knowledge that loss might result". When such a situation exists, any remedy arising out of doctrines of law other than the Model Law may be applied, if any such remedy exists in the legal system. This clause was introduced at the twenty-second session (A/CN.9/344, paras. 11 to 22). It was the result of a long discussion lasting several sessions of the Working Group as to whether the Model Law should provide that a receiving bank might be liable for indirect (consequential) damages.

42. The Working Group decided at its seventeenth session that, in exchange for a relatively strict regime of liability, the bank liable would not be responsible for indirect losses unless more stringent requirements were met than for the other elements of loss (A/CN.9/317, paras. 115 to 117). That decision was reaffirmed in another context at the eighteenth session of the Working Group (A/CN.9/318, paras. 146 to 150). As suggested at the seventeenth session the formula used in article 12(5)(d) from the eighteenth to the twenty-second session provided that the claimant would have to prove the intent or the reckless behaviour of the bank.

43. At the nineteenth session retention of the essence of the provision was again reaffirmed (A/CN.9/328, paras. 140 to 143). However, the formulation of the subparagraph was criticized as being imprecise. It was said that the subparagraph was not clear as to the types of losses that were to be covered or that those losses should have been the direct consequence of the failure on the part of the bank. The formula used for limiting the right to

recover, which had been taken from article 8 of the Hamburg Rules, was said not to reflect properly the problems of making credit transfers (A/CN.9/328, para. 142). After discussion the Working Group decided to place square brackets around the words "any other loss" and around the words taken from the Hamburg Rules to indicate its intention to redraft the provision.

44. At the twentieth session three of the four delegations that were asked to formulate an agreed position on the general liability regime of the Model Law (see comment 1) were in favour of retaining the provision in one form or another, while one delegation was in favour of deleting it (A/CN.9/329, para. 188, question 3).

45. At the twenty-first session the Working Group decided to limit the application of the provision so that only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender (A/CN.9/341, para. 114 and 126). Following that decision the Working Group considered at length whether the provision should be retained at all (A/CN.9/341, paras. 127 to 131). At the end of the discussion a suggestion was made to delete both any provision on indirect (consequential) damages and paragraph (8). Under that proposal the Model Law would not provide for consequential damages under any circumstances, but a party would not be precluded from relying on other doctrines of law that might be available in the relevant legal system to claim such damages. A similar suggestion was that the two provisions might be combined so that banks would be subject to other relevant doctrines of law when they acted in the ways described in the then current text of article 12(5)(d). The Working Group decided that it would need more time to study the implications of the suggestions that had been made.

46. At the twenty-second session the Working Group considered three possibilities:

(a) The Model Law should state that indirect (consequential) damages should be available and set the conditions under which they would be awarded. That was the system proposed in the original draft of article 12(5)(d).

(b) The Model Law should state that indirect (consequential) damages should never be available (A/CN.9/344, para. 14). In support of that suggestion it was said at the twenty-second session that any provision allowing for such damages would imply that in case of litigation an attempt would be made to determine whether the bank intended the harm that occurred. It was also said that in some legal systems a party was deemed to have intended the consequences of its acts. In those systems it would be at least a question for the trier of fact, which might be a jury of ordinary citizens, whether the bank intended the harm when harm resulted from a failure by a bank to act with due care. It was said that an attempt to determine the intent of the bank would not be compatible with the operation of automated high-value, high-speed funds transfer systems.

(c) The Model Law should leave the matter to national law outside the Model Law. It was noted that

this last policy could be implemented either by deleting both article 12(5)(d) as it then existed and paragraph (8) from the Model Law or by deleting article 12(5)(d) and rewording paragraph (8) in the manner finally adopted. Retention of some possibility to recover from a bank that acted so willfully was said to be appropriate because under many national laws parties to a contract could not validly agree to exclude liability for their own intentional misconduct (A/CN.9/344, paras. 13 and 18). The choice between those two alternatives, which were recognized to be technically all but identical in respect of the right to recover indirect (consequential) damages, lay between the desire to have no mention of such a possibility in the Model Law and the desire to have the possibility mentioned. The latter solution also preserved the general rule of exclusivity for all other cases.

Finally, the Working Group decided to adopt the last of those alternatives (A/CN.9/344, para. 21).

Exemptions from liability

47. The first draft of the Model Law prepared by the Secretariat for the seventeenth session contained a provision exempting the bank that was otherwise liable for damages from paying those damages under certain circumstances. See A/CN.9/297, para. 60 for the policy decision and A/CN.9/WG.IV/WP.37, article 15 for the first draft. That provision was an integral part of the scheme that made the originator's bank liable to the originator for the consequences arising out of the non-completion of the credit transfer as originally instructed, including the indirect (consequential) damages that might have been suffered. The Secretariat draft was considered at the seventeenth session (A/CN.9/317, paras. 151 to 156) and a revised draft was prepared for the eighteenth session (A/CN.9/WG.IV/WP.39, article 10). While the provision was subsequently renumbered as article 13 in the continuing preparation of the Model Law, it was not considered again until the twenty-second session. At the twenty-second session the Working Group deleted the provision on the ground that there was no need to maintain a rule on exemptions in the light of the prior decisions limiting liability to the payment of interest (A/CN.9/344, para. 58).

48. *Comparison with Article 4A.* Article 4A-305 provides that a receiving bank is liable for its late or improper execution or failure to execute a payment order. In the case of late completion the bank "is obliged to pay interest to either the originator or the beneficiary . . .". In the case of other types of improper or non-execution, the bank "is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses . . . resulting from the improper execution." "If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute." In all cases additional "damages, including consequential damages, are recoverable [only] to the extent provided in an express written agreement of the receiving bank".

CHAPTER IV. COMPLETION OF CREDIT TRANSFER AND DISCHARGE OF OBLIGATION

Article 17. *Completion of credit transfer and discharge of obligation*

(1) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

(2) If the transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash.

(3) A credit transfer shall be considered complete notwithstanding that the amount of the payment order accepted by the beneficiary's bank is less than the amount of the originator's payment order because one or more receiving banks have deducted charges. The completion of the credit transfer shall not prejudice any right of the beneficiary under the applicable law to recover the amount of those charges from the originator.

Prior discussion

A/CN.9/317, paras. 157 to 164 (seventeenth session, 1988)

A/CN.9/328, paras. 37 to 43 (nineteenth session, 1989)

A/CN.9/329, paras. 189 to 192 (twentieth session, 1989)

A/CN.9/341, paras. 11 to 23 (twenty-first session, 1990)

A/CN.9/344, paras. 138 and 139 (twenty-second session, 1990)

Comments

Paragraph (1)

1. Although earlier versions of the draft Model Law had implied that the credit transfer was completed when the beneficiary's bank accepted the payment order, a specific rule as to when the credit transfer was completed was first introduced into the draft Model Law at the twentieth session when it was placed in the definition of "credit transfer" in article 2(a) (A/CN.9/329, paras. 31 to 33). At the twenty-first session it was moved to article 14(2 *bis*)—(A/CN.9/341, para. 17). At the twenty-second session at the same time the name of the article was changed the provision was moved again, this time to article 17(1) (A/CN.9/344, paras. 138 and 139). As had previously been the case, the credit transfer is completed when the beneficiary's bank accepts the payment order.

2. At the twenty-first session the Working Group noted that by its adoption of what are currently paragraphs (1) and (2), it had decided that the point of time when the credit transfer was completed with the legal consequences that followed was when the beneficiary's bank accepted the payment order addressed to it. Consequently, the Working Group did not exclude the possibility that it

would reconsider the issue of acceptance of a payment order as it was set forth in current articles 6 and 8 (A/CN.9/341, para. 17). Although a proposal for amending paragraph (1) was contained in the working paper submitted to the twenty-second session (A/CN.9/WG.IV/WP.49, article 14, comment 14), it was not considered at that session.

3. Among the consequences arising out of the completion of the credit transfer are that its completion can no longer be stopped by revocation of a payment order (article 11(2)) and that the risk for any bank in the credit transfer chain that it may have to refund the amount of payment to its sender comes to an end (article 13). Another consequence arises out of the fact that, although the general policy of the Model Law is not to enter into the relationship between the beneficiary and the beneficiary's bank (comment 3 to article 9), paragraph (1) also provides that when the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it. However, the provision does not state when or how the beneficiary's bank must make the funds available to the beneficiary or the extent to which the beneficiary's bank can charge the beneficiary a fee for receiving and processing the transfer. Those are questions to be settled by the law applicable to the account relationship. Finally, if the credit transfer was for the purpose of discharging an obligation, article 17(2) provides that the beneficiary's claim against the originator/debtor is discharged at the same moment and to the same extent that the beneficiary's claim arises against the beneficiary's bank.

4. Paragraph (1) gives a clear rule as to the time when a credit transfer is completed in the normal case; it is completed upon acceptance of a payment order by the "beneficiary's bank". Although the term "beneficiary's bank" is not defined in article 2, it has always been assumed to be the bank of the beneficiary as indicated in the originator's payment order (article 9, comment 8 and A/CN.9/344, para. 120). Therefore, acceptance of a payment order by a bank named as the beneficiary's bank because of a mistake by one of the banks in the credit transfer chain would not be acceptance by the beneficiary's bank. Instead, the bank would be obligated under article 7(3) to give notice to the sender that the payment order had been misdirected.

5. The Model Law may not give the same result if it was the originator that designated the incorrect beneficiary's bank, even though the bank would be equally unable to credit the beneficiary's account. It would seem that in this case as well the bank should have the obligations of article 7(3) to give notice to its sender that the payment order was misdirected.

6. A variant of the problem arises if the beneficiary's bank has been properly indicated but the beneficiary has been improperly indicated, either by the originator or by an error of one of the banks in the credit transfer chain. While article 17(1) would suggest that the credit transfer was completed, it would still seem appropriate that the bank should be obligated to notify the sender of the problem under article 7(3), since all that the bank knows

is that it cannot identify the beneficiary. As far as the bank can tell, the payment order has been misdirected. Compare comment 13 in regard to paragraph (2).

7. The Model Law recognizes that acceptance of the payment order by the beneficiary's bank is completion of the credit transfer even if the payment order is for an amount larger or smaller than the amount in the payment order from the originator to the originator's bank. That result is specifically stated in paragraph (3) for cases in which the reason for the deficiency in amount is that one or more banks in the credit transfer chain deducted its fees from the amount of the transfer. It is also recognized for the general case by article 14, which obligates the bank that has sent its own payment order for an amount less than the amount of the payment order received by it to issue a payment order for the difference between the amounts of the payment orders, and by article 15, which provides that the overpayment can be recovered from the beneficiary "as . . . otherwise provided by law".

8. *Comparison with Article 4A.* Article 4A-104(a) provides that "A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order." The acts of acceptance of a payment order by the beneficiary's bank are somewhat different in Article 4A-209(b) from those in article 8.

Paragraph (2)

9. The first draft of the Model Law prepared by the Secretariat for the seventeenth session contained a provision that authorized payment of an obligation by a credit transfer (A/CN.9/WG.IV/WP.37, article 16(1)). The provision was redrafted for the eighteenth session (A/CN.9/WG.IV/WP.39, article 11(1)) following the decision of the Working Group at the seventeenth session that it would be appropriate to have such a provision (A/CN.9/317, para. 158). The paragraph was deleted at the twenty-first session (A/CN.9/341, para. 12). The reasons given were that, while many legal systems already recognized credit transfers as an acceptable method of making payment, it was a matter of the policy of each State to decide whether a monetary obligation could be discharged by a credit transfer and that it might be contrary to the monetary policy of some States to consider credit in an account in a bank as having the same legal significance as money issued by a central bank.

10. Prior to the twenty-first session paragraph (2) provided that the obligation of the debtor was discharged when the beneficiary's bank accepted the payment order. The beneficiary's bank became indebted to the beneficiary at the same time. The drafting history of that prior provision is set forth in A/CN.9/WG.IV/WP.46, comments 5 to 9 to article 14. The current text was adopted at the twenty-first session (A/CN.9/341, paras. 13 to 17).

11. Although there was a widespread feeling in the Working Group that the Model Law should neither provide that a debtor had a right to discharge an obligation by transferring funds to the credit of the creditor in his bank account nor provide that if such a transfer was made

the obligation would be discharged to the extent of the payment order received, there was a recognition that it would be useful to provide a rule that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, it was thought to be useful for the Model Law to indicate the time when such a discharge took place.

12. Paragraph (2) applies only if the transfer was for the purpose of discharging an obligation of the originator/debtor to the beneficiary/creditor and if that obligation could be discharged by credit transfer to the account indicated by the originator. Although it is unlikely that any State has a general prohibition against credit transfers, and especially international credit transfers, it is possible that certain obligations can be discharged only by payment in cash or by some other specified means. What is more likely is that in a given State an obligation is discharged by credit transfer to an account of the beneficiary only if the transfer is done with his consent. It may be that the consent need not be specific, that it could be implied from the very fact of having a particular type of account, from the indication of the bank account numbers on an invoice or from other similar circumstances.

13. Paragraph (2) provides that the obligation is discharged when the beneficiary bank accepts the payment order. Although not specifically so stated in paragraph (2), the payment order accepted by the beneficiary's bank must have directed credit to the proper account (see comment 6 in regard to paragraph 1). If the payment order was addressed to the proper account but the beneficiary's bank failed to credit the account or credited the wrong account, the obligation from the originator to the beneficiary is discharged and if the beneficiary suffered loss as a result of the misapplication of the credit, he must look to his bank for reparation under the law applicable to the account relationship.

14. Paragraph (2) provides that the obligation is discharged to the extent that it would be discharged by payment of the same amount in cash. The amount in question is the amount of the payment order accepted by the beneficiary's bank. If the beneficiary's bank charges a fee for receiving and processing the payment order, the fee is at the cost of the beneficiary. However, if the payment order accepted by the beneficiary's bank is for an amount less than the amount in the payment order sent by the originator's bank as a result of fees charged by intermediary banks, the originator is not discharged of his obligation to the beneficiary to the extent of those fees. Compare paragraph (3) and comment 18.

15. In most cases when less than the full amount of the obligation is paid, the obligation is discharged to the extent of the payment. However, in some cases the obligation is indivisible and payment of less than the full amount does not operate as a discharge of any of the obligation (A/CN.9/328, para. 39). Those are questions that are settled by doctrines outside the law of credit transfers. However, in order to know the effect of a transfer of a sum that is less than the entire obligation, paragraph (2) provides that the obligation is discharged to the

extent that it would be discharged by payment of the same amount in cash.

16. *Comparison with Article 4A.* Article 4A-406 has substantially the same rule in respect of time of discharge, subject to the qualification that the acts of acceptance of a payment order by a beneficiary's bank are slightly different in Article 4A-209(b) from those in article 8. Article 4A-406(c) provides that the extent of the discharge is the amount of the originator's payment order "unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges".

Paragraph (3)

17. Paragraph (3) is concerned with a problem that is difficult when credit transfers pass through several banks, even though the problem does not involve a significant amount of money. It could be expected that the originator would be responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international credit transfer, it cannot provide for that eventuality.

18. At the twenty-first session the Working Group decided that paragraph (3) should be redrafted to state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20). That decision was implemented at the twenty-second session by the current text of paragraph (3) (A/CN.9/344, paras. 139).

19. The last sentence in article 17(3) has the effect of countering a possible interpretation of article 14 that banks are prohibited from deducting their charges. Such an interpretation would arise out of the fact that article 14 provides that every receiving bank that executes a payment order for less than the amount of the payment order it accepted is obligated to issue a payment order for the difference between the amounts of the two payment orders.

20. A provision that the originator's bank has fulfilled its obligations to the originator when the credit transfer is completed has not been included in paragraph (3), since it would seem to be a natural consequence of completion of the transfer.

21. *Comparison with Article 4A.* Article 4A-302(d) contains a prohibition on the collection of charges "by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges . . ." unless instructed by the sender to do so. Such a quasi regulatory provision could not be included in the text of the Model Law, but it could be included by any State when enacting the Model Law if that seemed desirable. Article 4A-406(c) provides that if charges of one or more receiving bank have been deducted (perhaps by a foreign bank) "payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charge".

CHAPTER V. CONFLICT OF LAWS

Article 18. Conflict of laws

(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.

(2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender for the purposes of article 4(1).

(3) For the purposes of this article,

(a) where a State comprises several territorial units having different rules of law, each territorial unit shall be considered to be a separate State, and

(b) branches and separate offices of a bank in different States are separate banks.

Prior discussion

A/CN.9/297, paras. 34 to 36 (sixteenth session, 1987)

A/CN.9/317, para. 165 (seventeenth session, 1988)

A/CN.9/WG.IV/WP.42, paras. 69 to 80 (nineteenth session)

A/CN.9/341, paras. 24 to 49 (twenty-first session, 1990)

A/CN.9/344, paras. 112 to 114 and 140 (twenty-second session, 1990)

Comments

1. The Working Group at its seventeenth session requested the Secretariat to prepare a draft provision on conflict of laws (A/CN.9/317, para. 165). The draft provision was prepared for the eighteenth session of the Working Group (A/CN.9/WG.IV/WP.39, article 12). The problem of conflict of laws was considered in more detail in the report of the Secretary-General to the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80. That report considered the issues especially in light of the decisions of the Working Group at its eighteenth session that the text under preparation should be in the form of a model law for adoption by national legislative bodies and that it should be restricted to international credit transfers. At the twenty-first session the Working Group made a number of policy decisions

(A/CN.9/341, paras. 24 to 49) that were incorporated into the text at the twenty-second session (A/CN.9/344, para. 140).

Inclusion of conflict of laws provisions in the Model Law

2. At the twenty-first session there was a long discussion as to whether the Model Law should retain any provision on conflict of laws (A/CN.9/341, paras. 33 to 37). One objection to retaining any provision was that a certain number of States were already parties to bilateral or multilateral conventions on conflict of laws, and in particular to the Rome Convention on the Law applicable to Contractual Obligations between the member States of the European Communities, and that it would be difficult for those States to adopt any conflict of laws provisions that might be in the Model Law. A second objection was that no single conflicts rule would be appropriate for both high speed electronic transfers and paper-based transfers. A third objection was that, considering the complexity of the issues involved, the text before the twenty-first session did not have the degree of refinement that would make it acceptable to most States.

3. The Working Group decided to retain a provision on conflict of laws, primarily on the grounds that it could not be anticipated that the law governing international credit transfers would be uniform in the entire world by virtue of all States having adopted the Model Law in its entirety. Therefore, it was necessary for parties in States that had adopted the Model Law to know what law would govern the various relationships in an international credit transfer. Although it was possible that some States that would adopt the Model Law might have difficulties in adopting the conflict of laws provisions because of bilateral or multilateral conventions to which they might be a party, that was considered to be no more of a reason not to include such provisions in the Model Law than the existence of national provisions on the substance of the law governing credit transfers would be a reason not to include equivalent substantive provisions in the Model Law (see also A/CN.9/344, para. 114).

Paragraph (1)

4. One of the primary difficulties that the Working Group faced in preparing a legal regime for international credit transfers is the dichotomy between the point of view of the originator and beneficiary of the credit transfer (particularly when neither of those parties is a bank) and that of the implementing banks. From the point of view of the originator and the beneficiary, the transfer is a single operation in which their rights and obligations in respect of the transfer itself should be governed by a single law. From the viewpoint of the banks an international credit transfer is effectuated by a series of individual payment orders giving rise to rights and obligations of the sender and the receiving bank. From that point of view, each bilateral relationship in the credit transfer chain is a separate banking transaction. Being a separate banking transaction, the law applicable to that relationship might be different from the law applicable to the other bilateral relationships that taken together constitute the credit transfer chain.

That, however, is unsatisfactory in that the smooth implementation of international credit transfers requires that the rights and obligations of all parties are consistent with one another.

5. The following proposal was made at the twenty-first session to overcome those difficulties:

"A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail."

6. In support of the proposal it was stated that it was particularly important that one set of rules govern the rights and obligations of all the parties when the transfer was a high-speed transfer (A/CN.9/341, paras. 24 to 32). It was said that, unless there was a means for the parties to elect the application of a single law as was here proposed, the general rules of choice of law reflected in what was then article 15(1) would lead to the result that the law of different States would apply to the different segments of the credit transfer and that there would be no single law that would govern the entire credit transfer. It was pointed out that the technique suggested had already been implemented by CHIPS in its new rule 3 and the law of the state of New York had been chosen to govern the entire transfer if any part of it passed through CHIPS. (The CHIPS rule is set out in A/CN.9/WG.IV/WP.47.)

7. The proposal was rejected by the Working Group on the grounds that, even if it might be reasonable when restricted to the relationships between the banks, the proposal was excessive when it attempted to impose a law upon non-bank originators and beneficiaries that was different from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen (A/CN.9/341, para. 29). The proposal would have given the funds transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds transfer system might choose a law that was particularly favourable to the banks and unfavourable to the non-bank originators and beneficiaries.

8. At the twenty-first session the Working Group tried to find other rules that would also have led to the application of a single law to the entire transaction. One suggestion was that the substantive provisions of the Model Law applicable to the relations between the originator and the originator's bank should be governed by the law of the originator's bank but that the rest of the credit transfer should be governed by the law of the beneficiary's bank (A/CN.9/341, para. 38). Finally, it was decided that the only way to ensure that the Model Law might become applicable to the entire credit transfer was by its adoption by the several States concerned (A/CN.9/341, para. 39).

9. While the Working Group had not been willing to allow any group of banks to decide that the Model Law

or any other law would apply to parties to the transfer that were not parties to the choice-of-law agreement, the Working Group was in favour of permitting the parties to choose any law they wished to govern their relationship (A/CN.9/341, paras. 44 and 45).

10. The Working Group decided that, in the absence of a choice of law by the parties, the law of the receiving bank should apply to that segment of the transfer (A/CN.9/341, paras. 46 and 47). The only exception was that it should be made clear that the Model Law did not purport to determine what law would determine the authority of the actual sender to bind the purported sender under article 4(1). This decision was implemented at the twenty-second session without debate in the Working Group by the current text of paragraph (1) (A/CN.9/344, para. 140).

Paragraph (2)

11. The Working Group noted at its twenty-first session that the question as to whether an actual sender had the authority to bind the purported sender under article 4(1) raised complicated questions of conflict of laws that were not unique to credit transfers. It decided, therefore, that the Model Law should not attempt to solve the question as to which law should apply (A/CN.9/341, para. 46).

12. *Comparison with Article 4A.* Article 4A-507 is generally consistent with paragraphs (1) and (2), except that Article 4A would apparently apply the law of the receiving bank to the question whether an actual sender was authorized to send a payment order. Article 4A-507(c) is a slightly more complicated version of the provision set out in comment 5 that was rejected by the Working Group at the twenty-first session.

B. Model Law on International Credit Transfers: compilation of comments by Governments and international organizations (A/CN.9/347 and Add.1) [Original: English/French/Spanish]

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[A/CN.9/347]

INTRODUCTION

1. The Commission, at its twenty-third session in 1990, requested the Working Group on International Payments to present to it at its twenty-fourth session in 1991 a draft of the Model Law on International Credit Transfers.¹ The Working Group, at its twenty-second session (Vienna, 26 November—7 December 1990) adopted a text of the draft Model Law and presented it to the Commission for its consideration (A/CN.9/344, para. 142).

2. The text of the draft Model Law as adopted by the Working Group was sent to all Governments and to interested international organizations for comment. The comments received as of 26 April 1991 from 15 Governments and three international organizations are reproduced below.

ANNEX

Compilation of comments

States

BANGLADESH

[Original: English]

The Government of Bangladesh expressed its agreement with the draft Model Law.

CANADA

[Original: English/French]

Canada expresses general satisfaction with the improvements to the draft effected by the work of the Working Group on International Payments at its twenty-second session. Canada considers the basic structure and scope of the draft to be satisfactory. Our proposals for change are largely of an editorial nature, offered in the spirit of supporting the draft and in the hopes of improving it on a technical level. Some of our proposals are merely to move existing text to more logical positions within the draft Model Law. One possibly more significant

change seeks to clarify the terminology of the Model Law in dealing with the responsibilities of banks. Canada proposes a new term "to act" with reference to the duty of a receiving bank upon receiving a payment order, and a new term, "to pay", with reference to the duty of the beneficiary's bank. In the new usage a receiving bank that receives a payment order must *act* on it. It may either *accept* or *reject*. If it is an intermediary bank, and it *accepts*, then it must *execute* within the required time. If it is the beneficiary's bank, and it *accepts*, then it must *pay*, except that if the beneficiary does not have an account with the beneficiary's bank, its duty is to notify the beneficiary and to place the funds at his or her disposal.

We have organized our comments in the order that the points arise in the draft approved on 7 December, 1990 (A/CN.9/344, annex).

I. In paragraph (2)(a), the definition of "credit transfer" expresses the purpose of a credit transfer as being the "placing [of] funds at the disposal of a beneficiary". Canada objects to this on both practical and technical grounds. As a practical matter, it appears to us that most credit transfers are made for the purpose of making a payment to the beneficiary. On a technical level, it appears to us that if article 5 is generally acceptable in stipulating what may be payment to a receiving bank, then the Model Law ought to be able to prescribe a similar rule providing that the deposit by the beneficiary's bank of the sum payable under the payment order to the account of the beneficiary is payment to the beneficiary. In fact, where the credit transfer was completed in ECU or SDR (as contemplated, by the definition of *money*) some such provision would probably be required to supplement national legal tender statutes. Some qualifications of that general proposition may be necessary in order to accommodate local law. We address those subsequently. For the purposes of this comment on the definition of "credit transfer", it is sufficient to note that if the words "placing funds at the disposal of a" were deleted and replaced by the words "making a payment to", the definition would be improved.

At paragraph 15 *infra*, Canada gives its reasons for suggesting a significant simplification of article 7, paragraph (2). Part of that proposal is that the words "that contains the instructions necessary to implement the credit transfer in an appropriate manner" be deleted from article 7, paragraph (2) and added to the definition of "credit transfer". Canada also proposes to use the term "executed" so that the definition would conclude with the sentence.

"The term includes any payment order executed by the originator's bank or any intermediary bank that is intended to implement the originator's payment order."

Canada proposes the deletion from the Model Law of the verb "to issue" when used in connection with payment orders, and the substitution therefor of the verb "to send". The proposed usage is illustrated in the foregoing proposed amendment to article 2, paragraph (a).

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-third session, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17 (A/45/17)*, para. 25.

In the law of negotiable instruments in many common law countries, the term "issue" has been given a technical meaning that may prove to be inconvenient if transferred by the courts to its usage in the Model Law. That technical meaning includes an element of mental volition to transfer as well as a physical element of transfer of possession or delivery. It may also require a completed communication to the receiving bank in order to constitute a completed "issue". Canada believes that the policy promoted by the common law usage of the verb "to issue" would not be properly applied to the use of that verb in the Model Law. Canada proposes the substitution of a neutral term for that potentially misleading technical term. The verb "to send" would raise no risk that the unwanted technical meanings of "to issue" might be applied in the context of the Model Law. The use of "send" also would clarify the intention of the Model Law text that the sender fulfils its obligation at the moment it dispatches a message containing a payment order. There would be no need to consider what other steps might be necessary to comprise an "issue" of a payment order nor any implied requirement that the payment order must be received by the receiving bank in order to be properly "issued".

Canada supports the deletion of the square brackets and the retention of the text now contained in square brackets as the last sentence of article 2, paragraph (a), the definition of "credit transfer".

II. In article 2, paragraph (b), Canada proposes the deletion of the words "by a sender" from the first line of the definition of "payment order". The definition of "sender" in article 2, paragraph (e) leaves no doubt as to the designation of the person who sends a payment order. The inclusion of the words "by a sender" in the present definition of "payment order" gives rise to interpretational difficulties in those portions of articles 7 and 9 dealing with unauthorized, misdirected and incomplete payment orders.

III. In article 2, paragraph (c), Canada proposes to substitute the word "sender" for the word "issuer" in the definition of "originator".

IV. In article 2, paragraph (e), Canada proposes to substitute the word "sends" for the word "issues" in the definition of "sender".

V. In article 2, paragraph (f), Canada proposes to narrow the definition of "bank" and, to relate it more closely to the functions that the Model Law text now contemplates being performed by the entities it designates as banks. The Model Law now contains frequent references to accounts of various parties with receiving banks and of the beneficiary with the beneficiary's bank. On a plain reading of the text of the Model Law, it is now apparent that the account-holding function of the entities described as "banks" is at least as important as the "payment order executing" functions emphasized in the definition to the exclusion of all other considerations. Canada believes that the definition now places its emphasis on the wrong function. Canada suggests that the important function should be that an institution designated as a bank for the purposes of the Model Law should,

"as an ordinary part of its business, receive money from the public that is repayable by it on demand and make payments therefrom in accordance with instructions received from its customers."

Canada would prefer to substitute the quoted text for the words "in executing payment orders". If that solution is accepted by the Commission, it will not be necessary to retain the second sentence of the definition. If that solution is not acceptable, as a compromise, Canada would propose to add its quoted text

to the existing text as an additional element of the definition, so that an entity would have to satisfy both the existing and the proposed test in order to qualify as a bank.

VI. In article 2, paragraph (j), Canada proposes to enlarge the definition of "authentication" by re-expressing the existing requirement that the procedure be able to confirm the identity of the sender, and adding words to extend the meaning of the term to include procedures to detect error, omission or alteration in the text of the payment order, and erroneous duplication of a payment order, now addressed separately in paragraph (5) of article 4. Canada also proposes to add words to the definition to indicate that the agreement must be between a bank and its customer. The definition proposed also avoids the use of the word "issued" and substitutes the word "sent" therefor. Canada's proposals would produce a draft in the following terms:

"Authentication" means a procedure established by agreement between a bank and its customer for one or both of the following purposes:

(a) to determine whether a payment order or a revocation of a payment order is sent by the person indicated as its sender;

(b) to detect error, omission or alteration in the content of a payment order or revocation of a payment order, or erroneous duplication thereof."

VII. In article 2, paragraph (k), Canada proposes to delete the word "when" and to substitute therefor the words "on which".

VIII. In article 2, paragraph (l), Canada proposes to use the new term "act on" instead of "carry out" for reasons given in paragraph XX and to add to the definition of "execution" the words in the final clause of article 7, paragraph (2) (which Canada proposes to delete) so that the definition would read

"Execution" means, with respect to a receiving bank other than the beneficiary's bank, the sending of a payment order intended to act on the payment order received by it and containing instructions necessary to implement the credit transfer in an appropriate manner."

IX. In article 2, paragraph (m), Canada proposes to delete the words "placed at the disposal of" and to substitute therefor the words "paid to" in the definition of "payment date".

X. In article 4, paragraph (1), Canada proposes to delete the word "purported" as a modifier of sender. On our analysis, it appears that the application of the rule in this paragraph constitutes the identified person as the sender of the payment order both as a matter of fact and of law. There is, therefore, no need to describe that person as merely "purported sender". The use of the modifier "purported" in paragraph (4) of article 4 is, however, appropriate, and should be retained.

In the same paragraph Canada also proposes to change the word "issued" in the second line to the word "sent".

Canada notes the incongruity of providing that "a sender is bound" by a payment order upon the conditions described in the paragraph when it is clear from paragraph (5) of article 4 that the sender will not be bound if the receiving bank rejects the payment order. A more appropriate concept would appear to be that the sender is *potentially* bound or *committed* by the payment order if it subsequently becomes a binding obligation as a result of the acceptance by the receiving bank. Alternatively, the concept might be expressed as the sender being "responsible for" the payment order in the sense that it is his communication.

XI. Canada proposes to delete the word "provided" in the first line of subparagraph (a) of paragraph (2) of article 4 as superfluous.

XII. Canada proposes to re-express paragraph (3) of article 4 so as to clarify its presumed intent: that is, the parties may not, by their agreement, preclude a court from reaching its own conclusion as to whether an authentication is a commercially reasonable method of security. If it is agreed that is the policy intent of the paragraph, Canada proposes that it be expressed

"(3) The parties may not, by their agreement, preclude a court from determining whether an authentication is commercially reasonable."

XIII. Canada proposes that, in the English language version of the Model Law, the masculine pronoun ("he") be used uniformly throughout the Model Law to refer to parties designated as *originator*, *sender* or *beneficiary*; and that the impersonal pronoun ("it") be used to designate banks. The current usage is divided between "he" and "it" for the former.

Canada suggests that the references to "present or former employee of the purported sender" in paragraph (4) of article 4 is undesirably narrow since it might exclude a director, officer or other person whose relations with the purported sender might have enabled him or her to obtain improper access to the authentication or other operations of the purported sender, or are such that the purported sender is legally responsible for his or her actions. Canada proposes that the existing section be reviewed from the perspective of the policy reflected in its scope. Canada does not propose any specific language extending that scope until there is agreement in principle to do so.

XIV. The scope of paragraph (5) of article 4 should be expanded to include a revocation of a payment order.

If Canada's suggestion in paragraph 6 of this memorandum is adopted, Canada sees no reason to have a separate rule for erroneous duplication and errors in payment orders. The rule dealing with authentication generally appears to operate satisfactorily, and the definition may easily be expanded to include erroneous duplication and error. Canada's proposal would also include erroneous data omission within the scope of the rule. At present, erroneous data omission appears not to be covered.

XV. Canada proposes to move the first paragraph of article 10 so that it becomes a new article 4 *bis*, following article 4. Article 4, paragraph (6) refers to the acceptance of the payment order by the receiving bank. Article 5 refers to what flows from that. It seems logical to defer dealing with the time for acceptance to article 10. That treatment requires complicated forward references in provisions such as article 6, paragraph (2)(a) and article 8, paragraph (1)(a). A person reading the Model Law provisions in numerical order would, we submit, expect to find the provisions on time of execution dealt with before the consequences of execution.

XVI. Canada proposes that the present article 5 be relocated after article 9 and before article 10 as a new article 9 *bis*. It seems illogical to deal with the sender's obligation to the receiving bank following acceptance until after the provisions defining acceptance have been introduced.

XVII. Canada proposes to amend clause (i) of subparagraph (b) of article 5 to substitute the words "deposit of funds" for the words "enter a credit". In practice, only funds are entered into accounts. There is a risk of confusion if the word *credit* is used to mean both the act of depositing funds and in the sense of *available credit*.

Canada also proposes to add words to the clause to emphasize that the funds must be used by the receiving bank in order to attract the application of the rule.

The two changes proposed by Canada would result in the clause reading as follows:

- "(i) when funds that the sender causes to be deposited to an account of the receiving bank with the sender are used by the receiving bank, or if not used, on the business day following the day on which the funds are available for use and the receiving bank learns of that fact; or"

Canada proposes conforming changes to clause (ii) in the same subparagraph so that it would read:

- "(ii) when funds that the sender causes to be deposited in an account of the receiving bank in another bank are used by the receiving bank or, if not used, on the business day following the day on which the funds are available for use and the receiving bank learns of that fact; or"

XVIII. Canada proposes to add a provision to old article 5 (new article 9 *bis*) to make it clear that for the purposes of applying clause (iii) of subparagraph (b) of the article, separate branches or offices of a bank, even if located in the same State, are separate banks.

XIX. Canada proposes to delete from the last line of subclause (a) in clause (iv) of subparagraph (b) of old article 5 (new article 9 *bis*) the words "applicable law and". The Model Law can safely assume that the rules of any funds transfer system that would be acceptable to banks as a means of making final settlement would be operated in accordance with the law of the State in which the funds transfer system is located and operating. Any additional reference to applicable law, particularly where the reference is conjunctive, merely serves to introduce an undesirable element of uncertainty concerning the enforceability of the rule set out in the subclause. It might be thought, for example, that the final settlement had to be in accordance with some law applicable to the participants (by reason of their state of incorporation or location of the receiving branch) *as well as* the law in accordance with which the rules of the funds transfer system operated.

XX. Canada proposes to separate the first paragraph of article 10 and to make it into a new article 4 *bis* and to amend the text: (i) to create a new term "to act" which comprises both *execution* and *acceptance*; and (ii) to clarify the exceptions to the duties to execute and to accept promptly.

The draft proposed by Canada is as follows:

- ["4 *bis* (1) A receiving bank shall act on each payment order on the day it receives it.

- (2) If the receiving bank is not the beneficiary's bank, such action shall be to execute the payment order unless

(a) it rejects the payment order in accordance with paragraph (3) of article 6; or

(b) a later date is specified in the payment order, in which case the receiving bank shall execute the payment order on that date; or

(c) the payment order specifies a payment date and that date indicates that later execution is appropriate in order for the beneficiary's bank to be able to accept a payment order and to pay the beneficiary on the payment date, in which case the receiving bank shall execute the payment order on such later appropriate date.

- (3) If the receiving bank is the beneficiary's bank, such action shall be to accept the payment order unless

(a) it rejects the payment order in accordance with paragraph (2) of article 8; or

(b) the payment order specifies a payment date, in which case the beneficiary's bank shall either reject the payment order in accordance with article 8(2) before the payment date or accept the payment order on the payment date.]

XXI. In accordance with Canada's recommendation to move the text of paragraph (1) of article 10 to become a new article 4 *bis*, Canada recommends a conforming change to amend all references to article 10.

XXII. In subparagraph (d) of paragraph (2) of article 6, Canada recommends substituting the words "executes it" for the words "issues a payment order intended to carry out the payment order received".

XXIII. In paragraph (3) of article 6, Canada recommends deleting the word "sender" from the first line and amending the words "that sender" in the second and third lines to read "the sender".

XXIV. Canada recommends deleting most of paragraph (2) of article 7 so that it shall read:

"A receiving bank that accepts a payment order is obligated to execute it."

This change has been made possible by changes recommended by Canada to the definitions of "credit transfer" and "execution" in article 2, paragraphs (a) and (i) respectively.

XXV. In the last sentence of paragraph (5) of article 7, Canada proposes to change the words "would rely" to "may rely".

XXVI. Canada proposes to delete from subparagraph (a) of paragraph (1) of article 8 the term "execution" and the words "under article 10" and to substitute therefor the words "action under article 4 *bis*" and to re-express the remainder so that the first two lines of the subparagraph would read:

"When the time for action under article 4 *bis* has elapsed without action having been taken, provided that . . ."

XXVII. In subparagraph (b) of paragraph (1) of article 8, Canada proposes to delete the square bracketed word "execute" and to substitute therefor the word "accept".

XXVIII. In subparagraph (d) of paragraph (1) of article 8, Canada proposes to delete the words "places the funds at the disposal of" and to substitute therefor the word "pays".

XXIX. In paragraph (2) of article 8, Canada proposes to delete the square brackets and to retain the reference to the execution date.

XXX. In paragraph (1) of article 9, Canada proposes to delete the words "place the funds at the disposal of" and to substitute therefor the word "pay".

XXXI. In paragraph (2) of article 9, Canada proposes to delete the word "executed" in square brackets and to substitute therefor the word "accepted" and to change the reference to article 10 to "article 4 *bis*".

XXXII. In paragraph (4) of article 9, the last sentence, Canada proposes to delete the verb "would" and to substitute therefor the word "may", and to change the reference to article 10 to "article 4 *bis*".

XXXIII. In paragraph (4) of article 9, Canada proposes to change the reference to article 10 to "article 4 *bis*".

XXXIV. In paragraph (5) of article 9, Canada proposes to delete the words "execution date" in the square brackets and to substitute therefor the words "acceptance date".

XXXV. Canada proposes to move the text of paragraph (1) of article 10 to form a new article 4 *bis*. See paragraph 20 of this memorandum.

XXXVI. In paragraph (3) of article 10, Canada proposes to delete the square brackets around the term "payment date" and to retain that term.

XXXVII. In paragraph (4) of article 10, Canada proposes to delete the word "following" and to substitute therefor the word "next"; to delete the square-bracketed word "executes" and to substitute therefor the words "deals with"; and to add to the end of the sentence the words "in the ordinary course of its business", so that the predicate of the paragraph would read:

"is entitled to treat the order as having been received on the next day the bank deals with that type of payment order in the ordinary course of its business."

XXXVIII. In paragraph (5) of article 10, Canada proposes to delete the word "execution" in square brackets and the preposition following it, and to substitute therefor a reference to "that type of business"; to delete the word "following" and to substitute therefor the word "next"; to delete the word "executes" and the square brackets and to substitute therefor the words "deals with"; to add to the end of the sentence the words "in the ordinary course of its business", so that the paragraph (with conforming grammatical changes) would read:

"If a receiving bank is required to take action on a day when it is not open for that type of business, it must take the required action on the next day it deals with such matters in the ordinary course of its business."

XXXIX. In paragraph (1) of article 11, Canada proposes to clarify the meaning by moving the reference to "the receiving bank" so that it immediately follows the reference to the payment order at the beginning of the sentence and reads:

"A payment order sent to a receiving bank other than the beneficiary's bank may not be revoked by the sender unless the revocation order is received at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act . . ."

XL. In paragraph (2) of article 11, an editorial change similar to that suggested by Canada for paragraph (1) appears to be desirable to clarify the meaning so that the sentence would begin:

"A payment order sent to a beneficiary's bank may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner . . ."

Canada also proposes to change the word "or" in the last line of paragraph (2) to "and". This is merely a grammatical change.

XLI. In paragraph (4) of article 11, the requirement that a revocation order always be authenticated is more strict than the requirement of paragraph (2) of article 4 with respect to payment orders themselves. If authentication is optional in the case of a payment order, it should be optional in the case of a revocation order as well. Canada proposes to amend the paragraph so that it reads:

"A revocation order must be authenticated if the payment order was subject to authentication."

XLII. In paragraph (5) of article 11, it should not be necessary to retain the words "other than the beneficiary's bank" in the

first line, since the reference to a receiving bank "*executing*" a payment order is sufficient to exclude the beneficiary's bank.

XLIII. In paragraph (6) of article 11, the provision for refunds does not clearly appear to operate repeatedly with respect to each recipient in order to ensure that the refund will be returned to the originator. That intended meaning would be clarified if the reference to a refund under paragraph (5) were expanded to include a reference to a refund under paragraph (6) as well. In addition, Canada proposes to add the word "*credit*" before transfer to conform to the usage in other parts of the Model Law.

XLIV. In paragraph (8) of article 11, it appears to be desirable to expand upon the saving effect of the text so that all receiving banks that act to complete the credit transfer retain their authority notwithstanding the loss of the originator's capacity or the capacity of any intermediate sender. Canada proposes to amend the first sentence so that it reads:

"The death, bankruptcy or incapacity of the sender or the originator does not of itself operate to revoke a payment order or to terminate the authority of the sender or the originator or of any receiving bank to act to complete the credit transfers."

XLV. In article 12, Canada proposes to delete the words "*the next*" and to substitute therefor "*its*".

XLVI. In addition, Canada proposes to add a provision protecting the text of article 12 from variation by agreement between the parties in terms such as "The provisions of this article may not be varied by agreement".

XLVII. In paragraph (2) of article 13, Canada proposes to add, immediately following each reference to the intermediary bank, the words "*or funds transfer system*". The policy that shifts to the sender the risk of the failure of an intermediary bank should extend to cover as well the risk of failure of a designated funds transfer system.

XLVIII. In article 14, Canada proposes to conform the verb to the usage of the Model Law by deleting the words "*is obligated to*" and substituting therefor the word "*shall*".

XLIX. In article 15, the policy ought to extend to a payment order accepted by the beneficiary's bank. Canada proposes to add, after the reference to the payment order executed by a receiving bank in the second line, the words "*or accepted by the beneficiary's bank*".

L. In paragraph (3) of article 16, there should be a reference to a specific payment order in order to give a clear meaning to the term "*sender*". Canada proposes to add the words "*with respect to a payment order*" immediately following the reference to paragraph (5) of article 7 in the second line of paragraph (3). Canada proposes a similar amendment to the second line of paragraph (4) of article 16.

LI. In paragraph (5) of article 16, Canada proposes changes to implement its proposal that the verb "*issues*" be replaced throughout the Model Law by the verb "*sends*" and that references to "*placing funds at the disposal of*" the beneficiary be replaced by the words "*paid to*".

In the same paragraph, Canada proposes to modify the term "*improper action*" so that it reads "*improper execution*". This change should make it clear that any discrepancy between the payment order received and the implementing payment order executed may be a source of interest liability for the receiving bank when the circumstances of paragraph (5) are satisfied.

LII. In paragraph (8) of article 16, Canada proposes to delete the verb "*to execute*" in the fifth line and to substitute therefor the verb "*to act upon*", applying the new terminology suggested by Canada in proposed new article 4 *bis*.

LIII. In paragraph (2) of article 17, it appears to be an error to purport to discharge the obligation as soon as the beneficiary's bank *accepts* the payment order. Acceptance may occur at a time significantly before the time that the beneficiary actually receives payment from the beneficiary's bank. This could occur, for example, if the conditions of subparagraph (1)(a) of article 8 applied. Similarly, the conditions in subparagraphs (1)(c), (d) and (e) of the same article appear to be inappropriate events to create a discharge. Canada proposes to delete the verb "*accepts*" and to substitute therefor the words "*pays the amount of the payment order to the beneficiary*". Expressing the condition of discharge in terms of traditional *payment* emphasizes the bilateral nature of the necessary action (i.e. the funds must be both given and received with the intention of discharging the obligation) and protects the beneficiary from unwanted payments or having his contractual rights against the originator affected without his consent.

LIV. In paragraph (2) of article 18, Canada proposes a conforming amendment to delete reference to the purported sender, if its proposal to amend paragraph (1) of article 4 has been accepted. The provision should read:

"... shall not affect the determination of which law governs the question whether the sender is bound by the payment order for the purposes of article 4(1)."

CZECHOSLOVAKIA

[Original: English]

Article 7(5)

In essence, we have no objections to the contents of this paragraph. We, however, submit to your consideration whether the answer to the problem of a possible difference between the verbal and numerical expression of data in a payment order corresponds with the banking practice developed over many years. Moreover, the Geneva Conventions on Bills of Exchange and Promissory Notes unambiguously endorse the conclusion that, in the event of a difference between the numerical and the verbal expression, the verbal expression has priority.

Article 9(3)—see comments above.

Article 10(4)

We assume that the receiving bank's cut-off time will be an individual matter of the individual banks, because the "same date execution" might cause practical problems in a number of countries, viz. with regard to the fact that not only banks but also clients possess sophisticated computer technology.

Article 11(8)

It is our opinion that the specification of the respective facts should not be understood to be enumerative. This is why we would suggest to include in the text an expression like "similar circumstance" or a like expression to make it more explicit that an enumerative specification is not meant.

Article 13

In our opinion this is one of the most complicated questions in the draft of the Model Law. Duty to refund conceived as

money back guarantee seems too severe to us, viz. in spite of a certain limitation of this duty, which ensues from paragraph 2 of this article. We explain that, by virtue of the duty thus conceived, the behaviour of the banking system could be affected adversely, and payment orders might possibly be refused, which so far is not happening, on the part of the individual banks. Not only does the payment order enter in the bank's balance sheet but, in a number of countries, it would burden also the "risk asset ratio" of the banks, which is usually a binding indicator set by central banks. As opposed to the issuance of the banking guarantee, opening of a letter of credit etc., there would often be involved an unintentional, involuntary conduct with which the question of "contingent liabilities" would be connected.

Article 16

We submit to your consideration whether it would be appropriate to state in the text words to the effect "... to pay interest on the amount of the payment order in the currency involved ...", not in order that the rate be set directly, but to make it unambiguous that the interest rate should be related to the pertinent currency.

Article 16(8)

We take into consideration that the present document has the form of a Model Law, viz. that it would be embodied by means of domestic regulations. We agree to the variant that the Model Law itself does not specify "consequential damages" but, to this effect, only defines the pre-conditions under which these damages would be compensated, if the applicable law recognizes such damage.

The question remains, however, what pre-conditions the Model Law itself should set.

Maybe it is usual and in the practice of the individual countries it will cause no problems to define the expression "intention" as a form of "culpa". A major problem would in our opinion cause the interpretation of the Anglo-American term "recklessness" dealt with in the continental law, without this expression being defined for the purpose of the Model Law. According to our information the term "recklessness" has more meanings and is not interpreted uniformly even in the common law itself. This expression would namely cover both the "dolus eventualis" "indirect intention"/ as well as "gross negligence", which would obviously cause big problems in the continental practice in the application of these rules. This is why we suggest deletion of the expression "recklessness" from the draft of the Model Law, or to try and express the objective in another more customary manner.

EL SALVADOR

[Original: Spanish]

We have examined the approach contained in the draft in question and it appears to be consistent in several respects with our legislation. Nevertheless, we can suggest that other concepts should be taken into account, such as the following:

- (a) the credit transfer must be made in favour of a definite person;
- (b) each operation must be for a fixed quantity;
- (c) the transfer document must not be negotiable.

In addition, we can suggest in Chapter I of the draft a different wording for article 1, as follows:

"The present law has as its purpose the legal regulation applicable to credit transfers between customers of banks located in different States."

For the purposes of this law, branches and offices of a bank that are separate from their central office are considered to be separate banks, if they are to be found in different States, that is, in territories that do not have the same legal order.

FINLAND

[Original: English]

1. General comments

The Government of Finland welcomes the effort by UNCITRAL towards a harmonization of the law governing international credit transfers. The task undertaken by UNCITRAL is a difficult one, both because it raises a large number of policy issues and because the subject matter is very complicated. A Model Law must, in order to be acceptable, strike a reasonable balance between the interests of all the parties. It is necessary to take into account the conditions under which payment services are operated and must be operated in order to cope with large volumes of transactions, in terms of both number and value, and in order to meet the requirements and expectations of speedy processing. It is obvious that a Model Law on international credit transfers will largely deal with interbank relationships. At the same time, it is of special importance that the position of originators and beneficiaries that are not banks is adequately safeguarded. These parties depend and rely on the banking system for efficient and professional payment services, and even if the present project is focused on commercial payments and not on consumer protection, an essential function of the law in this field must be to provide bank customers with adequate rights and remedies in case their reasonable expectations on the professional payment services of the banking system are not fulfilled. The adoption of a law governing international credit transfers could hardly be justified unless the interests of bank customers were adequately taken care of.

While the draft Model Law provides a good basis for consideration, it is suggested that a number of improvements could be made, with regard to both substance and drafting and in order to achieve better coordination and clarity in the relationship between different parts of the text.

The draft Model Law also raises the question as to what the status of the text should be. It is subject to doubt whether the rules could work properly irrespective of whether all or only some of the banks involved in the transfer are subject to the same rules. Thus, the question arises whether it is appropriate to present the rules as a Model Law, applicable to all international credit transfers, rather than as a convention. Especially the liability rules envisaged in the draft would seem better fit for a convention than a Model Law.

2. Specific comments

Article 2. Definitions

(a) "Credit transfer"

In principle, there does not seem to be any particular reason to exclude transfers effected through point-of-sale payment systems from the scope of the Model Law, even though it is disputable whether they should be classified as credit transfers

or debit transfers. Consumer transactions and consumer oriented payment systems are not generally excluded, even if the footnote under article 1 makes it clear that the Model Law has been drafted without special consideration to consumer protection and is not intended to thwart separate legislation in that field. Thus, the last sentence should either be deleted or modified to state the opposite.

(e) "Sender"

The definition might be modified as follows: "Sender" means the person who issues a payment order or who is bound by a payment order under article 4, paragraphs (1) to (4). The term includes the originator and any sending bank.

(f) "Bank"

Taking into account the definition of the term "execution" in paragraph (1) the second sentence of paragraph (f) seems superfluous.

(j) "Authentication"

The term authentication is used in article 4, paragraphs (2) to (4). The problem is that the definition is broad enough to encompass even comparison of a signature with a specimen; this can also be described as a "procedure established by agreement to determine whether all or part of a payment order or a revocation of a payment order was issued by the purported sender". Comparison of a signature with a specimen is, however, not intended to be covered by the provisions of article 4, paragraphs (2) to (4). The cases where a payment order is authenticated by signature should be governed by article 4, paragraph (1) only. Thus, for the purpose of the Model Law, the definition of authentication needs to be modified accordingly. The following addition to paragraph (j) is suggested: "The term does not include comparison of a signature with a specimen." Another possibility would be to indicate this limitation in article 4, paragraph (2).

(l) "Execution"

The definition needs to be completed as regards execution by the beneficiary's bank. The following might be considered: "With respect to the beneficiary's bank, 'execution' means the action necessary in order to place the funds at the disposal of the beneficiary."

Article 4. *Obligations of sender*

Paragraph (2), subparagraph (a)

Taking into account the definition of authentication as an agreed procedure, a more appropriate expression than "authentication provided" would seem to be "authentication used".

The basic standard of commercial reasonableness is vague. Some guidelines concerning the factors to be taken into account in assessing whether an authentication procedure meets the standard should be given. The following formulation is suggested:

"the authentication used is a commercially reasonable method of security against unauthorized payment orders, taking into account the amounts and the frequency of payment orders normally issued by the sender to the receiving bank, the method of transmission used between them as well as other circumstances".

Paragraph (2), subparagraph (b)

This provision does not seem to provide a clear answer to the allocation of risk in cases where the authentication result is

incorrect due to a technical malfunction. It is uncertain how the words "complied with" should be interpreted in this context. The problem arises if, due to a technical malfunction in the authentication mechanism, a payment order passes as authenticated even if it shouldn't have passed (the computer "accepts" a false authentication code, for instance). If the words "comply with" are taken to mean that it is enough that the receiving bank has taken the steps required in order to comply with the authentication procedure, this would mean that the sender would bear the risk of falsely positive authentication results that are due to technical malfunctions. That would not be fair in cases where the technical problem arose in the computer system of the receiving bank; in such cases the loss should be borne by the receiving bank and not by the sender. The provision should be worded so that a proper risk allocation is ensured. The following amendment is suggested:

"(b) the receiving bank performed properly with respect to the authentication."

Paragraph (5)

The following wording of the first sentence of this paragraph would seem to be appropriate:

"Subject to the preceding paragraphs, a sender is bound by the terms of a payment order as received by the receiving bank. . . ."

Article 5. *Payment to receiving bank*

This article, which was introduced at the final session of the Working Group, raises a number of problems. The very purpose of the article is rather obscure. It is not clear what the provisions are intended to achieve and what their scope is intended to be. In the Model Law, the time of payment is of direct relevance in the context of deemed acceptance only, and some of the provisions in article 5 have been formulated with a view to that specific purpose. However, the solutions provided in article 5 do not seem to be satisfactory from the point of view of article 6. Moreover, the wording of article 5 does not indicate that the function of its provisions was limited to such a narrow purpose only. Rather, the wording suggests that the article is intended to pinpoint the time of payment for more general purposes. Some of the provisions included are, however, not appropriate for such a broader function, while others merely refer the issue to applicable law (and funds transfer system rules).

The following comments focus first on subparagraphs (b)(i) and (b)(ii), because they highlight the problems involved.

With respect to the duties of the receiving bank, the two basic questions relating to time are (1) when does acceptance occur and (2) when is the receiving bank required to execute the payment order. One of the main concerns in the drafting of the rules on acceptance has been to make sure that so-called deemed acceptance does not occur until the receiving bank has received good cover for the payment order. The drafting of subparagraphs (b)(i) and (b)(ii) of article 5 was determined by some of the problems that arise in the context of deemed acceptance, particularly by the need to afford the receiving bank an adequate possibility to make a credit judgment with respect to the credit provided by the sender. Thus, the draft seems to confuse the question of when payment occurs with the question of when the receiving bank is in a position to determine whether the credit provided constitutes acceptable cover. For the purpose of a regulation of the duties of the receiving bank, the question of when payment occurs is, as such, not necessary to deal with at all; the important issues relate to the time of acceptance and the time of execution, and should be dealt with under those headings.

Subparagraph (b)(i) deals with the situation where the receiving bank has an account with the sender. It states that payment is deemed to occur when the credit is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact. Article 6(2)(a), as well as 8(1)(a), deals with deemed acceptance. That provision states that acceptance occurs when the time for execution has elapsed without notice of rejection having been given, i.e. at the end of the day on which the payment order was received, assuming that no other execution date and no payment date was indicated. However, acceptance does not occur until payment has been received, i.e. not until the credit is used or "on the business day following the day on which the credit is available for use and the receiving bank learns of that fact". The latter rule is not very precise, and it is not clear why the time of deemed acceptance must be deferred to the day following the day on which the credit became available. With respect to the time of execution in the latter case, the draft Model Law fails to provide an explicit answer. The present text indicates that deemed acceptance in some cases takes place after the time for execution under article 10 has lapsed, which means that execution following deemed acceptance would always be late.

In contexts outside articles 6(2) and 8(1), it may cause problems to state generally that where the sender credits an account of the receiving bank with the sender, "payment" by the sender to the receiving bank "occurs" on the day following the day on which the credit became available. Even the credit in the account basically amounts to a claim against the sender.

Subparagraph (b)(ii) raises similar objections: the time of deemed acceptance can better be dealt with in articles 6 and 8 exclusively, and the rules proposed are not appropriate for the purpose of determining the time of payment for other purposes.

If, as the wording suggests, article 5 purports not only to relate to the time of deemed acceptance under articles 6(2)(a) and 8(1)(a) but to lay down a general rule on the time of payment, the situation becomes very peculiar. Let us assume that a sending bank (A) issued a payment order to the receiving bank (B) on day 1 and that the order was received and executed on day 1. Let us further assume that on day 1 the third bank (C) credited the account of bank (B) with the amount required to cover the payment order from (A) to (B), and that at the end of day 1 the receiving bank files for bankruptcy. The question then arises whether the amount already credited to B's account at bank (C) belongs to the assets of the sending bank (A) or to the assets of the receiving bank (B). Normally, it would be deemed to belong to the receiving bank (B). Under the principle in article 5(b)(ii), payment would not be deemed to occur until the following day, day 2, which means that the amount already credited would not have been part of the receiving bank's assets at the time of the bankruptcy. Instead, there would only be a claim against the sending bank. Such a result would be odd.

The reasons that have been advanced for the "following day" rule have no bearing on the question of when payment should be deemed to occur for purposes other than those arising in articles 6, 8 and 10, and there is no reason to introduce such a deviation from general principles to govern the time of payment in interbank relationships.

The subparagraph is strange also because it is inconsistent with the principles contained in article 17. Subparagraph (b)(ii) deals with a situation where the sender pays the receiving bank through a third bank: the sender (bank A) issues a payment order to the receiving bank (bank B) and a covering payment order to the third bank (bank C) for the benefit of bank (B). Such a cover transfer is also governed by the draft Model Law (nothing indicates the opposite). The beneficiary of the covering payment

order is bank (B), and bank (C) is both the originator's bank and the beneficiary's bank. Under article 17, the covering transfer is completed when bank (C) accepts the covering payment order issued by bank (A), and this is the time when payment from (A) to (B) would be deemed to occur under the principle contained in article 17(2). There seems to be no valid reason for deviating from that principle in cases where the purpose of the transfer is to discharge (A) from an obligation to provide cover for a payment order issued by (A) to (B).

Articles 6 and 8 can be drafted without resorting to a construction now found in article 5. Therefore, article 5 should be deleted and necessary elements from it should be incorporated into articles 6 and 8. A suggested redrafting of article 6 is presented below.

Other comments:

The *chapeau* of the article refers to "payment of the sender's obligation under article 4(6)". According to article 4(6), that obligation does not arise until the payment order has been accepted by the receiving bank. However, in article 6(2)(a) and 8(1)(a) the time at which payment occurs is used as a criterion for defining when acceptance occurs. Thus, the wording of the *chapeau* introduces an unnecessary circularity in the text.

Subparagraph (iv) is very ambiguous. It is unclear what its effect would be if adopted in a particular legal system. Especially the reference to applicable law in (iv)a. is very obscure. It is not clear whether the reference to applicable law means the law applicable to the payment obligation or the law applicable to the funds transfer system. In the first case the provision does not seem to say more than that payment occurs when final settlement takes place in accordance with the rules of the system, provided that the law applicable to the payment obligation in question recognizes that time as conclusive. Such a provision is hardly very useful. In the second case the provision is also of questionable value since it seems quite unclear what the law applicable to the funds transfer system might be. If it is not possible to elaborate and reach consensus on rules that would really ensure the legal effect of settlements made through netting arrangements, it is doubtful whether the Model Law could address these issues in some less controversial manner that would still be useful.

Article 6. *Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank*

The following restructuring and redrafting of article 6 is suggested:

"(1) This article applies to a receiving bank other than the beneficiary's bank.

"(2) If a receiving bank does not accept a sender's payment order, it shall give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date. Failure to give notice of rejection results in acceptance under the conditions and at the time laid down in subparagraph (3)(b). A payment order which has been accepted by the receiving bank can no longer be rejected by the bank.

"(3) A receiving bank accepts the sender's payment order at the earliest of the following times:

- (a) when it executes the payment order received;
- (b) when it gives notice to the sender of acceptance;
- (c) when the bank receives the payment order, provided that the sender and the receiving bank have agreed that the

bank will execute payment orders from the sender upon receipt;

(d) when the receiving bank makes a debit to an account of the sender with the receiving bank in order to cover the payment order;

(e) at the end of the day on which the payment order was received or at the end of the execution date indicated in the payment order, if later, provided that:

- (i) where payment is to be made by debiting an account of the sender with the receiving bank, acceptance shall not occur until there are funds available in the account sufficient to cover the amount of the payment order; or
- (ii) where payment is to be made by crediting an account of the receiving bank with the sender, acceptance shall not occur until the earlier of the following:
 - when the credit is used, or
 - at the end of the day on which the credit became available for use and the receiving bank learned of that fact; or
- (iii) where payment is to be made by credit to an account of the receiving bank in another bank, acceptance shall not occur until the earlier of the following:
 - when the credit is used, or
 - at the end of the day on which the credit was made and the receiving bank learned of that fact; or
- (iv) where payment is to be made through the central bank of the State where the receiving bank is located, acceptance shall not occur until final settlement is made in favour of the receiving bank; or
- (v) where payment is to be made through a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally, acceptance shall not occur until
 - final settlement is made in favour of the receiving bank in accordance with [applicable law and] the rules of the system; or
 - final settlement is made in favour of the receiving bank in accordance with a bilateral netting agreement with the sender; or
- (vi) where none of the subparagraphs (i)-(v) apply, acceptance shall not occur until the receiving bank receives payment for the payment order as provided by applicable law."

Article 7. *Obligations of receiving bank that is not the beneficiary's bank*

Paragraph (2)

Under this provision, the obligation of the receiving bank that has accepted a payment order is only to issue an appropriate payment order of its own to the beneficiary's bank or to an intermediary bank. Nothing is said about an obligation to provide cover for the payment order. However, the provision of cover is equally important in order to make the credit transfer work. The obligation of a bank as sender to pay for the payment order arises when the payment order is accepted. Such a provision, which only takes account of the relationship between a sender and its receiving bank, is not enough with a view to the credit transfer as a whole, because without cover acceptance will often not take place: failure by a bank to make covering funds

available is likely either to result in a rejection of its payment order by the next receiving bank or to defer acceptance by the next bank so that completion of the credit transfer is delayed. A Model Law on credit transfers which could be properly complied with merely by transmitting payment orders, without a timely provision of funds, would be odd. Under the present draft, however, neither the originator nor the beneficiary would have any remedy available in cases where the completion of the credit transfer was delayed because of a delay by one or more receiving banks in making cover available to the next receiving bank. That is not acceptable. The following amendment is suggested:

"(2) A receiving bank that accepts a payment order is obligated under that payment order

(a) to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner, and

(b) to take the appropriate steps in order to provide or make available sufficient cover for the payment order issued under subparagraph (a)."

Paragraph (3)

The paragraph should be deleted. The problem of misdirected payment orders does not merit regulation in the Model Law. It appears from article 16(3) that a failure to give notice of a misdirection will have consequences only when payment was received also. Firstly, it is probably an unlikely occurrence that both a payment order and covering funds are mistakenly delivered to the wrong bank. Secondly, should this happen, it is possible and perhaps most likely that the misdirection is not detected and the payment order will be executed. In that case, it seems that from the point of view of the draft Model Law there is no problem; no liability of any kind arises. Thirdly, if the misdirection is in fact detected, it is unlikely that the bank would not notify the sender. Fourthly, the draft does not provide that the rules concerning deemed acceptance would not apply in cases where a payment order comes in but is misdirected. This means that the receiving bank would be required to give a notice of rejection, provided that cover was received also.

Paragraph (5)

It is not clear how this provision relates to the provisions of articles 6 and 16. If a bank has failed to notify the sender of an inconsistency between the words and figures that describe the amount of the payment order, this may be due to the fact that the inconsistency was not detected and the payment order was executed in either amount. The liability provided for in article 16(3)—the payment of interest to the sender—does not seem to make sense in cases where execution has taken place. Paragraph (5) of article 7 is, however, not limited to situations where the inconsistency was in fact detected and the payment order was not executed.

For example: The amount in words was a hundred thousand and the amount in figures 10000. The bank executed by sending a payment order for 10000. The draft does not make it clear how such a situation is to be assessed. Has there—through execution—been acceptance and if so, in what amount? In other words, can the receiving bank be liable under article 16(5)?

It seems that the problem of inconsistency in words and figures describing the amount of the payment order can be properly solved only by establishing a rule as to which description shall govern.

Paragraph (6)

This paragraph is directly related to paragraph (2) and should be placed after it; in other words, paragraph (6) should become paragraph (3).

Article 8

This article should be restructured in the same manner as article 6.

*Article 9**Paragraph (3)*

See comments to article 7(5).

Paragraph (4)

This paragraph also lays down a duty of notification. It is not clear what the implications of a failure to give the required notice would be and how the provision relates to situations where the beneficiary's bank has executed the payment order on the basis of either the words or the figures. If the name and the account number identify different persons and the beneficiary's bank pays one of them, who turns out not to be the intended beneficiary, the Model Law does not seem to provide an answer as to what the consequences are. Presumably, the duty to refund (article 13) would apply, provided that the inconsistency did not originate from the originator's payment order. The bank that caused the error would also be entitled to a refund, and the beneficiary's bank would be the one to recover the funds from the person who received them. Paragraph (4) does not seem to affect this situation in any way. If, on the other hand, the inconsistency originated from the originator's payment order, i.e. from an error of the originator himself, the question arises whether paragraph (4) would be of some significance for determining the allocation of loss between the originator and the beneficiary's bank.

Article 10. Time for receiving bank to execute payment order and give notices

The provisions on deemed acceptance give rise to problems in the context of article 10. If a payment order is received on day 1 but payment is not received until day 2, deemed acceptance would, under articles 6 and 8, take place once the payment is received. Thus, it seems necessary to introduce a special provision on the time of execution for such cases. The following is suggested:

"(1) A receiving bank is required to execute the payment order on the day it is received or, in cases referred to in article 6(3)(e) and 8(2)(g), on the day following acceptance, unless . . ."

Article 11. Revocation

This article is based on the principle that a revocation of a payment order is effective only if received by the receiving bank so early that execution of the order can still be prevented. A receiving bank that has received a revocation at a later point of time is under no obligation to revoke its own payment order. Thus, the article limits the possibility for an originator to interrupt a credit transfer. Such a possibility can be of great importance to the originator (for instance in cases of fraud or the beneficiary's breach of contract or insolvency), while a requirement that the receiving bank would have to revoke a payment order already issued would not always be unreasonable. If, at the same time, it is recognized that it should be possible for

payment systems to be based on the principle of irrevocability and that adequate provision must be made for such a possibility, a more balanced solution could be found. The draft in the UNCITRAL Working Group's Working Paper A/CN.9/WG.IV/WP.49 p. 54-55 represents a better basis for a regulation of revocation than does the present draft.

Articles 12-15 and 17(1); general remarks

Articles 12-15 all start with a reference to the completion of the credit transfer "in accordance with article 17(1)"; Article 17(1) states that a credit transfer is completed when the beneficiary's bank accepts "the payment order". This leaves open at least one important question: if the payment order accepted by the beneficiary's bank was not consistent with the originator's payment order with respect to the identification of the beneficiary, it is not clear whether the Model Law treats the transfer as completed or not completed and which of the provisions in Chapter III would apply. It seems obvious that article 17(1) needs to be qualified so that a credit transfer is deemed to be completed "when the beneficiary's bank accepts a payment order to the benefit of the beneficiary designated in the originator's payment order".

Article 12. Duty to assist

The logic on which the provisions of this chapter are based does not seem quite unequivocal. On the one hand, the draft Model Law could be understood so that as long as the credit transfer is not completed, it follows from article 7(2)—which lays down the obligations of a receiving bank that has accepted a payment order—that the bank must, if necessary, make several attempts at execution (unless the refund provisions in article 13 are invoked). If a problem arises—the next receiving bank rejects the payment order or the execution was erroneous with respect to the identification of the beneficiary or with respect to the amount (it was too small)—the receiving bank's basic obligation is that it has a duty to try again by issuing a new payment order, possibly to another bank (in the case of rejection). On the basis of such a reasoning, the duty to assist provided for in article 12 could be understood to impose "new" obligations only on receiving banks other than the one where the execution problem actually arose. However, it is not clear whether this is the correct interpretation. Thus, the question arises—for example—whether the duty of a receiving bank to issue a new payment order in cases where it has made an error in the identification of the beneficiary would be derived from article 7(2) or from article 12.

The point is that a Model Law could reasonably be expected to be more specific with respect to the duty of a receiving bank to correct an erroneous execution—without additional cost to the sender or the originator. It should also be made clear that the assistance referred to in article 12 may not involve additional cost to the sender or the originator.

Article 14 deals with correction of overpayment. That provision could be incorporated into article 12, which could be amended as follows:

Article 12. Duty to correct erroneous execution and duty to assist

"(1) If the credit transfer has not been completed in accordance with article 17(1) because a receiving bank has issued a payment order in which the identification of the beneficiary did not correspond to the payment order it accepted, the receiving bank is obligated to issue, without additional charge, a new payment order containing the correct identification.

"(2) If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order issued by a receiving bank is less than the amount of the payment order it accepted, the receiving bank is obligated to issue, without additional charge, a payment order for the difference between the amounts of the payment orders.

"(3) If the credit transfer is not completed in accordance with article 17(1) or if it has been completed in an amount less than the amount of the originator's payment order, each receiving bank is obligated to assist, at its own cost, the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the credit transfer in accordance with the originator's payment order."

Article 13. *Duty to refund*

The principle contained in this article is of fundamental importance, even if the situations in which it would need to be invoked will probably, and hopefully, not be very frequent. The policy that the sender of a payment order does not risk losing the principal sum even if, due to later events, the credit transfer is not properly completed, represents a basic safeguard of the sender's and especially the originator's legal position.

The amendment suggested above for article 17(1) would make it clear that the duty to refund would apply also in cases where the payment order accepted by the beneficiary's bank was—because of fraud or error—to the benefit of a person other than that designated by the originator. However, in such a case the right to the return of funds from the next receiving bank should not extend to the receiving bank that had issued a payment order that was inconsistent with the payment order accepted by it. Therefore, an amendment of paragraph (1) to that effect seems necessary. The following redraft of article 13(1), second sentence, is suggested:

"The originator's bank and each subsequent receiving bank, with the exception of a receiving bank that has issued a payment order inconsistent with the payment order accepted by it, is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund."

An alternative would be to add the following sentence at the end of the paragraph: "However, a receiving bank that has issued a payment order inconsistent with the payment order accepted by it is not entitled to a return of funds from its receiving bank."

Article 14. *Correction of underpayment*

It has been suggested above that this provision should be placed in article 12.

Article 15. *Restitution of overpayment*

This provision deals with a situation where the beneficiary has received more money than he should have. The article does not attempt to regulate the right of a bank to recover such overpayment from the beneficiary but contains only a reference to relevant rules of law. Since there are other situations in which a need for restitution of payment may arise in connection with credit transfers—for instance where an error by some bank has resulted in payment to the wrong person—it is not easy to see a justification for including an express provision on one particular case while others are not dealt with.

Article 16. *Liability and damages*

This article involves a number of problems.

1. The article is based on the principle that if a delay by one receiving bank results in delayed completion of the credit transfer, the receiving bank that caused the delay is liable to the beneficiary for interest. The bank can discharge its liability by paying the interest to the next receiving bank, which in turn is obligated to pass the interest forward.

The principle that the beneficiary should be entitled to interest compensation in the case of delayed completion of the credit transfer is, as such, a good principle. However, the liability rules set out in the draft Model Law contain a major flaw because they can function properly only on the condition that all the receiving banks involved in the credit transfer are subject to the Model Law (or rules similar to it). Yet, the Model Law would be recommended to States as a statute that they are expected to make applicable to all international credit transfers, regardless of whether all the receiving banks involved are governed by the same rules. The kind of liability system that the draft contains would seem to require that the rules are given the form of a convention instead of a Model Law.

The problem can be illustrated by the following example: The originator and his bank are located in State A, which has adopted the Model Law, and the beneficiary and his bank in State B. The transfer goes through two intermediary banks in States C and D. If the intermediary bank in State D causes a delay, but State D has not adopted the Model Law, the beneficiary may have no claim against the intermediary bank under the applicable law, or there may be a great deal of legal uncertainty and practical problems involved in trying to pursue such a claim. Even if the beneficiary might have a claim under the law of State D, it is unlikely that the intermediary bank would on its own initiative forward any interest to the next receiving bank that is not the holder of the claim, unless the applicable law clearly recognizes such a procedure. Thus, if the credit transfer passes through a legal system not based on the Model Law, the beneficiary is not likely to receive interest as envisaged in article 16(1) and 16(2). In that case, the beneficiary is likely to claim against the originator (provided that there has been a delay with respect to the terms of the underlying obligations also). Given that State A has adopted the Model Law, the originator would have no possibility of recovering from the banking system any interest paid to the beneficiary.

It would not be a justifiable policy to recommend to States the adoption of liability rules which in many cases would either leave the beneficiary without compensation or let the originator bear the ultimate loss for delays that arise in the banking system.

If the draft is to be presented as a Model Law and not as a convention applicable when each receiving bank involved is subject to its provisions, the liability rules require modification in order to ensure a fair allocation of losses. The Model Law must provide a right of recourse for the originator in order to safeguard the originator against situations where the basic liability scheme does not work due to the fact that the system presupposes that every receiving bank is governed by uniform rules without making sure that this is the case.

2. Under article 16(1), the liability of a receiving bank arises if it fails to execute its sender's payment order in the time required by article 10(1). This language is all too narrow. According to article 2(1), execution means the issue of a payment order "intended to carry out the payment order received by the receiving bank". Thus, it seems that no liability would arise if the receiving bank causes a delay by issuing a payment order that is not consistent with the payment order accepted by it; it would be enough that the receiving bank managed to issue, within the time required by article 10, a payment order "intended" to carry

out the order it accepted. Obviously, the receiving bank must be liable if it causes a delay by erroneous execution and not only for failure to execute at all. If, for example, the payment order issued by the receiving bank erroneously instructed payment to the wrong beneficiary and this resulted in a delay in the completion of the credit transfer, article 16(1) must apply. The provision needs to be formulated by reference to a failure of a receiving bank to fulfil its obligations under article 7(2).

3. It has been pointed out in connection with article 7(2) that a receiving bank must also be liable for delays caused by the bank's failure to make cover available to the next bank so that the latter is put in a position to accept the payment order. If article 16(1) is amended so that reference is made to article 7(2) and article 7(2) is amended as suggested, this problem would be solved.

4. Paragraph (5) of article 16 contains a puzzling special provision on the liability of a receiving bank in the case of underpayment. According to this paragraph, interest would be payable only in case a payment date had been specified and there has been a delay in relation to that date.

The provision introduces a peculiar distinction between situations where the whole amount to be transferred has been delayed and situations where there has been a partial delay. Under article 16(1), the beneficiary is entitled to interest if the credit transfer has been completed later than it should have in the normal course of events. It is not required that a payment date has been specified and passed. This has been one of the basic considerations behind article 16(1). It seems odd and quite unjustified to deviate from that policy in the case of underpayment. The paragraph also contains a second sentence in which reference is made to "improper action" by a receiving bank. It is very unclear what that means and why liability should arise only on such a condition.

Paragraph (5) should be deleted. Instead, it should be made clear in article 16(1) that it applies regardless of whether there has been a delay with respect to the whole or to only part of the amount specified in the payment order accepted by the receiving bank in question.

5. According to article 16(1), a receiving bank may discharge its liability to the beneficiary by payment to the next receiving bank or by direct payment to the beneficiary. While it is important to encourage procedures that would make the interest compensation flow to the beneficiary automatically, this may not always happen in practice (even if the receiving banks in question were subject to the Model Law). If this is the case, it may often be difficult for the beneficiary to find out which bank is liable or, if that bank has discharged itself by payment to the next bank, which of the subsequent banks has failed to pass on the interest. Therefore, a duty for the receiving banks to assist the beneficiary in the necessary fact finding should be considered.

The following amendments to article 16 are suggested:

Article 16. *Liability for interest and other loss*

"(1) If the completion of a credit transfer in accordance with article 17(1) has been delayed due to the failure of a receiving bank other than the beneficiary's bank to fulfil its obligations under article 7(2), the receiving bank is liable to the beneficiary. The liability of the receiving bank shall be to pay interest on the amount of the payment order accepted by it for the period of the delay caused by the receiving bank's failure. If the delay concerns only part of the amount of the payment order accepted by the receiving bank, the liability shall be to pay interest on the amount that has been delayed.

"(2) The liability of a receiving bank under paragraph (1) may be discharged by payment to its receiving bank or by direct payment to the beneficiary. If a receiving bank receives such payment but is not the beneficiary of the transfer, the bank shall pass on the benefit of the interest to the next receiving bank or to the beneficiary.

"(3) Each receiving bank is, upon request, obligated to give the beneficiary reasonable assistance in ascertaining the facts necessary for pursuing his claim for interest under paragraphs (1) and (2).

"(4) If the originator has paid interest to the beneficiary on account of a delay in the completion of the credit transfer, the originator may recover such amount, to the extent that the beneficiary would have been entitled to but did not receive interest in accordance with paragraphs (1) and (2), from the originator's bank or the bank liable under paragraph (1). The originator's bank and each subsequent receiving bank that is not the bank liable under paragraph (1) may recover interest paid to its sender from its receiving bank or the bank liable under paragraph (1)."

(5) [Liability of a receiving bank for failure to give notices (if needed).]

(6)-(8) As in the draft Model Law.

GERMANY

[Original: English]

1. A Working Group of UNCITRAL has been dealing for some time with the drawing up of a Model Law on international credit transfers.

2. We feel that the work done so far deserves great praise, particularly the efforts to reappraise the problems involved in international transfers and the endeavour to solve these problems in a draft Model Law. Exercising the required caution *vis-à-vis* the undoubtedly carefully drafted proposals, however, we have a few reservations relating to their underlying concept, which we shall explain in the following comments.

3. At the same time, our comments are made in the belief that the General Assembly is the right place to discuss the draft in detail. In this light, we have taken up some fundamental reservations, of which we wish to mention already here the misgivings against article 10—principle of same-day execution—and against article 13—money-back guarantee.

I. *Necessity*

4. In our experience, international credit transfers are currently handled relatively smoothly in practice. In fact, the banking industry has proven that it is able, through the creation of complex systems, to efficiently handle international payments, taking into account satisfactory contractual bases as well; let us recall the SWIFT system.

5. The German delegation therefore initially felt that there was no need for a Model Law on international credit transfers. However, if the international community holds the view that legislation on international credit transfers requires harmonizing, we shall not close our eyes to this undertaking. Nevertheless, a Model Law makes sense only

- if it is based on the fundamental principles of international commercial law;
- if it takes account of actual practice in international credit transfer payments;

- if it promotes harmonization, i.e. if the Model Law really has a chance of being adopted internationally.

6. When any harmonization of legislation is undertaken, it may of course be necessary, for the common good, to abandon established concepts of national law. In this event, however, the regulatory concept adopted must be convincing. We believe that this is not the case with regard to some points:

- the restriction on freedom of contract is unsatisfactory;
- the sphere of application of the provisions also meets with misgivings on our part, and we wonder whether the draft Model Law really serves to promote harmonization or is not more likely to encourage a further fragmentation of legislation;
- a number of dogmatic breaks are unsatisfactory;
- also unsatisfactory are a number of provisions on the distribution of risk between the contracting parties;
- a number of provisions in the draft are unrealistic in the light of current actual practice;
- the regulations dealing with the effects on the "underlying obligations" do not appear convincing;
- in addition to this, we have a number of reservations about individual provisions contained in the draft.

II. Restriction on freedom of contract

7. Article 3 of the Model Law does state that the principle of freedom of contract applies. The rights and obligations of the parties listed in the Model Law may be varied by agreement.

8. This principle is, however, breached in key places, particularly article 11, paragraph (3), article 13, paragraph (2) and article 16, paragraph (7). There is no reason for the mandatory nature of these provisions and the resulting restriction of freedom of contract. Mandatory provisions are justified whenever these are required to ensure the due orderliness of payment transactions or to protect certain interests, e.g. of consumers. Neither is the case here. Neither the due orderliness of payment transactions is in question nor are there any recognizable interests in need of mandatory protection. The Model Law applies not only to credit transfers by firms but also to those made by consumers. Yet it is definitely not a law dealing with the protection of consumers (see footnote to article 1). UNCITRAL's task is in fact the harmonization of international commercial law. In trade and commerce, however, there is no reason to deprive the contracting parties of the opportunity to arrange their contractual relations at their own discretion. Neither the due orderliness of payments transactions nor the protection of a contracting party thus justify deviation from this fundamental principle of contract law:

- The idea that the mandatory provisions establish the characteristic obligations and risks of banks is incorrect, since banks can be both originator and receiving bank in a credit transfer transaction.
- Incorrect is the idea that an orderly return of faulty credit transfers requires more extensive liability on the part of a receiving bank, e.g. the "money-back guarantee" stipulated in article 13, since it is possible to find alternative arrangements that take into account the interests of the contracting parties in the same way. The shape of such arrangements should, however, be left to the contracting parties.
- Incorrect is also the idea that retail payments must be organized on a uniform legal basis, since it is precisely in the case of large-scale payments, on which the Model

Law also focuses, that individual arrangements may be appropriate.

9. Restricting freedom of contract also limits competition. On the one hand, this puts small and medium-sized banks at a disadvantage (see VI (c) below) and, on the other, deprives banks of the opportunity to develop different offers for payments and to fix prices for handling payments in accordance with the different types of agreement available.

10. The unrestricted importance of freedom of contract can, moreover, not be overestimated, since during a possible "adaptation phase" of the Model Law this law will exist in international payments only as a particular additional legislation, such as all other national laws (which have not yet been modified). Moreover, future, especially technical, developments will force an adaptability, as extensive as possible, of international payments to the needs of the parties involved, which is not to be impeded but rather enhanced by international efforts to harmonize legislation.

11. Particularly problematic is, finally, the fact that restricting freedom of contract may lead to banks no longer accepting certain payment orders because the risk involved is out of all proportion to the price. Take, for example, payment transfers to countries where, as a result of acts of war or similar circumstances, there is no guarantee that the amount will actually be credited to the beneficiary's account.

12. It is therefore proposed that all provisions entailing a restriction of freedom of contract be deleted.

III. Sphere of application

13. The Model Law defines payment orders as unconditional orders. A point of doubt is thus, firstly, what legal consequences arise when the payment order is issued subject to a condition. Although such cases are untypical in practice, they cannot be ruled out. It must in particular also be borne in mind that new forms of payment transactions will be developed in the future involving a conditional payment order.

14. It could be assumed that payment orders issued subject to a condition are to be treated in the same way as unconditional payment orders. The Model Law does not seem to have adopted this approach in our view. However, this would have to be stressed more clearly.

15. If it is assumed, secondly, that conditional payment orders are not, as a rule, covered by the Model Law, these payment orders thus remain subject to the current legal arrangements. For the future, this could mean that a state of "new disorder" will be created.

- In the case of cross-border transfers between countries that have adopted the Model Law, legislation on payments will be harmonized.
- This will not, however, apply to payments by consumers, since in this respect the national consumer protection legislation will take effect.
- The Model Law is not to apply to conditional payment orders either, so that the old legal arrangements will remain in force.
- Furthermore, the old legal arrangements will also remain in force, and will apply to all payment orders, if the Model Law is not adopted by a country.
- The system is further complicated by the fact that the Model Law is to apply when the payment order is issued subject to a condition and the condition subsequently comes into play (article 2(b), paragraph 2).

IV. *Dogmatic breaks*

16. If there is default in the execution of a credit transfer, e.g. if payment orders are not forwarded in due time by a correspondent bank, certain methods may well have developed in practice to deal with the resulting loss. However, it is not the task of the legislator to merely incorporate standard practice in a law drafted along the lines of a manual of operational rules. His task is in fact to take the contractual arrangements as the starting point. What is required is a reasonable balance of interests. This does not rule out a legal basis for claims also being embodied in a Model Law on international credit transfers. However, such a legally defined basis for claims then requires special justification.

17. This careful distinction between a contractual basis and a legal basis for claims is disregarded in several places. The following provisions of the draft Model Law appear to us to pose particular problems in this respect:

(a) Under article 16, paragraph (1), a receiving bank is liable to the beneficiary of a credit transfer if it has failed to execute the payment order within the period stipulated in article 10 and provided that the credit transfer was accepted by the beneficiary's bank in accordance with article 17. Article 16 therefore justifies claims by the beneficiary on intermediary banks although no contractual relationship exists between these parties.

What remains unclear is, *firstly*, whether such a claim only exists when the bank is responsible for the delay, i.e. when it is, in particular, guilty of wilful negligence. The present proposal implies that such claims exist irrespective of fault. This provision appears all the more problematic as the principle of an execution on the day the order is received (article 10) cannot be ensured; detailed comments on this point will be made under VI.

Secondly, article 16, paragraph (8) makes clear that a legal basis for claims is envisaged. Such an arrangement is justified by arguing that this is in conformity with banking practice in many countries and that existing practice—which is also economic in terms of costs—should thus be incorporated in a legal provision. This reasoning fails to convince. It blends a contractual basis and a legal basis for claims and produces inconsistent results. It is, for example, unclear how the beneficiary's claim stands in relation to the claim by the contracting party who issues the payment order to the bank which is responsible for the delay in forwarding the payment order. Are the types of claims implied under article 16, paragraph (8) to be ruled out, or are such claims to continue to exist, and how is a balance of interests to be achieved, if necessary, between the parties? In this light, this "interest-forward guarantee" appears unconvincing to us. Our proposal is that, when the execution of a payment order is delayed as a result of negligence, only the sending contracting party of the bank which forwards the payment order with a delay due to negligence on its part . . .

(b) The draft contains dogmatic breaks also in article 17. As a fundamental problem is involved this will be dealt with in more detail under VIII.

V. *Unrealistic obligations*

18. The Model Law must make allowance for the different types of payment systems. Credit transfers are partly electronic, partly paper-based, some are routine cases, some are transfers to beneficiaries involving special preliminary work to determine the transfer route. However, as the provisions of the Model Law are broad in scope and intended to cover all types of transfers, these special cases must also be taken into account. The banks

must also be able to depict the discharge of obligations in practice. In this light, article 10 with its periods for the execution of payment orders cannot be depicted in practice. At least with regard to orders in foreign currency, it has to be pointed out that the bank can transmit amounts in foreign currency only if the corresponding amount has been put at its disposal abroad. However, in accordance with the present execution procedures in foreign exchange transactions, this is the case only one or two days after the bank has received the order. This two-days-rule is also acknowledged in the EC Commissions's recommendation of February 14, 1990 on the transparency of banking conditions relating to cross-border transactions (see no. 4).

VI. *Reservations regarding individual provisions*

19. Notwithstanding the general reservations regarding the underlying concept of the provisions, specific arrangements also meet with misgivings.

20. Article 6, paragraph (2)(a) in conjunction with paragraph 3 of the Model Law could be understood to mean that a receiving bank is to be treated, even if no cover is available, as if it has accepted the payment order on condition that it does not reject the order on the execution date. If it fails to give notice of the rejection in time, i.e. in an extremely short period, the receiving bank is consequently forced into a contractual relationship, even if it does not wish to be. This "sanction" would be undue and inappropriate, since a claim for damages (especially a claim for interest as of receipt of cover) would, in doubt, exist under general provisions of private law.

21. Such claims for damage result from article 7, paragraphs (3), (4) or (5) in conjunction with article 16, paragraph (3) and article 9, paragraphs (2) or (3) in conjunction with article 16, paragraph (4) if, in practice, extremely short periods are not observed by the receiving bank or beneficiary's bank with regard to interest to be paid on amounts received, although the respective cause for not executing the order was given by the relevant sending bank. The reduction of damages is made more difficult for the receiving bank on account of the fact that the handling of payment orders and account management are dealt with by two separate bank departments and the obligation to pay interest is to exist until the amount is returned.

GREECE

[Original: English]

The views of the Greek authorities concerning the "Draft UNCITRAL Model Law on International Credit Transfers" are reflected in the comments submitted by the Commission of the European Communities.

ISLAMIC REPUBLIC OF IRAN

[Original: English]

On the basis of our examination of the matter, we wish to inform you as follows:

Article 16 stipulates that in case of any delay in the payment of the transferred sum, the incurred interest shall belong to the beneficiary. But, since the transfer of the sum takes place in accordance with a contract existing between the applicant and the beneficiary, and since such a contract has its own terms and conditions, e.g. price validity, duration, etc., a delay in the payment

of the transferred sum may invalidate the contract, in which case the payment of compensation for an invalid contract does not seem to be logical. Besides, so long as the sum is not given to the beneficiary, it in fact belongs to the applicant. It, therefore, seems to be more appropriate that the compensation for the delayed payment be paid to the applicant and not the beneficiary.

JAPAN

[Original: English]

The Government of Japan sincerely appreciates the long and assiduous efforts of the Working Group on International Payments of UNCITRAL towards the completion of the Draft Model Law on International Credit Transfers and considers that the Draft Model Law will serve as a sound basis for the discussion at the 24th plenary session of UNCITRAL. In order to further improve the Draft Model Law, however, it seems appropriate to make the following comments.

The following comments are submitted without prejudice to any final position to be taken by the Japanese Government at the plenary session.

1. Article 2(a)

According to the records of deliberations at the Working Group on the definition of the terms "Credit transfer" and "Intermediary bank", there seems to be an understanding at the Working Group that a reimbursing bank shall also be considered to an intermediary bank and a payment order issued for the purpose of reimbursement of an original payment order shall constitute a part of the original credit transfer chain (A/CN.9/WG.IV/WP.49, p. 8, para. 10, p. 18, para. 44). But this understanding not only gives rise to results contrary to an anticipation of a party as pointed out in the Secretariat Commentary (supra p. 8, para. 10), but also contradicts the common usage in banking practice and may bring about unnecessary confusion in the Model Law. Reimbursement relationships should be considered to be, not a part of the original credit transfer, but separate from the original credit transfer.

We propose, therefore, to delete the second sentence of article 2(a) and to insert a phrase "*that receives and issues payment orders*" at the end of article 2(h), which defines "intermediary bank".

2. The third sentence of article 2(a) in square brackets refers to a point-of-sale payment system. This reference to a specific payment system or specific technology seems to be inappropriate in view of the rapid development of technology in this field. It would be sufficient if we make a clarification on this point at the plenary session.

The third sentence of article 2(a), therefore, should be deleted.

3. Article 2(1)

This provision, which defines "Execution" only with respect to a receiving bank other than the beneficiary's bank, seems to imply that there is no such concept for the beneficiary's bank. This definition results in unexpected and unacceptable interpretations that the same-day requirement of article 10(1) shall not be applied to the beneficiary's bank and that the beneficiary's bank shall not be considered as a "Bank" in the definition of article 2(f).

We propose, therefore, to insert at the end of article 2(1) a phrase "*and with respect to the beneficiary's bank, receiving*

a payment order and placing funds at the disposal of beneficiary" in order to avoid the above-mentioned problem.

4. Article 3

We think that the phrase "agreement of the affected party" is an inappropriate expression which is rarely used and should be replaced by a common expression "agreement of the parties".

5. Article 4(1) and (5)

The provisions of article 4 need some clarification with respect to a question whether they should be applied to a case where the terms of an authorized payment order are altered by an unauthorized person. Although it can be interpreted that the provisions of article 4 covers the case of unauthorized alteration, express reference might be helpful.

We propose to delete the first sentence of article 4(5) and to make the following amendments to article 4(1):

"A purported sender is bound by the term of a payment order or a revocation of a payment order if it was issued by him or by another person who had the authority to bind the purported sender."

6. Article 4(3)

There is no restriction for the parties to alter the provisions of article 4(4) by agreement. But it would unfairly prejudice the position of the sender to allow the receiving bank to be exempted from its liability by agreement even in a case where the actual sender of a payment order is a present or former employee of the receiving bank who might have gained access to customers' information while he was working in the bank.

We, therefore, propose to amend article 4(3) as follows:

"The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable, nor are they permitted to agree that the same paragraph shall apply if it is proved that the payment order as received by the receiving bank resulted from the actions of a present or former employee of the receiving bank."

7. Article 5 chapeau

Although a practical purpose of article 5 is to determine the point of time when the deemed acceptance set out in article 6(2) and article 8(1)(a) shall occur, the present wording of the provisions may allow an interpretation that it also determines the time when a payment occurs in a case where the bank has suspended payment. We consider that this interpretation should be expressly avoided since careful consideration is required in that case.

We therefore propose to insert a phrase "*For the purpose of Article 6(2)(a) and Article 8(1)(a),*" at the beginning of article 5.

8. Article 5(b)(i) and (ii)

The provisions of article 5(b)(i) and (ii) provide that the payment by a sending bank occurs when a credit in an account of the receiving bank is used. The determination of the time of payment in these provisions, with which the deemed acceptance would take effect in the context of article 6(2)(a) and article 8(1)(a), is inappropriate in view of the fact that, in banking practice, the receiving bank might use a credit in its account without any knowledge of its origin or purpose.

We, therefore, propose to insert a phrase "*with the knowledge that the credit is paid as the payment of the payment*

order" after the word "used" in each provision of article 5(b)(i) and (ii).

9. Article 5(b)(iv)

We consider that this provision, which deals with settlement through bilateral or multilateral netting schemes, actually contains little substance, and that the provisions of article 5(b)(i) through (iii) would provide sufficient substitutes.

The provisions of article 5(b)(iv), therefore, should be deleted.

10. Article 7(5) and article 9(3)

The second sentences of article 7(5) and article 9(3) have become self-evident and unnecessary in light of article 3.

We propose to delete these sentences.

11. Article 10(1)

The provision of article 10(1) provides two exceptions to the same-day requirement of execution of a payment order. This requirement should not be imposed in a case where a sender does not make necessary payment.

The following new subparagraph (c) should be added to article 10(1).

"(c) the sender does not make payment in accordance with the provisions of Article 5. In this case the order shall be executed on the day the payment is made."

12. Article 12

If the credit transfer is not completed, it is indispensable to collect information such as whereabouts of the funds or the cause of the failure. This information is also helpful for a prompt refund in accordance with article 13. It would be appropriate, therefore, to add the duty to gather necessary information in the article.

We propose to insert the phrase *"in particular by offering and gathering necessary information such as the whereabouts of the funds,"* before the terms *"in completing the credit transfer"* of article 12.

13. Article 13(2)

The thrust of this provision is that, although the duty to refund should be basically a mandatory obligation, there is a case where the originator's bank should not be held liable, in particular, when its customer has designated an intermediary bank and thereby assumed the risk.

There must be other cases where this mandatory obligation is inappropriate in view of varied legal frameworks and practices of each State, and a State would have some discretion in dealing with these cases when it adopts the Model Law. Necessary amendments to this provision or clarification to this effect in records of the plenary session should be made in order to reflect this consideration.

14. Article 14 and article 16(5)

The provisions of article 14 and article 16(5) seem to contradict the provisions of article 17(3) by assuming that a credit transfer may be completed even though the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted. Article 14 and article 16(5)

should be aligned with the provisions of article 17(3), since there is no need to permit partial completion of a payment order except in the case of article 17(3).

Therefore, the clause *"the credit transfer is completed in accordance with article 17(1), but"* in article 14 and the clause in article 16(5) *"if the credit transfer is completed under article 17(1)"* should be deleted.

15. Article 16

Although the liability of a receiving bank is limited to paying interest in the current provisions of article 16, there was no such understanding in the consideration of the twenty-second session of the Working Group that the provisions on compensation for expenses incurred for a new payment order and for reasonable costs of legal representation should be deleted. As there is substantial ground to provide for such compensation, liability of a receiving bank should be extended to cover those expenses and costs.

16. Article 16(4)

While the provisions of article 16(4) refer to a notice requirement under article 9(2) and (3), they do not refer to the requirement under article 9(4). Since there is no reason to exclude article 9(4) in the application of article 16(4), reference to article 9(4) should be added to article 16(4).

17. Article 17(1)

Since there is no need to permit partial completion of a payment order except in the case of article 17(3), as we have already mentioned in the comment 14, this article should clearly prescribe that a credit transfer is completed when the beneficiary's bank accepts the payment order whose amount is equivalent to that of the originator's payment order except in the case of article 17(3).

18. Article 17(2)

These provisions clearly interfere with transactions between the originator and beneficiary, and this interference is not acceptable for us. The relationship between the originator and beneficiary should be governed by the applicable law designated by rules of conflict of laws and should be excluded from the scope of this Model Law. Not only have the provisions little merit, but they also cause serious confusion, especially in the case where a payment order accepted before the payment date is revoked.

These provisions should therefore be deleted.

19. Article 18

This article should be deleted as we can see no need to include in this uniform law these sorts of conflict of laws provisions.

MALAYSIA

[Original: English]

Article 2. Definition

"Credit Transfer"

It is suggested that the words *"and of which the beneficiary has a claim against the beneficiary bank"* be added after the words *"disposal of a beneficiary"* at line 3.

In our view, the word "funds" gives a very wide meaning to credit transfer and it is suggested that the word "credit" be used instead.

"Beneficiary"

As in the definition of "credit transfer" above, the definition of beneficiary should be a person who has a claim against a bank as a result of a funds transfer.

"Bank"

The words "not to be taken as" should be amended to read "not deemed to be engaged in" so as to make the sentence more comprehensible.

"Authentication"

It is possible in such high volume electronic system to authenticate part of a payment order.

A payment order is either authentic or not authentic.

Paragraph (1)

The phrase "carry out the payment order . . . receiving bank" on lines 2 and 3 should be substituted for the phrase "be carried out by the receiving bank which received the payment order".

"Payment date"

Again, it is suggested that the payment date should be the day when the beneficiary has a claim for payment from the beneficiary bank. See 1 and 2 above.

Article 4(1)

The purported sender is bound only if the agent of the purported sender is expressly authorized to bind the purported sender. The agency rule of ostensible or apparent authority is clearly not applicable under this provision.

Is this the intention of the Model Law? If this is not so, then we suggest that in place of the words "had the authority to bind the purported sender" on line 3 should be substituted the phrase "has been expressly or impliedly authorized by the purported sender to do so".

Article 4(4)

This paragraph relates to the burden of proof. The purported sender merely has to prove that the payment order received by the receiving bank arose from actions of a person (the third party) other than a present or former employee of the purported sender and it would not be bound under paragraph (2). The burden of proof then shifts to the receiving bank to prove that:

(a) the actions of the third party are the actions of the present or former employee of the purported sender, especially in the situation where it was the employee of the purported sender who disclosed the authenticated procedure to the third party; or

(b) the third party had gained access to the authentication procedure due to the fault of the purported sender.

As can be seen, the burden of proof is more burdensome on the receiving bank. Is this the intention of the Model Law?

Article 6(2)(d)

It is suggested that the phrase "carry out the payment order received" on lines 1 and 2 should be amended to read "be

carried out by it on receipt of such payment order", to render the subparagraph more comprehensible.

Article 7(5)

It is our opinion that it may be difficult to implement paragraph (5). In an environment where payment orders are being executed in a millisecond by machines that read numeric data in the order and make appropriate entries, having such a provision would force the receiving banks to abandon their high speed electronic operation and review each payment for inconsistency between the numeric amount and the alphabetic amount.

It will make more sense if only numeric information is applied.

Article 8(2)

The notice of rejection should be authenticated.

Article 9(3)

Again as in article 7(5) above, it is suggested that the numerical description should be accepted as the amount on the payment order in the event of any inconsistency in a payment order between the words and figures. In effect it would mean only the numerical figure would be applied.

Article 9(5)

It is necessary for notice to be given to a beneficiary who does not maintain an account at the bank.

It is suggested that the beneficiary should receive a cheque rather than a notice as this would cut down the costs of administration and record keeping.

Article 11(1), (2), (5) and (7)

It is suggested that clarifications should be obtained for the above four paragraphs.

Article 16(5)

The word late payment should be "payment of less than the amount of the payment order" since in effect it is not a late payment.

Also, what is meant by "improper action"? The meaning can be very wide.

MEXICO

[Original: Spanish]

The Government of Mexico considers that the draft UNCITRAL Model Law on international credit transfers, prepared by the Working Group on International Payments, fills a gap in legislation on the subject in question. It is also of the opinion that the draft offers a comprehensive regulation of credit transfers, which balances the needs of institutions engaged in providing transfer services and those of their users. The Government of Mexico hopes that UNCITRAL will adopt the draft in its next session and ask the General Assembly to recommend its adoption to Member States.

The following suggestions are offered with the aim of contributing to improving the Model Law.

Chapter I. General provisions

Article 2. Definitions

(b) Definition of "payment order"

Conditional payment orders are excluded from the sphere of application of the Model Law.

When the point was discussed during the twenty-first session, consideration was given to the hypothesis of a bank receiving a conditional instruction and executing it as if it were a straightforward payment. Such a transfer would not fall within the sphere of application of the Model Law. Consequently, if the transfer was not correctly executed, the parties would not have the rights or obligations derived from the Model Law, even though the cause of the error had nothing to do with whether the condition was or was not satisfied.

It was decided that such an effect was not desirable and that, without ceasing to exclude conditional payment orders from the sphere of application of the Model Law, provision should be made that in the hypothesis contemplated the effects of the condition between the bank in question and the sender would not be governed by the Model Law; the payment order would be treated as if it were straightforward (A/CN.9/341, paras. 73-75).

With the final section of subparagraph (b) as it stands, this result is achieved only if the condition is satisfied, and not in the opposite case. Furthermore, the hypothesis will as a rule only arise in respect of the originator's bank, for which reason an alternative text is proposed in square brackets. The following text is suggested:

"When an instruction is not a payment order because it is issued subject to a condition, if the receiving bank [originator's bank] executes it, for the purposes of this law the condition will be deemed not to have been made."

Additional article

Taking account of the international character of the operations to be regulated by the Model Law, and of the conclusion reached by the Working Group at its sixteenth session (A/CN.9/297, para. 33), we propose the addition of an article concerning uniform interpretation. What is proposed is the typical formulation which appears in the most recent conventions drafted by UNCITRAL and there is nothing to prevent its inclusion in a law. This text will be of particular importance in interpreting the final sentence of paragraph (8) of article 16.

The proposed text reads:

Article X. Interpretation

"In the interpretation of this law, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

Article 4. Obligations of sender

Paragraphs (2) and (3)

Paragraphs (2) and (3) require that the authentication procedure agreed between the parties should be "a commercially reasonable method of security". In the interests of uniformity of interpretation, the word "commercially" should be deleted.

The criterion of "reasonable", which has become established in international trade law documents, has been criticized

somewhat by those who maintain that there is no international jurisprudence which gives it meaning. It is a term of Anglo-Saxon origin. The word "commercially", included by the Working Group, adds little: if the criterion of reasonableness is invoked in an international trade instrument, "reasonable" must be "commercially reasonable" in the context of the branch of trade in question. Besides, if it is kept it will mean that international jurisprudence must define not only what is "reasonable" but also what is "commercially reasonable".

The deletion of the word "commercially" in paragraphs (2) and (3) is suggested.

Chapter III. Consequences of failed, erroneous or delayed credit transfers

Article 16. Liability and damages

The obligation to pay interest, provided for in paragraph (1) of article 13 and in article 16, leaves two problems unresolved:

1. The rate of interest. During the session of the Working Group when this subject was discussed, delegations were not yet aware of the publication of the *Guidelines on International Interbank Funds Transfer and Compensation* of the International Chamber of Commerce, whose article 18 is the basis of the paragraph (2) proposed below.

2. When a bank corrects an error by crediting an account of the sender on the correct date. In this second hypothesis it may happen that the bank chooses to credit an account of the sender which does not give rise to interest or gives rise to lower interest. Differences in interest rates may be due to several causes; the most common are: the currency in which the different accounts are maintained or the different situation arising when there are debit or credit balances. The receiving bank must make the credit to the correct account and not the one which best suits it.

The addition of the following article is proposed:

Article X. Calculation of interest

"1. By interest is understood the time value of the transaction amount in the country of the currency involved. Interest shall be calculated at the rate and on the basis customarily accepted by the local banking community of such country.

"2. When a receiving bank fulfils the obligation to pay interest under paragraph (1) of article 13 and paragraphs (1), (3), (4) and (5) of article 16, crediting an account of the sender on the date on which it should have executed the act whose omission rendered it liable, it must make the credit to the account in which it received the payment [in accordance with article 7].

"3. The period for which interest shall be payable shall start on the [date of execution] and end with the day before the day on which correction is made, that day being included."

Chapter IV. Preclusion and prescription

It is proposed to add a chapter with an article on preclusion (estoppel) on grounds of acquiescence, of the right to claim any amount, and another article on prescription (limitation of actions). It is not appropriate that the legal certainty of the debits, payments and liabilities arising from operations regulated by the Model Law should be suspended during the normal term of general rules on obligations and contracts. A shorter time limit is desirable. Nevertheless, to establish a short limitation period is inappropriate when international operations are involved, thus

a short time limit is proposed for giving notice of disagreement and, when notice has been given, a longer time limit before actions are time-barred.

Article X. Obligation to notify disagreement with debits and payments. Preclusion of actions

"(1) When one of the parties to a transfer has an action derived from this law, he must notify the party against whom he has the action of the matter which is the grounds for his action within a period not exceeding two months from the date when the transfer was completed or should have been completed according to the payment order of the originator.

"(2) If a party receives a notice from which it arises that his sender or receiving bank may be bound or liable, he has the obligation to inform that bank within two days of receiving the notice.

"(3) If a party does not give the notice mentioned in paragraphs (1) and (2) of this article, he may not subsequently initiate any action against any of the parties to the transfer."

Article Y. Limitation of actions

"(1) Any action under this law is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

"(2) The limitation period commences on the day when the transfer was completed or should have been completed according to the payment order of the originator.

"(3) The day on which the limitation period commences is not included in the period.

"(4) The party bound or liable may at any time during the running of the limitation period extend the period by a declaration in writing to the claimant. The period may be further extended by another declaration or other declarations.

"(5) A recourse action by one party against his sender, receiving bank or any other party may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the party who is going to institute the action has been held liable in an action against himself, or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim, against the party who is going to institute the action, that may result in a recourse action, notice of the filing of such a claim has been given to such sender, receiving bank or other party."

THE NETHERLANDS

[Original: English]

Add in article 9, paragraph 4 the sentence: "This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be".

Add in article 16 between paragraph (2) and paragraph (3) a new paragraph:

"(2 *bis*) Paragraphs (1) and (2) apply *mutatis mutandis* if a delay is caused by the failure of a sending bank

(i) where payment is to be made by debiting its account with its receiving bank, to put funds available in the account to be debited sufficient to cover the amount of the payment order, or

(ii) where payment is to be made by other means, to pay its receiving bank in accordance with article 5(b) or (c)."

SWEDEN

[Original: English]

Article 4. Obligations of sender

Paragraph (2), Subparagraph (a)

The text should contain a demand for a safe method of authentication—not only the vague standard "commercially reasonable". For example:

"(a) the authentication provided is a safe and commercially reasonable method of security against unauthorized payment orders, and".

Article 5. Payment to receiving bank

This article was introduced at the final session of the Working Group. However, it is rather unclear what is the purpose of the rules contained in this article. The reasons for having the rules of this article have to be more clarified at the session of UNCITRAL. Unless this is done, the article should be left out.

Article 6. Acceptance or rejection of a payment order by a receiving bank that is not the beneficiary's bank

Paragraph (3)

According to this paragraph the receiving bank has to give notice of its rejection of a payment order - not later than on the execution date. The paragraph should state that the notice should be given as soon as possible but not later than on the execution date:

"(3) A receiving bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (2)(a), is required to give notice to that sender of the rejection at the earliest possible time, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date."

Article 7. Obligations of receiving bank that is not the beneficiary bank

Paragraph (2)

According to the present draft, a receiving bank that accepts a payment order is obligated only to issue its own payment order but there is no obligation on the receiving bank under this provision to provide cover for the payment order it has issued. The obligation under article 4 paragraph (6) to pay the receiving bank for the payment order when the receiving bank accepts it only refers to the relationship between the sender and the receiving bank. It's therefore important that article 7 contains a provision on cover for the payment order, because without cover, the payment order will probably often be rejected by the receiving bank. The following amendment might be appropriate:

(2) A receiving bank that accepts a payment order is obligated under that payment order,

(a) to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an

appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner, and

(b) to take the appropriate steps in order to provide or make available sufficient cover for the payment order issued under subparagraph (a).

Paragraph (5)

This provision is not restricted to situations where the inconsistency between the words and figures in fact was detected and the payment order therefore was not executed. Hence, it is not clear how this provision relates to articles 6 and 16. The liability under article 16, paragraph (3)—to pay interest to the sender—does not make sense in cases when the inconsistency was not detected and the payment order was executed. The problem of inconsistency between words and figures describing the amount of the payment order can probably be properly solved only by establishing a rule as to which description shall govern.

If UNCITRAL decides to keep the rule as it stands, we interpret the words "if the sender and the bank have agreed" in the last sentence of the paragraph to mean both a standard agreement and a contractual agreement.

Article 8. Acceptance or rejection by beneficiary's bank

Paragraph (1), subparagraph (g)

According to the draft the beneficiary's bank is entitled to accept the payment order by applying the credit to a debt of the beneficiary owed to it. This is not acceptable. When the beneficiary's bank accepts a payment order it has an obligation to transmit the credit for the disposal of the beneficiary. The bank cannot, without the beneficiary's permission, be entitled to use the funds to settle its differences with the beneficiary. Therefore this paragraph should be amended as follows. But there is also a need for another amendment. Legal demands for the credit can be given not only by a court. This should be reflected in the wording. The paragraph should read:

"(g) when the bank applies the credit in conformity with an order of a court or another competent legal authority."

Paragraph (2)

In the last sentence of paragraph 2 there should be the same amendments as in article 6, paragraph (3):

"(2) A beneficiary's bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (1)(a), is required to give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given at the earliest possible time, not later than on the execution date."

Article 11. Revocation

The current drafting lays down the general principle of irrevocability. If a revocation order is given too late to be effective under paragraph (1), the originator has no prospect of interrupting the credit transfer. That possibility can be of such a great importance to the originator that a requirement on the receiving bank to revoke its own payment order already issued, would be legitimate. The provision under paragraph (4) of article 10 in the Working Group's previous draft should therefore be adopted (A/CN.9/341, annex).

Article 16. Liability and damages

This article is based on the principle that if a delay by one receiving bank results in delayed completion of the credit transfer, the receiving bank that caused the delay is liable to the beneficiary for interest. The bank can discharge its liability by paying the interest to the next receiving bank, which in turn is obligated to pass on the interest. However, this liability rule functions properly only when all the receiving banks involved are subject to the same or similar rules. If the credit transfer passes a legal system that does not recognize a similar procedure, the beneficiary is not likely to receive interest according to the liability rules of the Model Law. If the originator must compensate the beneficiary for the loss of interest as a result of the delay, the beneficiary would have no possibility under the Model Law to recover the expenses from the banking system. It is not acceptable if the result of the rules on liability in some cases would be that the beneficiary is left without compensation or the originator has to bear in the end losses for delays in the banking system. The following amendments to article 16 might solve the problem:

"(3) Each receiving bank is, upon request, obligated to give the beneficiary reasonable assistance in ascertaining the facts necessary for pursuing his claim for interest under paragraphs (1) and (2)."

"(4) If the originator has paid interest to the beneficiary on account of a delay in the completion of the credit transfer, the originator may recover such amount, to the extent that the beneficiary would have been entitled to but did not receive interest in accordance with paragraphs (1) and (2), from the originator's bank or the bank liable under paragraph (1). The originator's bank and each subsequent receiving bank that is not the bank liable under paragraph (1) may recover interest paid to its sender from its receiving bank or the bank liable under paragraph (1)."

Paragraph (5)

Under article 16 paragraph (1), the beneficiary is entitled to interest when the credit transfer has been delayed. In case of underpayment however, paragraph (5) introduces a contradictory rule, saying that interest would be payable only if a payment date has been specified and there is a delay in relation to that date. The provision in paragraph (1) should apply regardless of whether there has been a delay with respect to the whole or only part of the amount specified in the payment order accepted by the receiving bank. Furthermore, it is unclear why the bank's liability should apply only in case of "improper action" by the receiving bank. Paragraph (5) should be deleted.

Paragraph (7)

In accordance with the general rule on freedom of contract in article 3, the wording of paragraph (7) should be:

"(7) The provisions of this article may not be varied to reduce the liability to an originator or a beneficiary that is not a bank."

Article 17. Completion of credit transfer and discharge of obligation

Paragraph (2)

Paragraph (2) contains a rule which seems to deal with the legal relationship between the originator and the beneficiary. According to the rule an obligation of the originator to the beneficiary is discharged when the beneficiary's bank accepts the payment order. In cases where the beneficiary has had no influence on the choice of bank to be the beneficiary's bank this rule seems improper. It should be deleted.

SWITZERLAND

[Original: French]

A. Preliminary remarks

The present draft Model Law on international credit transfers reflects an in-depth approach to and analysis of international payments processes and the legal problems that arise therefrom. The Working Group has undoubtedly succeeded in presenting a draft whose structure and order are convincing. It also proposes in many provisions satisfactory solutions which take into consideration in an appropriate manner the interests of the parties involved in an international credit transfer. However, not all the rules have our unreserved agreement. Indeed, our delegation, during the sessions of the Working Group which have taken place up to the present, has expressed its doubts and reservations of principle on the subject of various rules contained in the Model Law. We shall return to these in detail in due course (cf. C).

B. Need for and appropriateness of a model law

Concerning the question whether it is necessary or desirable to draft a Model Law on international credit transfers, there is in principle, in the view of Switzerland, no need to establish uniform rules at international level. The business of foreign payments generally proceeds without any particular problems. Firstly, existing payments systems have proved efficient and, secondly, current legislation is adequate to ensure that payments are made smoothly both nationally and internationally. However, various factors justify a re-examination today of this position in respect of certain issues. The very rapid evolution of cross-border payments techniques should be taken into account. The new methods and services in the telecommunications area or "high speed/low cost" transactions illustrate this phenomenon. This gives rise to problems of liability on the juridical plane, and also problems in regard to identifying and authenticating originators of orders in electronic transfer systems. Technical errors in the course of significant payments can lead to complicated and endless discussions at both national and international level. In the above-mentioned areas, international provisions would permit the standardization of legal relations and thus increase legal certainty.

A Model Law of the kind presented here is thus justified, to this limited extent, and the drafting of international norms can be approved from this angle. It should, however, be pointed out that such regulation only makes sense and can only lead to the desired harmonization at international level to the extent that it is accepted by the majority of States concerned and incorporated in national law. This objective can be achieved only if solutions that are theoretically convincing and can be put into practice are proposed for discussion. This does not seem to us to be the case in various provisions of the Model Law, particularly as regards the assigning of risk in the event of error or omission in the transfer, the right to claim damages and interest, the restriction of freedom of contract and the consequences of the payment order for the legal act underlying the transfer.

C. Comments on the various articles of the model law

Article 1 (sphere of application)

There are grounds for approving in principle the proposal that the draft Model Law should also encompass interbank payments in its article 1. This will avoid a proliferation of standards. However, conflict of laws is inevitable when a banking operation involving several States leads to payments effected through the intermediary of banking establishments in different

countries. Such difficulties can be considerably reduced if the parties agree on the applicable law, but they cannot be completely eliminated.

The extension of the law to interbank payments may thus lead to complications due to the fact that the rules of national systems relating to payments (e.g. SIC, CHIPS, FEDWIRE) are in partial contradiction to the solutions envisaged in the Model Law.

The rule contained in paragraph (2) of article 1, under which the foreign branches of a bank must be considered as separate banks, will cause problems; in reality, one and the same legal entity is involved and it is difficult to see how, in the case of internal transfers, the matter of mutual rights and obligations is to be regulated and under what conditions it will be possible to make these prevail.

Article 2. Definitions

The definition of the concept of "payment order" contained in subparagraph (b) of this article expressly applies only to unconditional orders; consequently, a payment order made subject to a condition does not constitute a payment order in the meaning of the Model Law. Given that in practice one comes across conditional payments orders—even if they are not very common—which are admissible in the eyes of a large number of States, we consider it, to say the least, surprising that they cannot be treated here as payment orders. The legal consequences of this provision appear even graver when the second sentence of subparagraph (b) is examined; the Model Law applies to a conditional payment order only if the condition is subsequently satisfied. In certain circumstances, the condition will be satisfied only in the context of the execution of the payment order; thus one is inevitably confronted with two different legal orders, contrary to the original objective of the draft—to harmonize the payment process. Furthermore, a party can easily avoid the application of the Model Law by issuing a conditional payment order. We therefore recommend that this provision should be re-examined in the light of the foregoing considerations.

We also consider that the condition contained in subparagraph (b)(i), under which the receiving bank is to be reimbursed by the originator of the order, does not form part of the concept of a payment order; it is rather the logical consequence of executing the payment order, as is clear, moreover, from article 4, paragraph (6), of the Model Law.

Article 3. Variation by agreement

The fact that the principle of freedom of contract is expressly provided for in the Model Law must be approved. It is desirable that the parties should be able, within determined limits, to depart contractually from the Model Law. The scope allowed for freedom of contract is, however, too restricted—unnecessarily so. This comment is particularly relevant in respect of article 13, paragraph (2), and article 16, paragraph (7).

Freedom of contract may legitimately be subject to restriction when interests deserving protection—that is, those of the public and of the economy—so demand. In the present context, it would more be a question of ensuring the smooth functioning of the payments process or the protection of consumers' interests. As has already been indicated, the legal rules at present in force, which contain few restrictions on freedom of contract, are adequate to regulate the flow of payments. As for the protection of consumers, it should be borne in mind that not only banks and companies but also consumers may be party to international transfers. However, the Model Law has not been conceived to protect the rights of consumers (as expressly indicated in the

footnote to article 1), but rather to harmonize trade law at world level, in accordance with its basic objective. The Model Law should therefore not contain restrictions on individual freedom based on the protection of consumers' rights.

For the reasons expressed, we are in favour of the broadest possible guarantee of freedom of contract. We are nevertheless conscious of the need to have rules reflecting the greatest possible uniformity for the payments process in general. However, such rules should not impair basic legal principles, as they do here in the case of freedom of contract.

Article 4. *Obligations of sender*

The Working Group addressed the question of regulating payments by compensation, or netting, in the context of this article. As this problem is not specific to payments and the subject is not sufficiently "ripe" for codification, it should not, in our view, be regulated in the Model Law. A reference to netting contracts and to the rules of certain netting systems would tend to be a source of uncertainty.

Article 7. *Obligations of receiving bank that is not the beneficiary's bank*

According to paragraph 2 of this provision, the receiving bank is obliged to execute the payment order within one day. This time limit is very short and hardly leaves the bank time for processing or, where applicable, transmitting the order with care. It should be borne in mind that banks are not in a position to process and transmit automatically and without delay all the payment orders which come to them. It often happens, particularly in international payments, that complementary information and verification is necessary. It therefore seems justified to extend by one banking day the time limit within which the payment order must be processed, the more so as the Model Law regulates all types of transfers and not only those affected through electronic systems. A solution aimed at treating different transactions (electronic and other transactions) separately would scarcely facilitate the application of the Model Law; it might even lead to additional difficulties of interpretation.

Article 11. *Revocation*

In order to strengthen the security of transactions and the smooth functioning of the international payment process, the principle of irrevocability of transfer orders should be established and, in particular, exceptions to this principle should be defined expressly and restrictively. However, Swiss law does not recognize the principle of absolute irrevocability, and the transfer order is considered in principle to be revocable; the assignor may revoke the assignment to the assignee, provided that the assignee has not notified his acceptance to the beneficiary (cf. article 470, paragraph 2, Code of Obligations). Since in practice acceptance is not notified before payment, the notice of credit should be considered as acceptance. The customer, as assignor, may revoke the credit transfer order given to the assignee bank provided that a credit advice has not been effected to the bank of the final beneficiary.

The Model Law does not state where the sender may revoke the transfer order, in the event that revocation is admissible. In Swiss law, the sender can revoke the transfer order only through his bank—that is, the receiving bank. He cannot take similar action in respect of the other banks involved in the execution of the transfer order (indeed, such banks could not even identify him, since as a rule they do not know him). For reasons of practicality and on the basis of a certain legal logic, the revocation should take place in cascade—i.e., it must be transmitted by each receiving bank to the next bank in line. A right of direct

revocation, bypassing one or more links in the transmission chain, could not be admitted.

Under Swiss law, an assignment which has not yet been accepted is deemed to be revoked in the event of bankruptcy of the assignor (article 460, paragraph 3, Code of Obligations). Paragraph (8) of article 11 seems to run counter to this principle, in that bankruptcy does not automatically cancel a transfer order. We therefore request that this paragraph (8) should be re-examined in the light of the foregoing comments, at least taking account of international insolvency law.

Article 13. *Duty to refund*

We have very serious reservations concerning the duty to refund envisaged in this article, for the following reasons. Firstly, this guarantee of refund is contrary to certain fundamental principles of Swiss contract law. Swiss law authorizes the originator's bank to debit the customer's account provided that the credit transfer order has been correctly executed in accordance with the instructions of the parties. The bank is in no way bound to guarantee the success of the transaction as a whole. If the intermediary banks have diligently fulfilled their obligations, the originator must bear the consequences of any incidents. The originator's bank thus answers for the good execution of the credit transfer order, a responsibility which to some extent includes a judicious choice of intermediary banks. For legal reasons and reasons of principle, we categorically reject the idea of a broader responsibility, *a fortiori* one of an objective or causal nature.

Such a guarantee of refund would correspond to a kind of insurance, resulting in an obligation for the bank to collect the charges related to such operations with a view to adequate financial cover. In extreme cases, some banks might even refuse to effect payments in countries where there are high risks attached to transfers and commission.

Finally, it should also be noted that such risk regulation, which is, all in all, highly problematic for the banking sector, could, as a kind of "*pièce de résistance*", prevent broad acceptance of the Model Law.

If the guarantee of refund is retained, it should be a matter of enabling law. The parties to an international transfer would thus be able, on a contractual basis, to avoid the rule provided in the Model Law in respect of duty to refund. As a result of such flexibility, banks would have the choice of proposing payments with or without guarantee of refund. We therefore propose that article 13 should be formulated as a rule of enabling law.

Article 16. *Liability and damages*

The Model Law starts out here from the idea that the originator's bank is liable to the originator for the good execution of the transfer order and thus assumes liability for the transaction as a whole. Such a concept, which is very close to the objective liability attached to company contracts, is contrary to Swiss doctrine and jurisprudence, under which transfer orders are governed by the law of agency and assignments. Under these provisions, the agent is liable only for the good and faithful execution of the mandate and not for the result of the operation itself. Thus, when a bank carries out a transfer order with all the diligence that can be expected of it (good and faithful execution), it can in no case be made liable for any damage which might ensue. Any liability in respect of errors committed by intermediary banks should therefore be rejected. Otherwise the bank would run the risk of having to answer for significant damages which it had not itself caused. Firstly, such risk

regulation is contrary to the *ratio legis* of a Model Law which is intended to be balanced; secondly, it would simply oblige banks to insure themselves against such risks or set aside the necessary funds. This would inevitably result in higher transaction costs without being particularly useful to the banking systems of States.

The Model Law should provide for liability only in the context of a direct contractual relationship, meaning only between the various parties involved in executing a transfer order. To this end, we recommend that paragraph (8), which moreover relates more to the area of illicit acts and therefore has no place in a Model Law of the type proposed, should be quite simply deleted. This question should, if necessary, be regulated by national law.

According to article 16, paragraph (7), a bank can restrict its liability to the originator of an order or the beneficiary only to a very limited degree. This provision should be rejected, if only on the grounds of freedom of contract. Such a restriction also places an obstacle in the way of flexible regulations for certain types of payment ("high speed/low cost" transactions). We therefore take the view that it is for the parties to settle the question of risk by contractual means; a referral to national law may perhaps be possible.

Article 17. *Completion of credit transfer and discharge of obligation*

We are convinced that the Model Law must not intervene in the basic relationship between the originator of the order and the beneficiary. The transfer is independent of the relationship with the basic transaction and all provisions of the Model Law which directly or indirectly refer to that transaction should be eliminated. For the sake of clarity, it could even be stated in the Model Law that the transfer is abstract and independent of the legal relationship underlying it.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

1. Article 2(a): "Credit transfer"

We are not yet convinced that the words in square brackets should be retained. Transfers effected through point-of-sale systems may be either debit or credit transfers. If they are debit transfers the words in square brackets are unnecessary because debit transfers should be excluded by paragraph (ii) of the definition of "payment order". If they are credit transfers we are not certain why they should be excluded. We are concerned that if the words are retained to overcome a problem with card based payment systems, this might cause difficulty in the future if facilities are developed for processing ordinary credit transfers through terminals primarily intended for card based payment systems. However, we are willing to look at this further if the potential problem remains a concern, provided the meaning of "point-of-sale payment systems" can be made clear.

2. Article 2(b): "Payment order"

Requirement (ii) of the definition specifies that the instruction must not provide that payment is to be made at the request of the beneficiary. This is intended to exclude debit transfers, but may have the effect of excluding credit transfers made to a beneficiary who does not have an account where the beneficiary's bank is instructed to "pay on application". Any solution to this problem is not without difficulty but it might help to add

the following paragraph between (ii) and the paragraph about conditional order—

"Subparagraph (ii) shall not prevent an instruction from being a payment order merely because it directs the beneficiary's bank to hold funds for a beneficiary that does not maintain an account with it until the beneficiary requests payment."

3. Article 2(k): "Execution date"

The Working Group has noted that the provisions of the Model Law relating to payment, execution and acceptance are circular in that under article 4(6) a sender is not obliged to pay for a payment order until the execution date, but it is implicit in article 10 that a payment order does not have to be executed until it has been accepted and under articles 6(2)(a) and 8(1)(a) acceptance does not take place (assuming no other action on the part of the receiving bank) until payment is received. We propose amendments to articles 4(6) and 10 which we hope may overcome the problem. The problem is also relevant in relation to the definition of execution date. We comment below on those articles which refer to the "execution date" in a sense which we believe differs from the expression as currently defined.

4. Article 2(l): "Execution"

The draft report of the last session of the Working Group noted that the definition of "execution" adopted at that session did not cover the beneficiary's bank. Although it would be possible to devise another term for that purpose, we believe it would be better to adapt the present definition. The present definition (which relates to a receiving bank other than the beneficiary's bank) corresponds to "the doing of an act described by article 6(2)(d)". We believe therefore that it would be appropriate to add the following wording in order to cover the beneficiary's bank—

"... and with respect to the beneficiary's bank, the doing of any act described by article 8(1)(d), (e), (f), or (g)."

The words referred to by cross reference could be written out in full if that were thought to be clearer or more consistent with the first part of the definition, but that would make it much longer.

We have reviewed the terms "execute" and "execution" in the places where they occur in square brackets and believe that they work correctly if the definition of "execution" is amended as we suggest.

5. Article 2(m): "Payment date"

The term "payment date" is used in articles 10(1), 10(3), 11(2) and 16(5). We propose below that in articles 10(3), 11(2) and 16(5) it would be more appropriate to refer to the "execution date". If those amendments are accepted, there would be little point in keeping the defined term for use only in article 10(1): it would be sufficient there to refer to "a date when the funds are to be placed at the disposal of the beneficiary". The Working Group has also noted that SWIFT payment messages do not contain a field for a payment date and ISO has proposed to delete any reference to a pay (or payment) date in its next revision of standards, so the use of the term in the Model Law is somewhat unsatisfactory.

6. Article 3

The Working Group at its last meeting affirmed that the Model Law should be subject to freedom of contract. It recognized that there should be limits to this and that certain

provisions should be mandatory, but apart from one or two cases (such as article 13) did not decide which. A problem with permitting variation by contract is that not all the parties to a credit transfer will be in contractual relationships with each other. It is not always easy to see how an agreement between two parties to vary the operation of a rule in the law might effect other parties to the same transfer.

A further difficulty is that it is not clear which parts of the law are capable of variation by agreement. Article 1 for example, which defines the scope of the law, is presumably not capable of variation. Similarly, the definitions in article 2 determine the meaning of other provisions and should not be capable of amendment; if it is desired to change a definition in order to change the operation of certain of the substantive provisions, the substantive provisions themselves should be varied by agreement. This difficulty extends to other provisions of the law which are interdependent: it is hard to assess the effect of variation on the dependent provisions. The rules on deemed acceptance in article 6(2)(a) and 8(1)(a), for example, depend on when payment takes place, which is set out in article 5. Other provisions, although logically capable of amendment, are essential to the structure of the law, such as article 7(2) (the obligation of a receiving bank which has accepted a payment order to issue a payment order to implement it) or article 9(1) (the obligation of the beneficiary's bank to place the funds at the disposal of the beneficiary in accordance with the applicable law). We have taken the view that the following provisions are either not logically capable of being varied or are in a necessary part of the structure of the Model Law and as such should not be capable of variation:

- article 1
- article 2
- article 3
- article 4(3)
- article 5
- article 6(1) and (2)
- article 7(1), (2) and (7)
- article 8(1)
- article 9(1)
- article 10(6)
- article 11(3), (5), (6), (7), (8) and (9)
- article 13(2)
- article 15
- article 16(6), (7) and (8)
- article 17
- article 18

In some cases it is difficult to decide whether a provision is truly a necessary part of the structure of the law. If it is argued that certain of the above provisions are not truly essential to the structure of the law, we would reply that we nevertheless believe that it is essential for them to be mandatory.

We believe that the following provisions of the law, although not a necessary part of its structure, should be mandatory:

- article 4(6) (obligation mandatory, time of payment variable)
- article 6(3)
- article 7(3) and (4)
- article 8(2)
- article 9(2) and (5)
- article 10(1), (2), (3), (4) and (5)
- article 11(1) and (2) (except as permitted by (3))
- article 11(4)
- article 12
- article 13(1) (as stated in (2)).

A table setting out our analysis with a brief summary of our reasoning is contained in an annex to this note.

In view of the large number of provisions which we believe should not be varied, we wonder whether it would not be better from a drafting point of view to return to the position where contracting-out was not permitted except where stated.

7. Article 4(6)

As stated above the Working Group has noted that the provisions of the Model Law relating to payment, execution and acceptance are circular. The Group has also noted that a bank's failure to pay for a payment order is not treated as failure to execute and does not attract any liability under article 16. There is thus no incentive for a bank to break the circle. We believe that a bank should be required to pay for payment orders that have not been rejected and that late payment should attract an interest penalty. We suggest that article 4(5) be reworded as follows:

"(6) A sender becomes obligated to pay the receiving bank for the payment order when it is issued, but unless otherwise agreed payment is not due until the day when the receiving bank is required to execute the order under article 10, or would be required if the order had been accepted."

In order to ensure that a bank which pays late incurs an interest penalty for the delay caused, we propose below that a reference to a bank's failure to pay be inserted in article 16(1). We make other proposals to overcome the circular problem in relation to articles 6(2)(a), 8(1)(a) and 10(1).

8. Article 6(2)(a)

We noted above the circular problem relating to payment and acceptance. Acceptance under article 6(2)(a) cannot be dependent on execution if execution depends on acceptance. We propose below that article 10 should say explicitly that a payment order does not have to be executed until after it has been accepted, but that in determining the time for execution for the purpose of article 6(2)(a) that rule should be disregarded. This should have the effect of breaking the circle.

A further problem with "deemed acceptance" is that even when the payment order is received before the bank's cut-off time, the bank may be unable to execute it on the same day if "deemed acceptance" under paragraph (2)(a) occurs too late in the day. For example an order may be received first thing in the morning, but payment may not be received until shortly before close of business. Unless the bank rejects the order it will be deemed to have been accepted and the bank will be liable if it does not execute it that day (assuming neither 10(1)(a) nor (b) apply). This is not of course a problem with other forms of acceptance as they all involve a conscious act, or agreement, on the part of the bank. Nor is this a problem when payment is in accordance with article 5(b)(i) or (ii) as that involves either a conscious act (use of the credit) or a further day. We therefore suggest the addition of the following paragraph after paragraph (2):

"(2 bis) A receiving bank may set a time after which acceptance occurring under paragraph (2)(a) (except by virtue of payment under article 5(b)(i) or (ii)) may be treated as occurring on the following day the bank executes payment orders of the type concerned. Any such time must be set before the payment order has been accepted."

It should not be possible to vary this provision by agreement.

We have also given consideration to the concept of "deemed acceptance" in article 6(2)(a) in the light of the concern that a

bank which was deemed to have accepted a payment order without action on its part might find itself obliged to deal with a bank with which it would not normally deal. In practice we believe a bank in this position would refuse to complete the transfer and would refund the money. It might of course have to pay interest for failure to execute in accordance with article 7(2), but that would be the extent of its exposure under the law.

9. Article 6(3)

Paragraph (3) provides that a notice of rejection must be given not later than on the execution date. As we state elsewhere it is implicit that execution will not, indeed cannot, take place before acceptance. It is therefore not clear how the definition of "execution date" should be interpreted in relation to a payment order that is not to be accepted but is to be rejected. We suggest that the end of the paragraph be reworded as set out below. We also remain concerned that the words "otherwise than by virtue of subparagraph (2)(a)" are not entirely clear. It has been suggested that they mean that it is not necessary to notify rejection if funds are not received; whereas the words are intended to mean only that it is not necessary to notify the fact that the proviso has operated to prevent deemed acceptance taking place. We suggest the paragraph be reworded as follows:

"(3) A receiving bank that, otherwise than by virtue of the proviso to subparagraph (2)(a), does not accept a sender's payment order is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than the date when, if it were accepted, the receiving bank would be required to execute it under article 10."

10. Article 7(3)

At the twentieth session of the Working Group it was stated that the Model Law should not set forth a duty to detect misdirection but that it was appropriate to require notification once the misdirection had been detected. The present wording of article 7(3) does not reflect this and we believe it is important that it should. We suggest it be reworded as follows:

"(3) A receiving bank that detects that a payment order contains information which indicates that it has been misdirected shall give notice to the sender of the misdirection, if the payment order contains sufficient information to identify the sender, within the time required by article 10."

11. Article 7(4)

Instructions which are not payment orders are strictly outside the scope of the Model Law but we nevertheless think that a provision of this kind is useful. However we are concerned that the provision as currently drafted is too widely drawn. It covers instructions regardless of whether the receiving bank appreciates that the provision applies. If the provision is to be retained the following might be more appropriate:

"(4) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order or being a payment order cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10."

12. Article 7(5)

The view was expressed at the twentieth session of the Working Group that this provision was too restrictive. We

agree: the amount might for example be expressed in some form of code. The following wording is suggested:

"(5) If there is an inconsistency in the information relating to the amount of money to be transferred, the receiving bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified."

The last sentence of the present draft is unnecessary if article 3 is retained.

13. Article 7(6)

This paragraph is not entirely clear. Is a receiving bank able to choose another route without reference to the sender if it acts in good faith, or is it merely to enquire of the sender what action it should take (in which case unilateral action would be at its own risk)? The present draft says that the bank is "not bound" to follow the relevant instruction and "acts within the time required by article 10" if it enquires of the sender what it should do; it does not therefore appear to permit unilateral action. We suggest it read as follows:

"(6) If a receiving bank determines that it is not feasible to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer, or that following such an instruction would cause excessive costs or delay in completing the credit transfer, the receiving bank shall be taken to have complied with paragraph (2) if it enquires of the sender what further actions it should take in the light of the circumstances, within the time required by article 10."

In any event article 10(2) should be amended to refer to the making of an enquiry under article 7(6).

14. Article 8(1)(a)

We would make the same comments as we made on article 6(2)(a). Our proposed amendment to article 10 addresses the circular problem. We propose that the following paragraph be added after paragraph (1) to deal with the problem of deemed acceptance occurring too late in the day for execution to take place:

"(1 bis) The beneficiary's bank may set a time after which acceptance occurring under paragraph (1)(a) (except by virtue of payment under article 5(b)(i) or (ii)) may be treated as occurring on the following day the bank executes payment orders of the type concerned. Any such time must be set before the payment order has been accepted."

It should not be possible to vary this provision by agreement.

15. Article 8(2)

We would make the same comment as we made on article 6(3). We suggest that paragraph (2) be reworded as follows:

"(2) A beneficiary's bank that, otherwise than by virtue of the proviso to subparagraph (1)(a), does not accept a sender's payment order is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than the date when, if it were accepted, the beneficiary's bank would be required to execute it under article 10."

16. Article 9(2)

We would make the same comment as we made on article 7(4). The following is suggested as more appropriate:

"(2) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order, or being a payment order cannot be executed because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 10."

17. Article 9(3)

We would make the same comment as we made on article 7(5). The following wording is suggested:

"(3) If there is an inconsistency in the information relating to the amount of money to be transferred, the beneficiary's bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified."

The last sentence of the present draft is unnecessary if article 3 is retained.

18. Article 9(4)

This paragraph requires the beneficiary's bank to give notice to the originator's bank, if it can be identified, as well as to its sender. We understand that the reference to the originator's bank may have been added to this paragraph, but not to paragraphs 9(2) and (3), partly because a discrepancy in the manner of identifying the beneficiary was indicative of fraud. After further consideration we believe that only a minority of such discrepancies arise because of concerns about fraud; in our view this requirement would place an unnecessary burden on banks and should be deleted. This will not prevent banks from continuing to notify others in the chain if they suspect fraud, but the Model Law will require them to notify only their senders. We understand that this is the normal practice in the absence of suspicious circumstances.

19. Article 9(5)

Where the beneficiary's bank is directed to pay on application, notification is not required. We believe that this could be achieved by amending the beginning of paragraph (5) to read:

"(5) Unless the payment order states otherwise, the beneficiary's bank shall ..."

20. Article 10

It is perhaps implicit that a bank does not have to execute a payment order it has not accepted but this is not clear from the wording of article 10(1). The difficulty with stating this expressly is that, as we have noted elsewhere, acceptance is itself linked to the time for execution. We believe that this difficulty could be overcome if articles 4(6) and 10(1) are amended in the way we suggest. We propose the insertion of the following paragraph after paragraph (1):

"(1 *bis*) Nothing in paragraph (1) shall be taken to require a bank to execute a payment order before it is accepted, but for the purposes of articles 6(2)(a) and 8(1)(a) this provision shall be disregarded in determining the time for execution."

It should not be possible to vary this provision by agreement.

21. Article 10(1)

Article 10(1)(b) uses the term "payment date". We propose that in the other places where the term is used it should be replaced by "execution date". If those amendments are agreed,

it would be unnecessary to retain the definition for use in 10(1)(b), which would read:

"(b) the order specifies a date when the funds are to be placed at the disposal of the beneficiary and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on that date."

22. Article 10(2)

As noted above this provision should be amended to refer to the making of an enquiry under article 7(6). We suggest:

"(2) A notice under article 7(3), (4) or (5) shall be given, and an enquiry under article 7(6) shall be made, on or before the day the payment order is required to be executed."

23. Article 10(3)

We believe that if the definition of "execution" is amended to include the beneficiary's bank in the way we suggest, the reference to "payment date" in article 10(3) (which is in any event unsatisfactory as the payment order may not specify a payment date) should be amended to read:

"... the day the payment order is required to be executed".

It would also be possible to use the defined term "execution date" here and in article 10(2).

24. Article 11

At the last meeting of the Working Group it was suggested in the context of what was then article 12 that the law should address the case where a bank that was obliged to pay interest to another bank could not recover that interest from an insolvent bank. We proposed wording for this but it was not adopted because, although on first analysis it seemed fair, it was feared it might be incompatible with bilateral or multilateral netting schemes. It was pointed out that the rule would be of greater significance in the context of an obligation to refund the principal sum. We have therefore reconsidered it in relation to articles 11 and 13. In our view a rule of the kind proposed would be incompatible with netting schemes only if it purported to alter the obligations arising under those schemes. If it did not do so, a bank which had come under a separate obligation pursuant to such a netting scheme (or having given irrevocable instructions might do so when final settlement occurred) would not seek to take advantage of the rule. We propose the following paragraph to follow paragraph (6):

"(6 *bis*) Without prejudice to its obligations under any agreement that nets obligations bilaterally or multilaterally, a bank that is obliged to make a refund to its sender under paragraph (5) is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent."

It should not be possible to vary this provision by agreement.

25. Article 11(2)

This paragraph refers to "the payment date". As we point out in relation to article 10(3) a payment order may not specify a payment date. We believe that if the definition of "execution" is amended to include the beneficiary's bank as we suggest, the reference to "payment date" can be changed to "execution date".

26. Article 11(5)

At the last meeting of the Working Group it was agreed that execution of a payment order by a bank before the execution date (or payment date in the case of the beneficiary's bank) should not relieve the bank from the consequences of failing to act on a revocation order that was otherwise in time. Paragraph (5) refers to the execution or acceptance of a payment order "that has been revoked". However, if the revocation order is received before the execution date (or payment date), a sender should not have to pay for an order executed (or accepted) before the revocation order was received. We propose that the words "that has been revoked" are replaced by the words:

"in respect of which a revocation order that is effective under this article has been or is subsequently received".

27. Article 12

Articles 12 and 13 both begin "If the credit transfer is not completed in accordance with article 17(1) . . .". However, the duty to refund arises only where it is clear the transfer will not be completed, whereas we believe that the duty to assist should continue until the credit transfer is completed. We suggest that article 12 begins:

"Until the credit transfer is completed in accordance with article 17(1), . . .".

28. Article 13

We referred above to the need for a rule permitting a bank obliged to make a refund to make it to a prior sender. We propose the following addition to paragraph 13(1):

"Without prejudice to its obligations under any agreement that nets obligations bilaterally or multilaterally, a bank subsequent to the originator's bank which is obliged to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent."

The originator's bank and intermediary banks between it and the refunding bank will still be liable for their share of the interest, which will have to be passed up the chain or foregone. The exposure of a bank above an insolvent bank will however be greatly reduced where the rule operates.

29. Article 16(1)

As we mentioned above we believe that article 16(1) should be amended so as to require a bank which delays in paying for a payment order to pay interest. We suggest the insertion after the words "article 10(1)" the following:

", or its failure to pay for a payment order in the time required by article 4(6),".

30. Article 16(5)

This paragraph refers to "the payment date". As we point out elsewhere a payment order may not specify a payment date. We believe that if the definition of "execution" is amended to include the beneficiary's bank as we suggest, the reference to "payment date" can be changed to "execution date".

Annex

The table below shows our analysis of the extent to which it should be possible to vary provisions of the Model Law by agreement. We have described as "structural" those provisions which are logically incapable of amendment or which we believe are a necessary part of the structure of the law. Other provisions are described as "mandatory" or "variable".

Provision	Structural	Mandatory	Variable	Notes or Explanation
1(1)	×			Scope of the law.
(2)	×			Definition.
2	×			Definitions.
3	×			Provision about variation.
4(1)			×	Variable in principle, but scope for variation probably limited.
(2)			×	Variation subject to (3).
(3)	×			Provision about variation.
(4)			×	Could be varied by contract.
(5)			×	First sentence a basic proposition. Remainder could be valid by agreement, e.g. no liability if sender fails to comply with procedure.
(6)		×		The obligation must be mandatory. The time of payment may be varied by agreement: we believe its useful to state this.
5	×			Effectively a definition.
6(1)	×			
(2)	×			
(3)		×		Effectively a definition. It is implicit that the first sentence is mandatory; we believe the second sentence should also be.
7(1)	×			

<i>Provision</i>	<i>Structural</i>	<i>Mandatory</i>	<i>Variable</i>	<i>Notes or Explanation</i>
(2)	×			This provision is essential to the operation of the law.
(3)		×		We believe the law will be more effective if this is mandatory.
(4)		×		We believe the law will be more effective if this is mandatory.
(5)			×	The existing draft provides for contracting out; we agree with this.
(6)			×	Senders may wish to agree that banks should not delay but always act on their instructions.
(7)	×			
8(1)	×			
(2)		×		See our comment on 6(3).
9(1)	×			See our comment on 7(2).
(2)		×		See our comment on 7(4).
(3)			×	See our comment on 7(5).
(4)			×	Banks may in practice agree to rely on words or figures; we believe such agreements should be permitted.
(5)		×		If this provision is amended as we suggest it should be mandatory.
10(1)		×		The originator could agree with its bank a later payment date, e.g. for a lower fee. The rule must otherwise be mandatory if transfers are not to be delayed.
(2)		×		This provision is supplemental to 7(3), (4) and (5) (and (6) if 10(2) is amended as we suggest) and should be variable only to the extent that they are variable.
(3)		×		This provision is supplemental to 9(2), (3) and (4) and should be variable only to the extent that they are variable.
10(4)		×		There could be no reason to vary this rule.
(5)		×		There could be no reason to vary this rule.
(6)	×			
11(1)		×		This and paragraph (2) can be varied only to the extent specified in paragraph (3).
(2)		×		Provision about variation.
(3)	×			We believe this is important.
(4)		×		This and paragraph (6) are necessary for the operation of the law.
(5)	×			This proposition is the minimum that can be said.
(6)	×			This is quasi-definitional.
(7)	×			
(8)	×			
(9)	×			
12		×		We believe that the law will be more effective if this is mandatory.
13(1)		×		See 13(2).
(2)	×			Provision about variation.
14			×	A bank might agree with its sender or the beneficiary that it did not need to trouble itself with small discrepancies. However, in the absence of an agreement with the beneficiary, a bank should be able to contract out only as between itself and its sender: it must issue a payment order for the difference even where it has agreed its sender need not do so.

Provision	Structural	Mandatory	Variable	Notes or Explanation
15	×			This is the minimum that can be said.
16(1)			×	Paragraphs (1) to (5) are variable only to the extent stated in (7).
(2)			×	
(3)			×	
(4)			×	
(5)			×	
(6)	×		×	
(7)	×			This provision is supplemental to 9(1) and (5).
(8)	×			Provision about variation.
17(1)	×			This provision is supplemental to the rest of article 16.
(2)	×			Article 17 contains fundamental propositions about the nature of the law and should not be capable of amendment.
(3)	×			Provisions about conflict of laws are not capable of amendment.
18(1)	×			
(2)	×			
(3)	×			

Intergovernmental international organizations

BANKING FEDERATION OF THE EUROPEAN COMMUNITY

[Original: English/French]

I. General observations

As the problems inherent in international credit transfers are currently settled by banks through agreements, as widely accepted international standards do exist (e.g. SWIFT) and as the contentious issues in this area are of little importance, the Banking Federation considers that a Model Law on international credit transfers is unnecessary and indeed of no use.

This aside, the draft Model Law should respect the principle of contractual freedom which allows the parties to agree on the solution best adapted to their needs. The Federation considers that the restrictions placed on this principle by the draft Model Law should be deleted.

II. Detailed observations

Article 2. Definitions

(a) Credit transfer

The Federation considers that the notion of credit transfer would benefit from being defined as follows:

"Credit transfer means the movement of funds from an originator to a beneficiary, in accordance with a payment order from the originator received by his bank."

Should this proposal not be adopted, the present definition of credit transfer should at least be amended to specify that the credit transfer begins with a payment order that the originator gives to his own bank. The words "to his bank" should thus be inserted in the first sentence of (a) of article 2, after the words "... of the originator's payment order".

The square brackets around the sentence relating to payments made through a point-of-sale payment system should be deleted, leaving no doubt that these payments do not come within the sphere of application.

Article 3. Variation by agreement

In the concern to allow practice to develop in line with needs, the Banking Federation would like the Model Law to establish more widely the principle of freedom of agreements, contrary to the provisions of this text.

It suggested that the restrictions laid down in the following provisions should be deleted:

- paragraph 3 of article 4,
- the first sentence of paragraph 2 of article 13,
- the last sentence of paragraph 7 of article 16.

Article 5. Payment to receiving bank

The Banking Federation expresses its satisfaction that the Model Law mentions the settlement of obligations among participants either bilaterally or multilaterally, and the application of bilateral netting agreements.

Article 8. Acceptance or rejection by beneficiary's bank

To avoid any ambiguity the Banking Federation suggests wording the title as follows: "Acceptance or rejection of a payment order by beneficiary's bank".

Article 9. Obligations of beneficiary's bank

With regard to the fourth paragraph the Federation proposes that the rule be amended so that in the event of discrepancy between the description of the beneficiary in words and any reference number, it is the latter description which prevails.

Article 10. *Time for receiving bank to [execute] payment order and give notices*

The Banking Federation points out that in practice it will not always be possible to comply with the requirements of the time limit laid down in the first paragraph of article 10. It thus considers that the rule, whereby a receiving bank is required to execute the payment order on the day it is received, is too strict. The rule is all the more severe as article 16 provides tough rules relating to liability. The rule differs moreover from the principle stated by the European Recommendation of 14 February 1990 on the transparency of banking conditions relating to cross-border transactions, under which a cross-border credit transfer should be executed within two working days. Banks in European Community countries risk facing problems in applying the requirement, due to the practical impossibility of sorting out credit transfers into those for EEC countries and those for non-EEC countries.

It is therefore proposed that the first sentence of paragraph 1 of article 10 be amended as follows:

"A receiving bank is required to execute the payment order as soon as possible, and at the latest on the day after it is received."

In any case, agreements contrary to the rule of paragraph 1 of article 10 should certainly be allowed.

Article 11. *Revocation*

The Banking Federation is in favour of the principles of this article.

It is suggested however that the text be clarified by adding to the fifth and seventh paragraphs that the revoked payment order in question is an order revoked under the rules of paragraphs 1 and 2.

Article 13. *Duty to refund*

The Banking Federation is opposed to the rule of the first paragraph of article 13 and considers as unacceptable the rule of paragraph 2 under which agreements contrary to the rule of the first paragraph are not allowed (see article 3 above).

It considers that the principle of liability of the originator's bank is too strict, and that this liability should depend on the nature of the negligence. In particular, the Federation cannot accept that the originator's bank, obliged to return the funds if the credit transfer is not executed, must also pay interest when failure to execute the credit transfer is a result of non-acceptance of the credit transfer by an intermediary bank or the beneficiary's bank, who have refused to execute the credit transfer.¹

Furthermore, comparison of paragraphs 1 and 2 of article 13 reveals that the second sentence of the former refers to "the originator's bank and each subsequent bank", whereas the second sentence of the latter refers only to "a receiving bank". The

question therefore arises of whether the originator's bank, although a receiving bank according to the definition given in article 2, profits by the exception provided by the second sentence of paragraph 2 of article 13. To remove any ambiguity in this respect the second sentence of paragraph 2 should expressly refer to the originator's bank.

This same second sentence of paragraph 2 of article 13 only considers the case where suspension of payment or prevention from making the refund relates to an intermediary bank, whereas such suspension or prevention may be due to the beneficiary's bank. The beneficiary's bank should thus be referred to as well as an intermediary bank through which it was directed to effect the credit transfer.

Article 14. *Correction of underpayment*

The rule should be completed as follows "(. . .) without prejudicing the right to recover the amount of the charges as laid down in article 17(3)".

Article 16. *Liability and damages*

These rules would be too severe if the requirement stipulated in article 10 for the execution of the payment order by the receiving bank were to be maintained.

Paragraphs 3 and 4: these paragraphs can be deleted since the originator does not incur any financial loss in the cases mentioned.

Paragraph 7: the Banking Federation is not at all satisfied with the rule under which a bank cannot reduce its liability to an originator or a beneficiary that is not a bank. It considers that agreements contrary to the provisions of article 16 must be allowed without reservation. In any event, the originator's bank should not be liable to the originator in the event of executing a formal order from the latter.

Paragraph 8: the Federation understands the reference to reckless behaviour on the part of a bank to correspond to inexcusable or gross negligence (for example, a credit transfer made to a country where it seems almost certain, and well-known, that it will not be executed). The paragraph, which can be approved in principle, would benefit from being worded more clearly.

Article 17. *Completion of credit transfer and discharge of obligation*

The Banking Federation considers that a credit transfer is completed only when the funds are placed at the disposal of the beneficiary by the latter's bank, and it expresses the wish that article 17 be amended in this sense.

Furthermore, it would perhaps be more logical to place this chapter after chapter I.

COMMISSION OF THE EUROPEAN COMMUNITIES

[Original: English]

Article 5. *Payment to receiving bank*

We would suggest to reformulate article 5(d)(iii) as follows:

"When final settlement is made in favour of the receiving bank at a central bank in which the receiving bank maintains an account."

¹The Dutch Banking Association considers it is not unreasonable that the originator's bank guarantees the execution of a payment order. The originator's bank should however have the right to refuse a payment order if the risks are too high. In this case the parties should be able to agree that acceptance of a payment order is subordinated to the condition that the originator bears the entire risk for a payment order not properly executed. Furthermore, an originator's bank accepting a payment order with special risks must have the right to charge the additional costs for covering the risk to the originator.

We consider that situations may arise, especially within the European Community, in which banks participate in payment systems, and have accounts with Central Banks of other countries without being located (established) in those countries. The proposed amendment clarifies that this possibility is not precluded by the specifications laid down in article 5. The amendment does not intend to modify the provisions of this article with regard to the timing of a payment ("following day" in sections (i) and (ii) as opposed to "final settlement" in sections (iii) and (iv)).

Article 10. Time for receiving bank to execute payment orders and give notice

We assume that the opening clause of article 10, stipulating that a receiving bank is required to execute a payment order on the day it is received, will be discussed again during the twenty-fourth session of the Commission to be held at Vienna from 10 to 28 June 1991.

The Commission of the European Communities is presently developing plans to increase the efficiency and in particular the speed, of cross-border transfers in the Community. Endeavours to induce banks to execute payment orders on the day they are received are, therefore, in principle to be welcomed.

The Commission has the impression, however, that banking systems of some countries might experience difficulties in this respect at the present stage. Without making a formal proposal to this effect, we would like to suggest that a possible compromise in this discussion, if it arises, may be reached in stipulating that the execution of a payment order must take place no later than the following day.

Article 18. Conflict of laws

The relation between this article and the "Convention on the law applicable to contractual obligations" (opened for signature in Rome on 19 June 1980, doc. 80/934/EEC, *Official Journal of the European Communities* No. L 266 of 9/10/1980, page 1) requires further studies. It might be useful to include certain principles, in particular those enshrined in article 9 of the said Convention, in article 18 of the Draft Model Law. However, this raises very complex problems of international law. We have not been able to retain the possibility of making further comments in this respect.

**HAGUE CONFERENCE ON PRIVATE
INTERNATIONAL LAW**

[Original: French]

Article 2. Subparagraph (a): Definition of credit transfer

It is proposed that the second sentence of the definition of "credit transfer" be deleted, saying that the term "includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order". Not only does this sentence seem unnecessary, since the hypothesis it envisages is already covered by the first sentence of the definition, but it even presents a danger, to the extent that a court might interpret the sphere of application of the Model Law as defined in its article 1 in a restrictive manner, applying the Model Law only to the element of the transfer effected between the sending bank and the receiving bank situated in different States.

Article 5. Payment to receiving bank

Subparagraph (b)(iv) a: The Permanent Bureau wishes firstly to point out that there is a typographical error in the draft Model Law submitted for appraisal by Governments: the reference to "applicable law" should be placed in square brackets, as is clear from the the last sentence of paragraph 83 of the report of the Working Group (A/CN.9/344 of 10 January 1991).

The Permanent Bureau proposes that this reference to applicable law should be deleted. It will be recalled in this connection that the hypothesis envisaged in this subparagraph relates to settlements effected by an interbank "netting" system. Netting is a relatively new system which has been the subject of study, notably by a Group of Experts on Payments Schemes of the Central Banks of the Group of Ten Countries, which met under the auspices of the Bank for International Settlements (BIS). As the report of the UNCITRAL Working Group quite correctly notes in paragraphs 60-62 (document A/CN.9/344), the Group of Ten was faced with an extremely complex legal problem, notably with regard to determining the law applicable to netting. Indeed, it is clear from their work and the statements made during the twenty-second session of the Working Group by the observer for BIS that the system of netting is only instituted with the agreement of all the parties and this agreement is reflected in internal rules, not depending on or regulated by the law of a given State. The only consensus which has been achieved within the Group of Ten is that the internal rules creating the netting must not be in conflict with the laws of any of the States parties to the system.

In other words, the monetary settlement that takes place between a sending bank and a receiving bank linked by a netting system can be in accordance only with the rules of the system: the reference to applicable law has no meaning because, once the netting is established, monetary settlement can take place only in accordance with the system established and not with a national law. The end of the article therefore only needs to read: "the settlement is made in accordance with the rules of the system".

Subparagraph (c): While a provision such as that contained in subparagraph (c) of article 5 can perhaps be justified in the context of an international convention, it does not seem to have any meaning in a Model Law. The fact is, and this is a classic legislative technique, that any reference in a Model Law to "the law" can refer only to that Model Law, which will become the national law of a State which decides to incorporate it in its system of law. It is precisely this Model Law, having become national law, which lists the means of settlement by which the sender's obligation to pay the receiving bank is discharged: that is the subject of article 5. One cannot see to which other law subparagraph (c) refers, unless there is an intention to allow the national legislator to add other means of paying the obligation to article 5; if that is the case, it would suffice simply to give such authorization either in the report or by a footnote. In the view of the Permanent Bureau, subparagraph (c) of article 5 should be deleted.

Article 17. Paragraph 3

The Permanent Bureau takes as its starting point the idea that the reference to the applicable law, in the last sentence of this paragraph, refers to the law applicable to the underlying liability linking the originator of the transfer with the beneficiary. It is suggested, for clarification purposes, that this should be specifically stated in the text of the provision.

Article 18. Conflict of laws

The problems raised by the conflict of laws in relation to international credit transfers, particularly because of the various

modalities of such transfers, are extremely complex in nature and would have deserved serious study before regulatory provisions of the kind contained in article 18 could be adopted. Not only has no such study been undertaken during the deliberations of the Working Group on International Payments, but article 18 as it stands, with the additions adopted during the last session of the Working Group following a proposal by the United Kingdom delegation, was not even discussed in open session. In the view of the Permanent Bureau of the Hague Conference, this article 18 raises too many delicate issues to be adopted as it is and, since it is not possible to amend it without serious study, the Permanent Bureau suggests that article 18 of the Model Law should simply be deleted.

Without going into all the problems raised by article 18, the Permanent Bureau would like to draw attention to the following points:

(a) Article 18, paragraph (1), as submitted by the UNCITRAL Secretariat (document WP.42 of 27 April 1989—it was then article 15), contains an ambiguity because of an apparent confusion of two problems: on the one hand the conditions for the application of the Model Law, and on the other the conflict-of-laws rules whose object is precisely to determine the application of this Model Law. The report of the Secretariat suggested that one could envisage a provision regulating conflict of laws only when the dispute arose in a State which had adopted the Model Law, and the other interested State or States had not done so. Hence the ambiguity: is article 18 intended only to determine the applicable law when the banking relationship involves States which have not adopted the Model Law—which would imply that, for application in a State of the uniform rule itself, another conflict rule should apply—or is article 18 also intended to designate the law of the State which has adopted the Model Law? If that should be the case, and the Permanent Bureau cannot see how article 18 can be interpreted in any other way, one is faced with a clear technical inadequacy, consisting of adopting in a substantive law a conflict rule whose aim is specifically to determine the application of that law. This technique is, admittedly, used in some legal systems (notably in the United States—cf. the conflict rule in article 4A of the Uniform Commercial Code (UCC), section 507—but in this context it can be justified as an American interstate rule), but it is quite alien to the civil law system and the Permanent Bureau knows of no examples of conventions or Model Laws adopting such a solution.

(b) A much more serious objection, in the eyes of the Permanent Bureau, to the solution in article 18 concerns the very nature of the Model Law and its very broad substantive sphere of application. The Permanent Bureau does not think that it is possible for one and the same conflict rule to be included in the Model Law to cover two fundamentally very different cases: that of paper-based transfers and that of electronic transfers. In the case of paper-based transfers, the segmentation of a global international credit transfer into a series of distinct bilateral operations, to each of which a different law would apply, may be conceivable (although it does not seem desirable), but it would seem quite impracticable in the case of an electronic credit transfer. The extreme speed of such transfers makes it in practice impossible to split them into different bilateral operations within the overall transfer, and for this new method of transfer a system should be devised in which a *single law* regulates the transfer as a whole.

Moreover, it seems that in the United States, where electronic credit transfers are most advanced, such a conception of the single law does indeed exist, despite the conflict rule of article 4 of UCC, section 507: credit transfers through the Federal Reserve Bank system, that is transfers through FEDWIRE, are subject to a new Regulation J which came into force on

1 January 1991 (see Federal Register, vol. 55, No. 194, of Friday, 5 October 1990) and which mandatorily sets aside article 4A of UCC for all transfers by FEDWIRE and imposes Regulation J on all parties to such transfers. The same goes for the system introduced by the Clearing-House Interbank Payments System (CHIPS), which in its rule 3 imposes the law of New York for all transfers made through that system (see document A/CN.9/341 of 13 August 1990, paragraph 27).

These considerations probably explain why the United States delegation at one time proposed a special rule for article 18 (which was then article 15) to resolve the specific problem raised by an electronic funds transfer system (see document A/CN.9/341 of 13 August 1990, paragraphs 24 *et seq.*), a proposal which was not taken up by the Working Group.

The Permanent Bureau wishes to recall here that the Hague Conference has placed on its agenda of future work a study of specific problems of private international law which, in regard to trade law, may arise from the use of electronic procedures (see the final act of the sixteenth session, B, paragraphs 4a and b), and has in particular invited the Permanent Bureau to establish links in this area with those international organizations concerned, "taking specially into account, as regards electronic funds transfers, the work undertaken within the United Nations Commission on International Trade Law (UNCITRAL)". It is likely that, if article 18 were to be deleted from the Model Law, the Hague Conference would then undertake work on the subject, making the necessary studies of specific problems of conflict of laws relating to international transfers, in collaboration with interested banks, in order to achieve complete regulation of conflict of laws for all transfer systems.

[A/CN.9/347/Add.1]

FRANCE

[Original: French]

The Draft Model Law on International Credit Transfers, adopted by the Working Group on International Payments at the conclusion of its twenty-second session, held in Vienna from 26 November to 7 December 1990, calls for the following observations.

1. *On the principle of a model law*

A model law seems preferable to the drafting of an inter-governmental convention.

2. *Sphere of application (article 1)*

The sphere of application as defined in article 1 is satisfactory.

3. *Definitions (article 2)*

Definition of "credit transfer"

The phrase in square brackets ["The term does not include a transfer effected through a point-of-sale payment system"] should be deleted since the question of knowing whether the payments effected through a point-of-sale system are credit orders or debit orders is not clear.

4. *Payment to receiving bank (article 5)*

Paragraph (b)(iii)

The wording adopted by the Working Group is based on the idea that a bank can only obtain "central bank settlement" at the central bank of the country in which it is located.

Thus, assuming that the sending bank and the receiving bank are located in different countries and that both have an account at the central bank of the country in which the sending bank is located, the obligation to pay could be discharged only under the terms of paragraph (b)(ii) ("when a credit . . . is used" or "on the business day following the day on which the credit is available for use") and not under the terms of paragraph (b)(iii) (that is, when final settlement is made at the central bank).

If the basis of the rule laid down in paragraph (b)(iii) is that a settlement through an account at a central bank is equivalent to a settlement in cash, all cash settlements at central banks should be treated in the same way, with no distinction made as to whether it is the central bank of the country in which the receiving bank is located or another central bank.

This point is all the more important since within the European Economic Community some central banks are unclear as to the possibility of accepting in the settlement systems they manage banks that are not established in their country but that operate out of another Community country.

For these reasons, it is proposed that paragraph (b)(iii) should be amended as follows:

"when final settlement is made in favour of the receiving bank at the central bank at which it has an account, or".

Paragraph (b)(iv)

The Working Group has wished to recognize the existence of interbank settlement systems, on the one hand, and bilateral netting agreements, on the other.

According to the present wording of subparagraphs (a) and (b) of paragraph (b)(iv), the obligation to pay the receiving bank would be discharged when final settlement was made through any interbank settlement system or in accordance with any bilateral netting agreement even if these systems or agreements were operating under conditions that were insufficiently secure in legal terms to allow these systems or agreements to be recognized as valid according to the criteria laid down in the Report of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries (report published by the Bank for International Settlements in November 1990).

It would be advisable, therefore, at least to add a reservation to subparagraphs (a) and (b) of paragraph (b)(iv). This reservation might consist in adding the following phrase to each of these subparagraphs:

"provided that the rules governing this system (this agreement, in the case of subparagraph (b)) are compatible with this law."

5. *Obligations of receiving bank that is not the beneficiary's bank (article 7)*

It is desirable that the following sentence should be added to article 7(2):

". . . to implement the credit transfer in an appropriate manner. It must, specifically, effect the operation in the currency or unit of account stipulated by the sender."

The purpose of this addition is to remind the banks that they are not, when implementing payment orders, to take the initiative of converting the funds received into a currency other than that in which the order has been made out by the sender.

The automatic conversion of currencies by receiving banks is the main source of disputes between French and United States banks in connection with the implementation of credit transfers.

6. *Obligations of beneficiary's bank (article 9)*

An addition similar to the one recommended for article 7(2) and inspired by the same concern is also desirable in the case of article 9(1):

". . . relationship between the bank and the beneficiary. It must, specifically, place the funds at the disposal of the beneficiary in the currency stipulated by the sender, unless otherwise instructed by the beneficiary."

7. *Time for receiving bank to [execute] payment order and give notices (article 10)*

The principle of execution on the same day is too restrictive since the purpose of the model law is to govern not only electronic credit transfers but also paper credit transfers.

It is proposed that the chapeau of article 10(1) should be amended as follows:

"A receiving bank is required to [execute] the payment order no later than the day after it is received, unless . . .".

8. *Revocation (article 11)*

Article 11(4) requires the authentication of a revocation order, whereas article 4 suggests that the authentication of payment orders is optional. This difference in treatment hardly appears justified.

Moreover, the current wording of article 11(4) has resulted, it would seem, from the fact that at one time it was envisaged that a revocation order was to be authenticated "in the same manner as the payment order" that it revoked, and that the Working Group had rightly taken the position that this formal parallelism was not necessary.

Once the words "in the same manner as the payment order" had been deleted, all that remained of the original provision was the phrase "A revocation order must be authenticated", with no further specification.

This being the case, article 11(4) would gain by being re-drafted in the following way:

"When a revocation order must be authenticated, this need not necessarily be done by the same method as the payment order."

9. *Duty to refund (article 13)*

The drafting of article 13(2) is not satisfactory.

It is very important that the principle of the obligation to refund the funds received when a credit transfer cannot be completed should be maintained. Under French law, in fact, a bank that has received funds for the purpose of carrying out a credit transfer is regarded as bound to the party that has remitted these funds to it by a bailment contract, it being considered that the obligation on the part of the bailee to return the funds to the bailor is the very essence of a bailment contract.

Nevertheless, it should be admitted that, in certain circumstances, a bank can only agree to carry out a credit transfer at the risk of the originating party.

In the current drafting, the second sentence of article 13(2) does not convey this idea that only exceptional circumstances can justify the stipulation in a credit transfer order that it is "at the risk" of the originating party.

In addition, it also seems reasonable to suppose that, assuming that the originating party has instructed that the transaction should involve one (or several) particular correspondent (or correspondents), he will make it his business to recover the funds directly from the correspondent (correspondents) in question as soon as it (they) has (have) received the funds.

Article 13(2) at best very indirectly reflects this idea, which is only conveyed by the words "through which it was directed to effect the credit transfer" (French: "conformément aux instructions reçues", line 5 of the French text).

For these reasons, article 13(2) should be discussed anew.

ITALY

[Original: English]

The draft Model Law refers to credit transfers, i.e. to shifts of amounts carried out under the initiative of the debtor at an international level, i.e. implying an ordering bank and a receiving bank sited in two different States.

The regulation of the different phases and multiple aspects of these payments has been dealt with by a draft Model Law, and it is not excluded that the latter can be transformed into a Convention. To this regard we esteem that the second solution would be more advisable, as it would not leave to adherent States any space for possible departure from the official procedure, therefore enabling to pursue the aim of a standardized regulation.

On the other hand, the necessary flexibility in some particular situations would in fact be guaranteed, within some limits, by article 3, which allows parties to depart from the law, unless the latter formally provides for non-derogation.

Operations regulated by the draft Model Law are characterized as international transfers. To this regard in Community circles, it has been debated on the opportunity to extend the implementation of the law also to national transfers, keeping into account the possibility that the EEC itself incorporates UNCITRAL dispositions in a measure of its own (directive or other).

To this regard we point out that there would not be any hindrance to an extension of this legislation within our country, such legislation being consistent with inter-bank systems in force.

The Model Law, furthermore, excludes from its field of implementation the transfers originated by means of a point-of-sale terminal, i.e. those specifically defined under the banking terminology, but also covers all other transfers, of any amount. This exclusion seems consistent with the choice not to take into account matters which may pertain to the consumers' protection.

This line of activity moreover can seem satisfactory for the United States which already avail themselves of an adequate legislation as far as the relationship between consumers and

financial institutions is concerned, but leaves the matter unsolved for the European nations who, like ours, do not have such regulation.

Referring to provisions concerning the intervention of intermediary banks, the article 6(2)(a) establishes the rule that the order has effectively been accepted, if the term provided for by article 10 has elapsed without notice of rejection having been given, but such acceptance is subordinated to an availability of funds in the account to be debited, or to the fact that the payment has been executed.

On the other hand we deem it would be preferable, keeping in mind a clear need of security, that the rule could be valid in every case, i.e. that the bank which receives the order should always be bound to make its rejection known, even if such rejection is due to lack of funds, because otherwise the person who issues the order, faultlessly unaware of such circumstance, could rely on the execution of the order and be kept liable for failure of execution. A possible modification, as we have suggested it, would entail the necessity to modify accordingly the following paragraph (3).

Article 7 regulates the obligations of the receiving bank which is not the bank of the beneficiary. In paragraph (5) of this article, it would be better to establish that in case there should be not time to ask instructions to the sender, the order should stand for the lesser amount or for the amount written into letters, and the sender should be notified thereof. In paragraph (6) of the same article it is advisable to delete the sentence contained between "or that following the instruction" and "the credit transfer", as the execution of an order is not impossible in this case, but it might be more expensive.

The same consideration can be made, with reference to the above-mentioned comment relating to article 6(2)(a) and article 8(1)(a) when regulating the case of acceptance by the beneficiary bank. If this modification is accepted, paragraph (2) should also be adjusted, in cases of rejection of a transfer order.

As for article 9(3), we hold that what is said in paragraph (5) of article 7 is valid, as the former seems to be a repetition of the latter.

In the Model Law the principle of the irrevocability of the transfer is established, in view to give security to the use of such means of payment. In fact this principle lives together with a whole set of possibilities of exception which would repeal its validity. As on the other hand the same article 11 allows parties to establish the total irrevocability of the order which has been given, it would be better to reverse the matter, and establish the irrevocability from an absolute point of view, providing for a possible waiver by means of an agreement between the debtor and the beneficiary. If article 11 were to be maintained in its original wording, the possibility to shorten the terms of the revocation of a payment, provided for at article 3, should not be allowed, as it could be a source of insecurity. In paragraph (4) of this article, one should then regulate the hypothesis of the paper money order, for which there is the problem of the signature (and authentication of the signature) of the person who can legitimately undertake obligations on behalf of the sender.

Lastly, we must remember the principle contained in article 17, under which the acceptance by the beneficiary's bank is the last phase of the payment order, and it extinguishes the obligation existing between the parties just like a payment in cash. The principle is taken from the recent United States law on the matter of funds transfers, but it is opposite to the solution sustained by the best Italian doctrine, under which the paying off of the obligation coincides with the crediting of the

beneficiary's account, or in any case with the moment when funds are placed at the disposal of the beneficiary.

MOROCCO

[Original: French]

1. Article 2

(a) The last, bracketed sentence in the definition of "credit transfer" should be deleted since a payment order issued by a point-of-sale payment system also implies an authentication or validation procedure agreed upon by the originating party and his bank.

(i) The definition of the term "funds" or "money" is overly restrictive since it is limited to credits on account and excludes cash payments.

(j) If the authentication procedure is correctly applied, the payment order in its entirety will be regarded as having been issued by the purported sender, so that the words "all or part of" should be deleted.

(m) The "payment date", more commonly known as the "validity date", is not always indicated on the initial payment order. In this case, it generally corresponds to the date on which the payment order is accepted by the beneficiary's bank. Accordingly, it would be useful to provide for this case.

2. Article 4

The provisions of paragraphs 1 to 4 have not been drafted with sufficient clarity to facilitate their understanding and interpretation, all the more since the term "purported sender" is nowhere defined.

What is more, the provisions of paragraph 4 are subject to criticism in that, in actual practice, all payment orders that have been duly authenticated in accordance with the authentication procedure agreed must bind the sender *vis-à-vis* his bank or its foreign correspondent. The purported sender must logically enter a claim against the party that originated the fraudulent instruments and not against his bank or its foreign correspondent. The purported sender remains bound by these instruments so long as he has not revoked them before the completion of the credit transfer.

3. Article 5

Paragraph (c) refers to the "law" without specifying whether it is the law of the country of the sender (originating party, primary receiving bank or intermediary bank) that is intended.

Moreover, it might be supposed that this paragraph refers, *inter alia*, to payment by drawing on an authorized overdraft or cash facility. If this is not the case, which would imply the prior existence of sufficient funds on account, explicit provisions should be made for this case. Subparagraph (a)(ii) of paragraph 2 of article 6 and subparagraph (a)(ii) of paragraph 1 of article 8 should be brought into conformity with this observation.

4. Article 10

Since certain national regulations provide for execution dates different from those covered by paragraph 1 of article 10, a subparagraph (1)(c) should be added to this article with the following wording:

"The regulations in effect in the country of the receiving bank provide for an entirely different execution date."

5. Article 13

In the case of the non-completion of the credit transfer in accordance with article 17(1), the principle of the refund of the funds paid at the different stages of the operation is incontestable. With regard to the interest running from the day of payment to the day of refund, the payment of such interest does not have to be justified except when the receiving bank has failed to honour the sender's instructions. This idea should be reflected in paragraph 1 of article 13.

6. Article 16

(a) Paragraphs 1 and 2

The provisions of paragraph 1 do not appear to be in keeping with actual practice. In fact, when there is a delay in the receipt of the funds by the beneficiary, the latter enters a claim for damages (delay interest) against the originating party and not against a receiving bank other than his own. However, for its part, the beneficiary's bank that fails to place the funds at the beneficiary's disposal within the period specified remains directly responsible and thus liable to the beneficiary for delay interest.

Accordingly, paragraphs 1 and 2 of article 16 should be redrafted.

(b) Paragraph 5

The last sentence of this paragraph should have referred to the receiving bank's liability for the shortfall between the amount of the payment order received and accepted and the order issued for execution. As drafted, this sentence should be deleted.

UNITED STATES OF AMERICA

[Original: English]

I. Background

The seventh session on international credit transfers of the United Nations Commission on International Trade Law (UNCITRAL) Working Group on International Payments ("Working Group") was held in Vienna, Austria, from November 26 to December 7, 1990 ("Vienna session"). A revised text of a draft model law on international credit transfers ("draft model law") was produced. This text of the model law will be presented to the plenary meeting of UNCITRAL, to be held in Vienna from June 10-28, 1991 ("plenary meeting"). The United States has urged that the draft model law be designed to be compatible with new computer banking and clearing systems and thus facilitate international commerce and trade.

II. Organization

This paper is a list of the continuing concerns of the United States regarding the draft model law.

Some of the continuing concerns are accompanied by a proposed change in the draft model law. Each proposal is specifically denoted as such by separating it from the preceding and subsequent text.

Other concerns, however, are not accompanied by a specific draft for a proposed change. The United States hopes that such

discussion will lead to an appropriate change in the draft model law. The absence of a specific draft for a proposed change below should not be interpreted as an indication that the concern listed is of diminished importance.

III. General comments

The delegation is heartened by the significant progress made at the Vienna session. But, it cannot fail to express its continuing concerns regarding certain provisions in the draft model law. What must be considered are potential adverse effects of these provisions on: (1) existing high-speed, high-volume electronic credit transfer systems; and (2) facilitating the development of such systems.

The position of the United States is dependent upon there not being introduced and adopted new provisions which would undercut the ability of the Model Law to support existing and future high-speed, high-volume electronic credit transfer systems.

IV. List of continuing concerns and proposed changes

A. Article 1: Sphere of application

1. Article 1(1): Test for internationality

A credit transfer should not be divided into an "international" part and a "domestic" part. Such a distinction poses conceptual problems. The test for internationality contained in article 1(1) ("a sending bank and its receiving bank are in different States") is formalistic and therefore potentially under- and/or over-inclusive. For example, suppose a sending and receiving bank are located in State A, but the originator is in State B and the beneficiary is in State C. This transfer is treated as outside the scope of the draft model law, and accordingly the draft model law may be viewed as under-inclusive.

The test for internationality also may pose operational problems. It presumes that a receiving bank is cognizant of the geographic location of its sending banks. In many instances, this may be so. But the draft model law purports to govern all segments of an international credit transfer, and not all receiving banks in a funds transfer chain may be aware that a sending bank earlier in the chain was located in a different State. For instance, suppose a sending bank is located in State A and receiving bank No. 1 is located in State B, so the Model Law is triggered under article 1(1). Suppose further that subsequent intermediary banks, e.g., receiving banks Nos. 2 and 3, are located in State B too. The draft model law purports to govern the credit transfer segments between receiving banks Nos. 1 and 2 and Nos. 2 and 3. It is not clear that receiving banks Nos. 2 and 3 know that sending bank No. 1 was in State A. This is relevant in so far as the draft model law imposes obligation on them that are different from those under domestic law.

Finally, as a legal matter, dividing credit transfers into "international" and "domestic" does not necessarily result in greater harmony among domestic payments system laws, contrary to the goal of the Working Group. Rather, it may result in the creation of a public international law document (the draft model law) which tolerates disharmony among domestic laws. Stated differently, to the extent the draft model law seeks to create a "level playing field" in the area of payments system law, then the drafters should be wary of artificial distinctions.

2. Footnote: Consumer law

The footnote to this article states that the draft model law does not deal with consumer-protection issues. It is unclear

whether this means that the draft model law applies to consumers unless the internal laws of a particular State otherwise govern the transaction. What if consumer protection laws of a State conflict with provisions in the draft model law only in some respects? Would the draft model law apply to parts of a credit transfer, and that State's consumer protection laws apply to other parts of the transaction?

Proposed change:

To clarify such issues, the footnote as currently drafted should be replaced by the following footnote:

"The consumer protection laws of a particular State may further govern the relationship between the originator and the originator's bank, or between the beneficiary and the beneficiary's bank, within the State, but may not impair the rights of other parties to a credit transfer located in a different State, as provided in this law."

B. Article 2: Definitions

1. "Credit transfer" (article 2(a))

There appears to be opposition on the part of certain delegations to the bracketed language in the definition of "credit transfer". The draft model law should not cover point-of-sale transactions ("POS"), because these are more properly regarded as debit transfers. Furthermore, regardless of the conceptual issue, the legal implications of POS transactions have not been reviewed *vis-à-vis* all the other provisions of the draft model law. Finally, POS transactions are primarily consumer transactions, and the complications of including them seems at odds with the purpose of the draft model law.

Proposed change:

The square brackets should be removed and the text should remain as currently drafted.

In addition, a "credit transfer" is more precisely viewed as a series of "payment orders," not a series of "operations".

Proposed change:

Accordingly, the word "operations" in the first sentence of article 2(a) should be replaced with the word "payment orders".

Finally, the ending point of a "credit transfer" is currently set forth in the first sentence of article 17(1). To avoid any misunderstanding, it would be more appropriate to include this in the definition of "credit transfer" in article 2(a).

Proposed change:

The first sentence of article 17(1) should be included in article 2(a) as the last sentence of article 2(a).

2. "Beneficiary" (article 2(d))

This definition is not sufficiently restrictive so as to eliminate the possibility that a "beneficiary" could be a party receiving funds from a non-bank.

3. "Bank" (article 2(f))

This definition is too broad because it includes telecommunications carriers, possibly certain securities firms, and other entities which do not maintain the same standards as banks and are not subject to similar regulatory regimes.

Proposed change:

The current definition should be eliminated and replaced by the following definition:

"A bank is defined as an institution that:

- (i) engages in the business of banking;
- (ii) is recognized as a bank by the bank supervisory or monetary authorities of the country of its organization or principal banking operations;
- (iii) receives deposits to a substantial extent in the regular course of business; and
- (iv) has the power to accept demand deposits."

4. "Authentication" (article 2(j))

A payment order is authenticated in its entirety, but this definition refers to the authentication of "part" of a payment order. In addition, authentication can refer to amendments of a payment order.

Proposed change:

The definition of "authentication" should be amended by deleting the words "all or part of". In addition, the words, "an amendment of a payment order" should be inserted after the words "payment order". Thus, article 2(j) should read:

"'Authentication' means a procedure established by agreement to determine whether a payment order, an amendment of a payment order, or a revocation of a payment order, was issued by the purported sender."

5. Additional definitions

Even though the term "Credit Transfer System" (or "Funds Transfer System") is used in articles 5 and 7, it is not defined. (See article 5(b)(iv).) This is also the case with respect to "Interest" and "Revocation" of a payment order.

Proposed changes:

"Credit transfer system":

"'Credit Transfer System' means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed."

"Interest"

"Unless otherwise agreed between the relevant parties, 'interest' refers to the inter-bank rate of interest in the currency of the State in which the receiving bank is located."

"Revocation"

"A 'Revocation' of a payment order is an instruction to a receiving bank from a sender intended to rescind a payment order previously issued by the sender."

C. Article 3: Variation by agreement

Article 3 does not provide for variation by a credit transfer system rule. How will this affect a credit transfer sent through existing and future systems? For example, how will it affect a credit transfer involving the Society for Worldwide International Financial Telecommunications ("SWIFT"), or a credit transfer through the Clearing House Interbank Payments System ("CHIPS"), which is destined for a foreign beneficiary's bank on the books of a US bank? How will this affect a credit transfer

which in part is sent through Fedwire but which has an international aspect to it (e.g., the beneficiary's bank and the beneficiary are located in a foreign country)?

The draft model law should provide for the possibility of varying the effect of a rule of a credit transfer system by agreement, if rules of a credit transfer system provide for such variance, and therefore, this should be made clear in article 3.

D. Article 4: Obligations of sender

1. Article 4(3): Authentication

Article 4(3) is a problem because, if authentication is not commercially reasonable, then article 4(2) does not apply by its own terms. It would seem that the intent behind article 4(3) is to prohibit variation by agreement of the effect of article 4(2). Yet, because article 4(2) deals only with payment orders subject to authentication, is it possible to vary the terms of the draft model law as they relate to an unauthenticated payment order? That is, may the parties vary the effects of article 4(1) by having the purported sender of an unauthorized order be bound by the order none the less because the receiving bank and the sender choose not to authenticate?

2. Article 4(2): Variation

An additional and perhaps more important concern is as follows. Under article 4(2), a purported sender of a payment order is bound by that order if the order is authenticated by a commercially reasonable security procedure with which the receiving bank complied. Suppose the authentication procedure is not commercially reasonable. Can a sender agree with its receiving bank that the sender nevertheless will be bound by the payment order? Under article 4(3), the answer is no.

This answer is imprudent. Each sender should be allowed to perform its own cost-benefit analysis and agree with its receiving bank on the security procedure that is less than commercially reasonable. In turn, the receiving bank should be allowed to disclaim liability if such a procedure is adopted. Currently, major banking systems do allow such variation. A law which purports to prohibit such an accepted commercial practice poses difficulties that are not matched by any benefits.

Proposed change:

Article 4(3) should be deleted in its entirety.

E. Article 6: Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank

Article 6(2)(a) is objectionable because it allows for "passive" acceptance on the part of the originator's bank or the intermediary bank. That is, not rejecting within the time for execution prescribed by article 10, acceptance is deemed to have occurred. A court may view culpability for failure to execute an accepted payment as a very serious matter, and "the door remains open" to consequential damages. (See article 16(8).)

F. Articles 7 and 9: Obligations of banks

1. General concerns

(a) The obligations are neither appropriate nor feasible

Notification duties are imposed on receiving banks that are well beyond the scope of duties normally viewed as reasonable and are incompatible with the development of high-speed,

high-volume electronic credit transfer systems. In particular, a receiving bank may be required to give notice of a misdirection, an insufficiency in data, or an inconsistency between words and figures (article 7(3)-(5) and article 9(2)-(4)).

Receiving banks in an electronic environment must have the ability to rely on figures, not words. Electronic transmission in large volumes cannot be stopped on receipt of each payment order and checked for discrepancies. An electronic credit transfer is akin to an express train that, unlike a local train, bypasses most stations. Forcing a delayed system because of pauses at each receiving bank will increase costs, slow volume, and not work with high-speed banking.

Hence, for example, the obligation imposed on a receiving bank to give notice of an inconsistency between words and figures describing the amount (article 7(5)), and the obligation to give notice of an inconsistency between words and figures describing the beneficiary (article 9(4)), are too severe. A receiving bank should be entitled to rely solely on figures, and so long as prior parties in the credit transfer chain are aware of this practice, the receiving bank should bear no liability for mismatches or misdescriptions.

There is no clear indication in the draft model law that a receiving bank is allowed to rely on a figure, as opposed to a word, in the event of an inconsistency. For high-speed, high-volume systems, in which processing of payment orders is automated, the ability to rely on numbers is crucial. Presumably, banks want to comply with laws. Yet, as an operational matter, compliance with the draft model law would be difficult or impossible.

If a receiving bank is permitted to rely on numbers with respect to domestic credit transfers, but not with respect to international credit transfers under the draft model law, then it would be forced to divide the payment orders it receives between those that come from domestic and from foreign senders. Yet, this would pose serious operational difficulties and increased costs, and would be unlikely to be implemented.

(b) The penalties are not properly specified

The remedy for failure to perform these duties is interest on the funds that are held (article 16(3)-(4)). While this might simply prevent unjust enrichment, there is no definition of "interest" so this is not certain to be the result.

2. Specific concerns

(a) Article 7(2)

The reference to "appropriate" intermediate bank is ambiguous. Receiving banks that are instructed should not be authorized to change those instructions unilaterally. (See the discussion of article 7(6).)

Proposed change:

The word "appropriate" should be deleted.

(b) Article 7(5)

This subparagraph concerns an inconsistency in a payment order between words and figures. In the case of "straight-through" processing (i.e., automated processing without manual intervention), the inconsistency may not be discovered by a receiving bank. Or, the receiving bank may not be notified of a problem occurring elsewhere in the credit transfer.

Proposed change:

An appropriate correction in the text of the draft model law should be made.

(c) Article 7(6)

This subparagraph allows a receiving bank to disregard the instructions of a sender regarding the use of an intermediary bank. Suppose the beneficiary's bank (or the beneficiary) relied upon the receipt of funds at a designated intermediary bank, and consequently drew down on its account with the intermediary bank in reliance upon this expected receipt. Then, an overdraft might be created, and overdraft interest charges and other damages might result. Accordingly, a receiving bank should not be allowed unilaterally to disregard instructions on the designation of an intermediary bank.

(d) Article 9(3)

This is a serious problem for the reasons previously discussed, namely, with automated processing, a beneficiary's bank should not be expected to discern a discrepancy between words and figures.

(e) Article 9(4)

This provision poses serious difficulties and would have deleterious effects on the payments system. Because a beneficiary's bank is likely to receive payment orders from a myriad of sources, and because it is not possible to have contracts with all bank senders and remote parties varying this provision, how can reliance ever be placed by a beneficiary's bank on account number? Suppose the account number matches the beneficiary with reasonable certainty, but does not match the name of the intended beneficiary. Will the beneficiary's bank be liable for the amount of the credit transfer if it credits the party identified by number? Banks which are not able to distinguish domestic from international credit transfers will have to match all orders by name and account number. Processing payment orders will be slowed down immeasurably, and the cost of such processing will vastly increase. This is all the more likely because article 9(4) would require a beneficiary's bank to give notice both "to its sender and to the originator's bank".

G. Article 8: Acceptance or rejection by beneficiary's bank

Article 8(1)(a)(i) refers to "passive" acceptance occurring upon receipt of sufficient available funds in the account of the sender to be debited. There is a lack of precision as to when acceptance occurs, because deposit accounts are dynamic. That is, funds are incoming and outgoing continually throughout the day. Few banks in the United States (and we believe in other countries as well) have on-line, real-time accounting systems; only at the close of the banking day will there be a static balance.

Proposed change:

It is essential to have a rule that allows for rejection within a specific time from the opening of the next banking day.

H. Article 10: Time for receiving bank to [execute] payment order and give notices

Apparently, this applies to all types of receiving banks—originator's banks, intermediary banks, and beneficiary's banks. Article 10(1) requires execution unless certain enumerated events (i.e., (1)(a) or (b)) occur. However, the relationship between this provision and articles 6 and 8, which do not require

execution (i.e., which allow for a payment order to be rejected), is unclear and must be addressed.

In addition, the times within which required notices must be provided are unrealistically brief. If a notice must be provided (see the discussion of articles 7 and 9), it may well be operationally impossible to provide it on or before the day the payment order in question is required to be executed (article 10(2)), or on or before the payment date (article 10(3)).

Suppose a payment order is received late in the day, and that day is the execution date or the payment date. If a notification duty is triggered, it may be too late in the day to fulfil this duty. Instead, the earliest time at which notification can be provided may be after the beginning of the next banking day.

Proposed change:

Article 10(2)-(3) should be changed to allow for the provision of notice on the banking day after the payment order in question is received.

I. Article 11: Revocation

The conjunctive "and" on the fourth line of article 11(1) should read "or". (See, e.g., the style in article 11(2).)

Proposed change:

Replace "and" with "or" on the fourth line of article 11(1).

J. Article 12: Duty to assist

A receiving bank is obligated to assist each prior party in a credit transfer, and to seek the assistance of each subsequent party in a credit transfer, in the event the transfer is not completed. The vagueness of this duty is a serious problem.

With respect to this objectionable "duty to assist", there is no explicit statutory penalty for a failure to abide by the "duty", which itself is not defined. Does it mean telephone calls? Does it mean filing lawsuits in three countries? While the provision could be viewed as unimportant for this reason, a court may reason that a right without a significant remedy is not right at all, and, accordingly, it may read an implied remedy into the draft model law. Such an implied remedy could be severe.

K. Article 13: Duty to refund

1. Article 13(1)

Article 13(1) requires a refund with *interest* if the credit transfer is not completed in accordance with article 17(1). "Interest", however, is not currently defined. The definition of "interest" here proposed for article 2 will correct the ambiguity.

2. Article 13(2)

This subparagraph indicates that subparagraph (1) may not be varied by agreement. That is, the purpose of article 13(2) is that the general rule of article 13(1), the "money-back guarantee", may not be varied by agreement. In so far as this is accomplished by article 13(2), this is entirely correct—it should not be possible to vary the money-back guarantee by agreement.

The money-back guarantee is a fundamental aspect of the overall synthesis of interests of parties to credit transfers under the draft model law. It works to the advantage of senders of

payment orders in view of the necessary compromises on other issues made because of the high-speed, high-volume nature of electronic credit transfers.

However, as a separate matter, there is a potential ambiguity in article 13(2). Does it, for example, mean that the parties cannot agree as to an appropriate interest rate? This should be clarified.

L. Article 14: Correction of underpayment

An ambiguity needs to be resolved in view of existing commercial practices. Suppose the receiving bank does not issue a payment order for the difference between the amounts of the payment orders. This might occur because the originator has undertaken to remit the shortage or other arrangement may have been concluded to resolve underpayment (e.g., set-offs, etc.). What happens then? The draft model law should not be worded so as to preclude commercial practices.

M. Article 16: Liability and damages

1. Article 16(1), (5)

These subparagraphs are troubling in that they could create rights in a would-be beneficiary of a non-existent credit transfer against some bank. Specifically, the legal theory, and the conception of the relationships of the parties upon which this liability would exist, are seriously at variance with existing commercial legal principles and practices.

2. Article 16(3)-(5)

The "interest" which must be paid is unclear. The definition of "interest" proposed above will correct the ambiguity.

3. Article 16(4)

As currently drafted, this provision is applicable only to the obligations imposed on a beneficiary's bank that are specified in article 9(2) and (3). The draft model law does not specify the penalty for failure to perform the obligation specified in article 9(4) or 9(5). We have recommended that these obligations be deleted because of their impracticality. In any event, the penalty for violation of these obligations should have been limited to that specified in article 16(4).

4. Article 16(8)

This provision remains a very serious problem. The draft model law proposes penalties that have not been accepted in any other major electronic or telecommunications commercial field, and are unlikely to be accepted if included here.

A general "exclusivity clause" exists which states that the remedies set forth in the draft model law are exclusive. An express exception exists for "any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order (a) with the *intent* to cause loss, or (b) *recklessly* and with *knowledge* that loss *might* result". (article 16(8), emphasis supplied).

This exception is dangerous and unnecessary for several reasons, and is incompatible with high-volume, computerized banking and clearing systems.

First, the highlighted words may be interpreted differently in different jurisdictions, and may be seen as an invitation to award catastrophic damages. That is, terms like "intent", "recklessly", "knowledge", and "might" are imprecise without further qualification and have different meanings in different legal cultures.

Second, the words "any remedy" could be taken to include consequential damages. More generally, if "any" is meant literally, then this word is most troubling. Does this include consequential and punitive damages? Criminal sanctions?

Third, the words "reckless" and "might" are so broad as to open participating banks to liabilities that could preclude modern high-speed, high-volume systems.

Fourth, just as the language above is imprecise and vague, so too are the "trigger mechanisms". What constitutes a "failure" to execute or "improper" execution? These terms are not clearly defined. Yet, these are critical terms because these events trigger the imposition of an article 16(8) remedy.

Finally, article 16(8) is commercially unacceptable because it could apply to an originator's bank or intermediary bank that "passively" accepts a payment order.

N. Article 18: Conflict of laws

The general choice of law rule is that in the absence of an agreement, the law of the receiving bank applies (article 18(1)). This appears to be the proper result in the absence of a conflicts law which results in one law as applicable to all segments of a credit transfer.

However, this rule is inapplicable in the event of interloper fraud and in the event of a disputed agency relationship (article 18(2)). In such cases, there are two senders, the innocent customer and the alleged wrongdoer. If these parties are in different jurisdictions, then there are two additional potentially applicable laws to determine the issue of authority—that of the innocent customer and that of the alleged wrongdoer. This would present problems.

Proposal:

Article 18(2) should be eliminated in its entirety.

Comment:

A credit transfer system should be allowed to freely choose the law applicable to its system. The failure to include such a provision is likely to result in considerable difficulties in applying the draft model law. This is because international banking is increasingly moving toward new high-speed, high-volume means of transferring credit.

Proposal:

The Working Group should reconsider its earlier decision rejecting this concept.

BANK FOR INTERNATIONAL SETTLEMENTS

[Original: English]

A number of comments that address specific international aspects of the draft Model Law, in particular from the point of view of cooperation between central banks, have been transmitted to [BIS] by several central banks.

In the Bank's capacity as an observer at the sessions of UNCITRAL's Working Group on International Payments, I feel that it would be helpful if we were to pass on to you, in summary form, the comments which have been received by the BIS.

I therefore have pleasure in enclosing that summary, which complements, in specific areas, the observations which may already have been transmitted to you directly by the national delegations.

Summary of the comments received by the BIS from several central banks with regard to the UNCITRAL Model Law on International Credit Transfers

A. General observations

(1) Attention was generally drawn to the risk of possible conflict arising between different rules governing "national" and "international" credit transfers if the Model Law were adopted by legislation in any given country. In general it was felt that banks had sufficient capacity to distinguish between national and international credit transfers (e.g. usage of the SWIFT system).

However, the view was expressed that it was desirable for the rules which govern purely domestic credit transfers to be harmonized with those which deal with international credit transfers in order that the risks which arise in a credit transfer can be easily foreseen by the parties involved. In one country a special advisory committee is working on both the rules for purely domestic credit transfers and those for international credit transfers so that those rules become compatible.

(2) The point was raised that the application of the Model Law to interbank payments would lead to problems whenever the rules of the respective funds transfer system contradicted the rules of the Model Law. It seemed unlikely that national funds transfer systems would adapt their rules to the Model Law; in order to accomplish international funds transfers via the existing systems, the operating agency of such funds transfer systems, e.g. the central bank, would have to exclude the applicability of the Model Law as much as necessary and feasible.

(3) It was suggested that some of the problems indicated above could be overcome if the rules of the Model Law were not incorporated in a "model law" intended to be incorporated into different national legal systems but rather in a "convention". The "model law" approach could lead to a situation where, for instance, an intermediary is located in a country that had not adopted the rules of the Model Law. If, in such a case, the credit transfer was not completed, the originator's bank would have to refund the originator (article 13.1), without being able to get its money back from its receiving bank. On the other hand, a "convention" could be drafted in such a way that the rules would apply only if all banks involved were domiciled in contracting States (see, for example, the UN Convention on International Sale of Goods).

(4) A number of central banks feared that too great a divergence of the Model Law from existing national practice and domestic legal rules would cause participants in a credit transfer to make the widest use possible of "variation by agreement" (article 3), thereby invoking the danger of the Model Law being "art for art's sake".

B. Comments on specific articles

Article 5(b)(iv). Payment to receiving bank/netting

On the question whether there might be a conflict between the rules of netting schemes (or of a bilateral netting agreement) and the rules of the Model Law, various views were expressed.

(1) One view was that this clause should be maintained since it did not pose a major problem. The clause left the actual time of payment to be determined by the netting scheme's rules and applicable law; there was no attempt to validate or harmonize national laws governing netting.

Although these references to netting were narrow and limited, it was felt that they may be helpful in highlighting for national legislators the issue of the legal validity of netting, albeit only in the context of credit transfers.

(2) Other views expressed were in favour of deletion of the clause. It was stated that with regard to interbank netting schemes, there seemed to be a consensus that the time at which an obligation under a payment order is discharged should be determined by the terms and conditions of each netting scheme. Accordingly, it was suggested that article 5(b)(iv) was neither appropriate nor necessary.

The concern was voiced that the problems relating to "netting" had not yet been solved in a sufficient manner to be included in the Model Law with a view to defining the time of payment between sending and receiving bank.

(3) According to an intermediate view the clause required further study and refinement. It was thought that a mere reference to a netting agreement or to rules of a netting scheme would tend to create rather than to reduce uncertainties in this respect. For instance, it was pointed out that it was uncertain whether choice-of-law clauses in netting scheme rules would be upheld by a national court; rules relating to bankruptcy might be upheld in one, but not in the other country; bankruptcy law was mostly "national" law, and there did not exist generally accepted conflict-of-law rules regarding bankruptcy; netting involved problems like assignment of future obligations and novation of future debt that are not known or equally accepted in all legal systems. (For instance, it was stated that a rule like article 11.8 was contrary to certain national bankruptcy rules according to which a payment order is deemed to be revoked by the sender if it has not yet been accepted by the recipient.)

It was also pointed out that subparagraphs (a) and (b) open the possibility for an obligation to be settled in a "netting scheme" that did not function with all required legal security and that, in particular, did not comply with the minimum standards put forward in the Report of the Committee on Interbank Netting Schemes of the central banks of the Group of Ten Countries.

In addition, even though this clause did not seem to have a direct influence on the way participants in a "netting scheme" regulated their contractual relations, it was felt that this question should be studied more thoroughly, especially by those countries having wide experience in that domain. In addition, the references to netting in the Model Law did not address the problems which may arise from differing national law; it was suggested that this issue could be addressed by UNCITRAL in the future.

Article 10. *Time to execute payment order*

Concern was voiced that the rule according to which a receiving bank is required to execute the payment order on the day it was received created a problem whenever payment orders issued on paper and concerning small amounts were involved. In the light of the fact that the Working Group had opted not to make any reference to the form in which the payment order might exist and therefore not to limit the Model Law to electronic credit transfers, it was suggested that article 10 should more realistically reflect banking practice by obliging the receiving bank to execute a payment order no later than one

banking day after the day it was received. Another solution would be to make a distinction between electronic and paper based credit transfers.

Article 13. *Duty to refund*

(1) With reference to the "money-back guarantee" and the concern that this clause—which deviates greatly from banking practice in a large number of countries—might have a bearing on the applicable capital ratio, we refer to the letter from the Secretariat of the Basle Committee on Banking Supervision of 22 May 1991 (copy enclosed).

(2) With regard to article 13.2 it was suggested in comments received by the Legal Service that the exceptions listed should be more explicit. The French version, for instance, speaks of "impossibilité de payer". Does that include bankruptcy of the bank concerned? If so, the guarantee and security which is meant to be achieved in article 13 would be greatly weakened. In addition, under certain circumstances, a bank might not wish to perform a credit transfer unless it was agreed that the originator would assume all risks.

Article 17. *Completion of credit transfer and discharge of underlying obligation*

(1) Some answers appear to be in favour of the proposed rule: they stated that it was not unreasonable to relate the completion of a credit transfer to the point at which the beneficiary's bank accepts the payment order. However, under existing law, this approach remains a minority view in some countries.

Even though this rule might be considered an encroachment upon the underlying relationship, the rule nevertheless had the advantage that the beneficiary's bank would be considered as his "agent", so that the beneficiary would bear the risk of his own bank's bankruptcy.

In this connection, it was suggested that while the principle contained in article 17.1 correctly stated the time when a credit transfer is completed, this provision should rather be moved to the definition of "credit transfer" in article 2(a).

(2) Other answers were more critical with respect to the proposed rule. Taking into consideration the fact that credit transfers were often initiated for the purpose of discharging underlying obligations, it was observed that article 17.1 could complicate the situation because there may be some discrepancy between the time at which the credit transfer is completed pursuant to article 17.1 and the time at which the underlying obligation is discharged under relevant domestic rules.

Several answers commented that substantial differences existed with regard to time and place of "cash-less" payments. These problems were not solved by linking the completion of a credit transfer to "acceptance" by the beneficiary's bank. It was suggested that it would be preferable for international initiatives to achieve harmonization of domestic rules among major countries with regard to the time and place of payment to be revived. Such efforts should be given sufficient time to resolve possible conflicts with civil and commercial laws in those countries.

(3) With regard to article 17.2 several comments were made.

It was suggested that the question of time of payment could be dissociated from that of revocation of payment, so that the latest possible moment for revocation would be, for example, the debiting of the originator's account, while the payment itself would only be completed when the beneficiary's account was credited. This would have the advantage of reducing risks linked

to credit transfers (especially that of insolvency of the originator) while at the same time being in conformity with civil law rules on the time of payment.

It was also pointed out that the impact of article 17.2 on conflicting domestic rules has yet to be thoroughly analysed and that, pending such analysis, it might be preferable to delete this provision.

However, it was felt that the rule linking the discharge of a payment obligation to the "crediting of a beneficiary's account or otherwise placing the funds at the disposal of the beneficiary" (article 8.1(d)) conformed with precedent and legal doctrine. This rule was also in conformity with the International Law Association's Model Rules on the Time of Payment of Monetary Obligations.

Article 18. *Conflict of laws*

(1) The Model Law seems to take the position that it accepted multiple applicable laws at various stages of a credit transfer, on the assumption that participating countries would enact domestic laws compatible with the Model Law, and that it would be difficult to single out one law which would govern all States of a credit transfer. It was pointed out that a single applicable law governing an entire international transfer might be a preferable outcome, and that article 18 might help to achieve this outcome.

(2) It was suggested that while refining the rules to settle conflicts of law was realistic and meaningful at this stage, harmonization of the laws governing credit transfers was a more important goal.

It was felt that the question of conflict of laws would be less prominent if a large number of countries interested in international credit transfers were to enact the Model Law. The same would be valid if, in a given contract, the Model Law was made applicable by reference; it could even be envisaged that the Model Law should develop into a "usage", similar to the ICC's rules on letters of credit.

(3) However, it could not be expected that all countries will take legislative action to implement the provisions of the Model Law as a whole. It would thus be necessary to have a simple and decisive rule to settle the conflict of laws issue so that the Model Law provides foreseeability to the parties. Article 18 of the Model Law is ambiguous, however, regarding the extent to which the governing law chosen by the parties would be applied and the liability for damages incurred by a third party who is not in a sender-receiver relationship. It was therefore suggested that

article 18 should be deleted unless the present text of the draft undergoes considerable amendment.

It was believed that in any event the parties to credit transfers ought to remain free to choose the legal regime applicable to their transactions.

(4) It was suggested that the expression "law chosen by the parties" could be misleading. Even if this was meant to cover the whole transfer procedure, there could be a difference between the rules governing, say, the calculation of interest when a transfer is not completed (article 13) and the technical rules regarding the payment (*modalités de paiement*). The former rules should be governed by the chosen law but the technical rules might remain governed by the domestic law of the country where the intermediary bank is domiciled. Further discussion and clarifying amendments thus seemed necessary.

(a) *Basle Committee on Banking Supervision*

22 May 1991

Dear Mr. Bergsten,

I refer to your letter to M. Lamfalussy of 8 February 1991 on the UNCITRAL draft Model Law on International Credit Transfers (A/CN.9/344). As M. Lamfalussy indicated in his letter of 13 March 1991, as Secretary of the Basle Committee on Banking Supervision I have drawn the attention of the member institutions to article 13 and specifically to the question whether intermediary banks might be required to hold capital against the risk of having to return funds to the initiator of a transaction, without being able to receive the corresponding funds due to them.

Members do not feel that the 1988 capital accord would require banks placed in this position to include this risk as a contingent liability with a capital weight. Notwithstanding this view of the Model Law, I should add that the 1988 agreement acknowledges that there are a number of risks with which it does not deal, and some countries have additional requirements of their own. Banking practice in some member countries clearly differs from the practice envisaged in article 13 so that a further review might be necessary both by individual supervisors and perhaps by the Committee should the risks become material.

I hope that this letter helps to answer the question raised by the working group, but if I can be of any further help please let me know.

(P. C. Hayward, Secretary)

C. Report of the Working Group on International Payments on the work of its twenty-first session

(New York, 9-20 July 1990) (A/CN.9/341) [Original: English]

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INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to begin the preparation of model rules on electronic funds transfers and to entrust that task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments.¹

2. The Working Group undertook the task at its sixteenth session, at which it considered a number of legal issues set forth in a note by the Secretariat (A/CN.9/WG.IV/WP.35). The Group requested the Secretariat to prepare draft provisions based on the discussions during its sixteenth session for consideration at its seventeenth session (A/CN.9/297, para. 98). At its seventeenth session the Working Group considered the draft provisions prepared by the Secretariat. At the close of its discussions the Working Group requested the Secretariat to prepare a revised draft of the model rules (A/CN.9/317, para. 10). At its eighteenth session the Working Group began its consideration of the redraft of the model rules, which it renamed the draft Model Law on International Credit Transfers (A/CN.9/318, paras. 10-19). At its nineteenth and twentieth sessions it continued its consideration of the draft Model Law (see A/CN.9/328 and 329).

3. The Working Group held its twenty-first session in New York from 9 to 20 July 1990. The Group was composed of all States members of the Commission. The session was attended by representatives of the following States members: Bulgaria, Cameroon, Canada, Chile, China, Costa Rica, Czechoslovakia, Denmark, Egypt, France, Germany, Federal Republic of India, Iraq, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

4. The session was also attended by observers from the following States: Australia, Burkina Faso, Colombia, Ecuador, Finland, Indonesia, Israel, Jordan, Liberia, Pakistan, Philippines, Poland, Republic of Korea, Rwanda,

Saudi Arabia, Sweden, Switzerland, Thailand, Uganda, United Republic of Tanzania, Vanuatu, Venezuela and Yemen.

5. The session was attended by observers from the following international organizations: International Monetary Fund, Bank for International Settlements, Hague Conference on Private International Law, Banking Federation of the European Community, International Chamber of Commerce, Latin American Federation of Banks and Society for Worldwide Interbank Financial Telecommunication.

6. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora
(Mexico)

Rapporteur: Mr. Bradley Crawford (Canada)

7. The following documents were placed before the Working Group:

- (a) Provisional agenda (A/CN.9/WG.IV/WP.45);
- (b) International credit transfers: comments on the draft Model Law on International Credit Transfers (A/CN.9/WG.IV/WP.46 and Corr.1);
- (c) International credit transfers: proposal of the United States of America (A/CN.9/WG.IV/WP.47).

8. The Working Group adopted the following agenda:

- 1. Election of officers.
- 2. Adoption of the agenda.
- 3. Preparation of Model Law on International Credit Transfers.
- 4. Other business.
- 5. Adoption of the report.

9. The following documents were made available at the session:

- (a) Report of the Working Group on International Payments on the work of its sixteenth session (A/CN.9/297);
- (b) Report of the Working Group on International Payments on the work of its seventeenth session (A/CN.9/317);

¹Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 230.

(c) Report of the Working Group on International Payments on the work of its eighteenth session (A/CN.9/318);

(d) Report of the Working Group on International Payments on the work of its nineteenth session (A/CN.9/328);

(e) Report of the Working Group on International Payments on the work of its twentieth session (A/CN.9/329);

(f) International credit transfers: major issues in the Model Law on International Credit Transfers (A/CN.9/WG.IV/WP.42).

I. CONSIDERATION OF DRAFT PROVISIONS FOR MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

10. The text of the draft Model Law before the Working Group was that set out in the report of the twentieth session of the Working Group (A/CN.9/329, annex) and reproduced with comments in A/CN.9/WG.IV/WP.46 and Corr.1.

Article 14

11. The Working Group recalled that at its twentieth session there had been a short general discussion of article 14 so as to lay a foundation for a more thorough discussion of the article at the current session (A/CN.9/329, paras. 189-192).

Paragraph (1)

12. Although opposition was expressed, the Working Group decided to delete paragraph (1). It was stated that, while many legal systems already recognized credit transfers as an acceptable method of making payment, it was a matter of the policy of each State to decide whether a monetary obligation could be discharged by a credit transfer. It was also noted that it might be contrary to the monetary policy of some countries to consider credit in an account in a bank as having the same legal significance as money issued by a central bank.

Paragraph (2)

13. Under one view paragraph (2) should be deleted. In support of that view it was said that the current text assumed that the function of a credit transfer was to discharge an obligation even though a credit transfer could, in fact, have many other functions such as shifting funds between accounts of the same person. It was also stated that discharge should not result from a credit transfer if payment through another means had been stipulated between the parties or if the transfer had been credited to the wrong account.

14. It was stated that the Model Law should treat a credit transfer as an abstract operation, without regard to the purpose for which the transfer had been made or the legal effect of the transfer on the underlying transaction.

Under that view the Model Law should contain a provision stating when a credit transfer was completed. If the transfer was for the purpose of discharging an obligation, other rules of the law applicable to the obligation would determine whether, when and to what extent the obligation had been discharged by the transfer. The proponents of that view also suggested that, in order to be consistent with the definition of a "credit transfer" in article 2, completion of the transfer should result from the placing of the funds at the disposal of the beneficiary and not from the acceptance of the transfer by the beneficiary's bank.

15. Under another view, even though the Model Law would not have a provision providing that a credit transfer would constitute discharge of an obligation, the Model Law might include a provision that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, the Model Law might indicate the time when such a discharge took place. However, it was stated, such a provision should indicate that the extent of the discharge arising out of the credit transfer would not be greater than if the payment had been in cash. The following text was suggested in implementation of that view:

"If the transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash."

16. It was also stated that the two views were not fundamentally incompatible and that the Model Law might include both the provision set out above and a provision on the time of completion of the credit transfer that might read as follows:

"A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it."

17. The Working Group decided to adopt the two provisions in the form in which they had been suggested. It noted that its decision comprised both a decision as to the matters that should be included in the Model Law and a decision that the point of time when the credit transfer was completed, with the legal consequences that followed, was when the beneficiary's bank accepted the payment order addressed to it. The Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in articles 5 and 7 in light of the fact that acceptance entailed completion of the credit transfer.

Paragraph (3)

18. The Working Group noted that the sums of money involved in paragraph (3) were relatively small, but that the legal questions that it raised were significant. It was noted that few people could anticipate the extent of the fees that might be charged for the making of an

international credit transfer and that there was a general lack of agreement or understanding as to who should bear those fees or how they should be collected.

19. Although a suggestion that the paragraph should be deleted was not adopted, there was general agreement that the paragraph should not deal with the effect on the underlying transaction resulting from the deduction of fees by the bank from the amount of the transfer.

20. The Working Group decided that paragraph (3) should state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer. The Working Group requested a drafting group to be created at the next session of the Working Group to prepare a provision implementing that decision.

Paragraph (4)

21. The view was expressed that the paragraph was too detailed for a model law. It was also stated that the paragraph as drafted was inconsistent with provisions of paragraph (4) of article 4 in that paragraph (4) of article 14 would give the bank a right to debit the account of the sender when the bank received the payment order, whereas paragraph (4) of article 4 stated that, although the sender's obligation to pay the receiving bank was created upon acceptance of the payment order, actual payment was not due until the execution date of the payment order.

22. The Working Group decided to delete the paragraph.

Title of article

23. The Working Group noted that the title of the article should be changed to reflect the current content of the article.

Article 15

Proposed paragraph (3)

24. The Working Group discussed a proposal of the United States of America contained in A/CN.9/WG.IV/WP.47 that would add a new paragraph (3) as follows:

"(3) A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail."

25. In support of the proposal it was stated that, since the rights and obligations of one party to a credit transfer might be affected by the actions of a party to the transfer located in another State, it was important that one set of rules govern the rights and obligations of all the parties to the transfer. It was stated that the concern was particularly important in respect of high-speed electronic transfers (a term that was defined in another portion of the written proposal). Unless there was a means for the parties to elect the application of a single law as was here proposed, the general rules of choice of law reflected in article 15(1) would lead to the result that the law of different States would apply to the different segments of the credit transfer and that there would be no single law that would govern the entire credit transfer.

26. In addition, it was stated, the Model Law should better accommodate the needs of high-speed electronic transfers than it currently did. It was stated that the current draft reflected the law appropriate to slower means of making credit transfers and that in its current form it would impede high-speed transfers rather than facilitate them. There were two means by which high speed transfers could be facilitated by the Model Law. One was to reconsider all of the substantive provisions and to amend them to reflect the needs of high-speed electronic transfers, or to add special rules reflecting those needs. The other, as proposed here, was to allow a funds transfer system to choose the law of a State that had rules more appropriate to such transfers as the law to govern the entire transfer if any portion of the transfer passed through the system.

27. It was pointed out that the technique suggested had already been implemented by the Clearinghouse Interbank Payments System (CHIPS) in its new rule 3 and the law of New York had been chosen to govern the entire transfer if any part of it passed through CHIPS. (The CHIPS rule was set out in A/CN.9/WG.IV/WP.47.)

28. There was general agreement in the Working Group that the Model Law should meet the operating needs of high-speed electronic credit transfers. It was stated that one of the very purposes of preparing the Model Law was to meet those needs, and that the individual substantive provisions should be reviewed with those concerns in mind. It was suggested that there might be scope for different rules governing paper and electronic transfers to be included in individual articles of the Model Law.

29. A view was expressed that the proposal might be a reasonable means for the banks that engaged in making international credit transfers to agree upon a single law to govern their relations. It was stated, however, that, even if the proposal might be reasonable if it was restricted to the relationships between the banks, it was excessive when it attempted to impose a law upon non-bank originators and beneficiaries that was different from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen. The proposal would give the funds transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds transfer system might choose a law that was particularly favourable to the banks and

unfavourable to the non-bank originators and beneficiaries.

30. A suggestion was made that the Model Law might be drafted so that, while it would apply to the entire transfer, it would recognize that the rules of a funds transfer system would govern the participants in that system to the exclusion of the Model Law to the extent that the rules and the Model Law were inconsistent.

31. Under another view the proposal would lead to the disunification of the laws governing international credit transfers rather than to their unification. It was pointed out that a transfer might go through two funds transfer systems and that the two systems might have chosen different laws to apply to the entire transfer.

32. The Working Group did not adopt the proposal but decided that it would review the draft provisions of the Model Law to be sure that they were compatible with the needs of high-speed credit transfers.

Paragraph (1)

33. The suggestion was made that article 15(1) should be deleted since it would be preferable for the Model Law not to contain any provision on conflicts of law in international credit transfers. It was stated that, considering the variety of national laws on means of payment and the complexity of the issues involved, the draft provisions of article 15(1) did not have the degree of refinement that would make them acceptable to most States. It was noted, for example, that no provision had been made as to the means by which the parties would have to express their choice of the applicable law. In this regard attention was drawn to article 3 of the Rome Convention on the Law Applicable to Contractual Obligations, which states that:

"The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case."

It was also stated that it would be difficult for States that were parties to the Rome Convention or to other bilateral or multilateral conventions on conflicts of law of contractual obligations to adopt any conflicts of law provisions of the Model Law.

34. Furthermore, it was suggested, no single conflicts rule would be appropriate for both high-speed electronic transfers and paper-based credit transfers. If a need was felt for specific conflicts rules in the area of international credit transfers, the preparation of a convention on the topic should be considered. That would be particularly appropriate since the Working Group contained expertise on the substantive aspects of international credit transfers but not on the complex questions of conflicts of law.

35. In opposition to the suggestion to delete the provision on conflicts of law from the Model Law, it was stated that in an ideal world in which all States would adopt the Model Law no rules on conflicts of law applicable to international credit transfers would be necessary. However, that could not be anticipated and parties should not have to litigate to know which conflicts rule applied to

their transfers. It was also stated that the fact that some States might be party to a bilateral or multilateral convention on conflicts of law that would in some measure be applicable to a credit transfer was no more of a reason not to include provisions on the subject in the Model Law than would be the existence of national provisions on the substance of the law governing credit transfers.

36. It was noted that any rule on conflicts of law should take into consideration the needs of certain States where the substantive law governing credit transfers was the law of the constituent jurisdictions rather than of the State itself.

37. After discussion the Working Group decided to retain a provision based upon article 15(1).

38. The suggestion was made that the conflicts of law provision should indicate that the substantive provisions of the Model Law applicable to the relations between the originator and the originator's bank should be governed by the law of the originator's bank but that the rest of the credit transfer should be governed by the law of the beneficiary's bank. It was noted that the identity and the location of the beneficiary's bank were known from the commencement of the credit transfer and were known to all relevant parties.

39. In opposition to the suggestion it was stated that, while it would be desirable for the Model Law to apply to an entire international credit transfer, it was no more feasible for that result to be accomplished by a conflicts of law provision in the Model Law dealing with electronic transfers than it would be by a choice of law by a funds transfer system, a proposal that had already been rejected. Application of the Model Law to the entire credit transfer could be achieved only by its adoption by the several States concerned.

40. The Working Group decided that article 15(1) should continue to be drafted so as to apply to individual segments of the transfer.

41. There was general agreement that the parties to the credit transfer, or to any segment of it, should be free to choose the law applicable to their relations. It was noted that that was not only the general rule in respect of conflicts of law, but that it was specifically stated in the Rome Convention (see paragraph 33 above). It was said that including such a rule in article 15(1) would reduce the possibility of conflict between the Model Law and the Convention, thereby reducing the difficulties for the parties to that Convention to adopt the Model Law.

42. A discussion took place as to whether the Model Law should set forth any limits on the freedom of the parties to choose the law applicable to their relations. It was noted that the provision as currently drafted limited the choice of the parties to the law of the State of the sender, of the receiver or of the State in whose currency the payment order was denominated.

43. Under one view, the Model Law should contain a requirement that some reasonable link existed between the

law chosen by the parties and the credit transfer operation. In that respect, it was suggested that, in addition to the three possibilities that were currently provided, the law of the State in which a funds transfer system through which the credit transfer would pass might be included. A concern was also expressed that the freedom of choice by the parties should be limited by public order considerations. It was stated that the choice of some irrelevant law by the parties should not allow them to avoid application of any mandatory provisions of the Model Law, for example as regards the money-back guarantee in article 11(b).

44. Under another view, the Model Law should recognize the absolute freedom of choice of the applicable law by the parties. It was stated that it would be contrary to the general principles of private international law on party autonomy to create mandatory rules that the parties could not avoid by choosing another law. It was stated that such mandatory rules were highly exceptional in private international law and different from public policy rules under national legislation.

45. The Working Group decided that article 15(1) should contain a general rule that, except where otherwise provided in the Model Law, parties were free to choose the applicable law.

46. The Working Group then considered the law that should be applicable to a segment of the credit transfer when the parties had not exercised their right to choose the applicable law. Under one view the characteristic performance in the transfer process was that of the sender. Under another view the characteristic performance was that of the receiving bank which was faced with the obligation to verify the source of the payment order, to accept it or give notice of rejection, and, if the bank accepted it, to issue a new payment order consistent with the payment order received. Under that view the appropriate law to be applied to that segment should be the law of the receiving bank. It was stated that the only exception to such a rule arising out of the current text of the Model Law was to be found in article 4(1) on the authority of the actual sender to bind the purported sender. However, there was general agreement that the Model Law should not attempt to provide which law would be applicable to the question as to whether the actual sender of a payment order was authorized to bind the purported sender.

47. After discussion, the Working Group decided that, unless otherwise agreed, the law of the receiving bank should apply to that segment of the transfer and that article 15(1) should make it clear that it did not apply to the law applicable to the authority of the actual sender to bind the purported sender.

Paragraph 2

48. In view of the fact that the primary rules on the effect of a credit transfer on the discharge of a monetary obligation had been deleted from article 14 (see paragraphs 15 to 17 above), the view was expressed that paragraph (2) might be deleted as well. In any case, it was stated, it did not set forth appropriate rules. However, the Working Group decided that, since a rule had been

retained as to the time when an obligation would be discharged by a credit transfer, paragraph (2) should be retained provisionally.

Square brackets

49. At the close of the discussion the Working Group decided that the entire text of article 15 should be placed in square brackets pending a final review at a later session.

Article 16

50. A proposal for a new article 16 was submitted in A/CN.9/WG.IV/WP.47. The first paragraph of the proposed new article read as follows:

"Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party."

The proposed new article provided in its second paragraph that rules adopted by a funds transfer system could be effective between the participating banks "even if the rule conflicts with this law and indirectly affects another party to the funds transfer who does not consent to the rule".

51. Considering that the corresponding proposed amendments of article 15 had not been accepted by the Working Group, the entire proposal was withdrawn by its proponents. The Working Group noted that at its eighteenth session it had decided that the extent to which the Model Law would be subject to the agreement of the parties would be considered in connection with the individual provisions (A/CN.9/318, para. 34). The Working Group also noted that the draft before it mentioned the effect of contractual rules in a number of provisions.

52. Subsequently, the Working Group decided to adopt the first paragraph of the proposed article 16 and to review each of the substantive articles to determine whether the previous statements as to the effect of an agreement should be retained or could be deleted.

Review of the text: General comments

53. The suggestion was made that the legal issues arising out of the use of netting should be addressed in the Model Law and that all provisions of the Model Law should be reviewed with a view to their compatibility with the operation of netting systems. While there was general agreement that the Model Law should take account of the use of netting, the Working Group recalled that at its nineteenth session it had decided to wait for the study on the topic that was expected from the Bank for International Settlements (BIS) (A/CN.9/328, para. 65) and that the study had not yet been made available. The Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not made available soon.

54. The question was raised as to whether the text of the Model Law should take into account exchange control regulations that existed in some countries. The Working

Group agreed that that question should remain outside the scope of the Model Law, although national legislators might have to consider such issues when adopting the Model Law. It was also suggested that the effect of exchange control regulations might be discussed in any commentary that might later be prepared on the Model Law once it has been adopted by the Commission.

55. The view was expressed that the Model Law should not become too favourably oriented to the interests of banks. A contrary view was expressed that the Model Law should be neutral in its coverage concerning all commercial parties rather than focusing on one party, i.e. banks, as a problem. It was said that in some States business users of electronic credit transfer systems had expressed a clear preference for less protection in exchange for lower costs or service fees.

56. It was stated that the general direction of the Model Law might be viewed as running contrary to the needs of high-value, high-speed and low-cost wire transfer of funds systems. It was also stated that UNCITRAL should focus on facilitating international commerce. A concern was expressed that the Model Law could have the effect of burdening commerce. Another view was that the money-back guarantee in article 11(b) should be considered in the same light.

Article 1

Paragraph (1)

57. There was strong support for the proposition that the scope of the Model Law should be as broad as possible.

Internationality

58. There was general agreement that the text of the paragraph as it had been modified by the drafting group at the twentieth session did not reflect the result of the decisions made by the Working Group (A/CN.9/329, para. 194). The Working Group decided that further discussion should be based on the text that it had adopted at its twentieth session (A/CN.9/329, para. 23). That text read as follows:

"This law applies to credit transfers where the originator's bank and the beneficiary's bank are in different States or, if the originator is a bank, that bank and its receiving bank are in different States."

59. The view was expressed that the test of internationality was contrary to the operation of high-value, high-speed and low-cost wire transfer of funds systems. One suggestion was that the Model Law should apply to the situation where, although the originator's bank and the beneficiary's bank were located in the same country, the transfer was denominated in a foreign currency.

60. Another suggestion was that the test of internationality adopted at the twentieth session was unsatisfactory because (a) there was an apparently arbitrary distinction

between originators that were banks and originators that were not, and (b) unless information about an originator was included on a payment order, it would probably not be possible to tell if the payment order was covered by the Model Law or not. In order to overcome those problems the following text was suggested:

"This law applies to credit transfers where the first sending bank to issue a payment order and the beneficiary's bank are in different States."

61. Under another proposal, the test of internationality of a credit transfer should be that it crossed a border. Accordingly, it was stated that the following wording should be adopted:

"This law applies if any payment order comprising the credit transfer is sent from a sender located in one State to a receiving bank in another State."

62. In opposition to the proposal it was said that, when the transfer was to another bank in the same country but the transfer was denominated in a foreign currency and there was a clearing for that foreign currency in the country where the transfer was taking place, the originator would not be able to foresee, at the time when the credit transfer originated, whether or not the transfer would be sent to the country of the currency or whether it would remain within his country. Therefore, it would not be possible to foresee whether the transfer would be subject to the Model Law. In reply it was said that it would always be possible for the originator to specify to his bank what should be the routing of the credit transfer.

63. An additional objection to the proposal was that it would create a degree of uncertainty since it referred to the location of the sender. Location could be interpreted either as the permanent domicile of the sender or, in the case of a physical person, all possible residences to which he might move. As a solution to that difficulty, it was suggested that only the location of banks and not that of their customers should be considered.

64. After discussion the following text was adopted:

"This law applies to a credit transfer where a sending bank and its receiving bank are in different States."

Consumers

65. It was suggested that the footnote to article 1 providing that the law "is subject to any national legislation dealing with the rights and obligations of consumers" should be deleted. It was said that the Model Law confined itself to commercial law issues. Therefore, it should neither affect the situation of consumers nor be described as "subject to" consumer legislation. In reply it was said that the footnote served an educational purpose since the Model Law would apply to all bank customers. After discussion, the Working Group decided that the footnote should be reworded to state that the Model Law was not intended to deal with issues related to the protection of consumers. The matter was referred to the drafting group.

Article 2

Definition of a "bank", subparagraph (f)

66. It was noted that the definition of the word "bank" was of particular importance in the Model Law because it was one of the elements in determining the scope of application of the law. The Working Group was in agreement that the definition should exclude telecommunications carriers and other similar entities that carried payment orders but did not perform a credit transfer service. There was also general agreement, despite some continuing opposition, that those entities that did perform a credit transfer service were intended to be covered, even though they might not be defined as banks under other legislation in their country. It was pointed out that the Model Law was not a regulatory statute that was confined to banks in the traditional sense.

67. A proposal was made that a "bank" should be defined as follows:

"'bank' means an entity which, under the law of the State where it is permitted to act, is authorized to create, keep and destroy funds, as defined in the present Law."

There was no support for the proposal.

68. The suggestion was made to delete the words "and moving funds to other persons", which were within square brackets. It was said that the words were superfluous. In reply it was stated that the words had been added precisely to make it clear that the definition of a bank did not cover message systems. It was therefore decided that a second sentence should be added to the current definition to state specifically that entities that merely transmitted payment orders were not banks. The Working Group decided to delete the words within square brackets.

69. A discussion took place as to whether the definition of a bank should be limited to entities that executed payment orders as a regular part of their business, or whether it should also encompass entities that only occasionally engaged in executing payment orders. The proposal that the definition of a bank should be extended to cover entities that only occasionally executed payment orders was not adopted.

70. At the end of the discussion the Secretariat was requested to reconsider the possibility of using a word other than "bank" and to report to the Working Group at its next session. The Working Group recognized that any word chosen would need to serve in such compound terms as "receiving bank".

Definition of a "branch"

71. A view was expressed that the Model Law should contain a definition of a "branch" of a bank. The reason given was that under some national laws "branches" were defined in a restrictive way that would not cover certain offices or agencies of a bank that might be intended to be treated as separate banks under the Model Law. Accordingly, it was proposed that the significant feature of a

"branch" under the Model Law should be that it sent and received payment orders. That proposal was objected to on the ground that the sending and receiving of payment orders were acts that could be carried out by simple message carriers. Although there was a general view that no definition of a "branch" was necessary, the delegation that had raised the question was invited, if it so wished, to prepare a draft definition and to submit it to the Working Group at either the current or the next session of the Working Group.

Definition of a "credit transfer", subparagraph (a)

72. Taking into account the newly adopted provision on completion of the credit transfer in article 14(1) (see paragraph 16 above), the Working Group decided to delete the words in square brackets in article 2(a) that indicated when a credit transfer was completed.

Definition of a "payment order", subparagraph (b)

73. It was generally agreed that any reference to conditional payment orders should be deleted from the Model Law. It was also agreed that, in order to accommodate high-speed credit transfers, the Model Law should expressly state that it applied only to unconditional payment orders. The Working Group noted that such a provision would be subject to contrary agreement between the parties. Following the discussion, the Working Group decided that subparagraph (i) should be deleted. The first part of subparagraph (b) was reworded as follows:

"'Payment order' means an unconditional instruction by a sender to a receiving bank to place at the disposal of a designated person a fixed or determinable amount of money if: . . .".

74. A discussion took place on the status of the parties when a customer submitted a conditional payment order to a bank. It was noted that, in such a case, the contract between the sender of the conditional payment order and the receiving bank would not fall within the scope of the Model Law. In the event that the condition was fulfilled, the bank would be expected to execute the conditional payment order by issuing its own unconditional payment order. That payment order and the resulting credit transfer, if the transfer was international, would fall within the scope of the Model Law. The consequence would be that, under the Model Law, the bank would be regarded as the originator of the payment order and not as the originator's bank. The customer who had sent the conditional payment order would have no standing under the Model Law. Therefore, if the credit transfer was not carried out properly for reasons unconnected with the original condition, any rights the customer might have would arise from rules of law outside the Model Law.

75. The Working Group was in agreement that that result was not desirable and decided that a provision should be included in the Model Law so that the sender of the conditional payment order would have the rights of an originator of the credit transfer under the Model Law where the execution of the conditional payment order eventually resulted in an unconditional credit transfer. It was also agreed that the condition itself as well as the

fulfilment or non-fulfilment of the condition would remain outside the scope of the Model Law.

76. The deletion of subparagraph (ii) was suggested on the grounds that the question of reimbursement of the receiving bank should be left for the originator and his bank to agree upon on a contractual basis. After discussion, the Working Group agreed that subparagraph (ii) was necessary in order to exclude debit transfers from the scope of the Model Law.

77. A proposal to delete subparagraph (iii) received no support. Another proposal was that the subparagraph should be replaced by the following wording:

"The payment order is to be transmitted to the receiving bank, either directly [, using or not a communication system established between banks,] or indirectly, using a funds transfer system established between banks."

78. Yet another proposal was that the words "the instruction is to be transmitted" in the existing text should be replaced by the words "the instruction is transmitted". The Working Group agreed that the two proposals should be referred to the drafting group.

79. In view of the deletion of subparagraph (i), the Working Group decided to delete subparagraph (iv).

Definition of "execution"

80. A proposal was made to add to the Model Law a definition of the "execution" of the payment order. It was said that such a definition would be helpful for the interpretation of articles 9(1) and 9(2). There was not sufficient support for the proposal to warrant a change in the text.

Definition of "authentication", subparagraph (j)

81. It was noted that some methods for authentication of the source of a payment order required verification of the contents of the payment order. It was suggested that that fact should be recognized in the definition of authentication. However, the Working Group decided to consider issues having to do with verification that the contents of a payment order as received were the same as the contents of the payment order as sent in its discussion of article 4 (see paragraph 102 below).

Definition of "pay date", subparagraph (l)

82. It was noted that Society for Worldwide Interbank Financial Telecommunication (SWIFT) payment messages no longer carried a field for the indication of a pay date and, it was stated, the International Organization for Standardization (ISO) would delete any reference to a pay date in the next revision of its standards. It was said that the date commonly used on payment orders was the value date, i.e., the date on which the funds were to be available to the receiving bank.

83. It was suggested that the term execution date could be made to serve the intended function of pay date

provided that a sender could not stipulate a date earlier than the date when its receiving bank received the payment order. That suggestion was not adopted. It was stated that, even though payment orders used in inter-bank practice might not provide for the designation of a pay date, the original payment order sent by the originator to his bank might stipulate that the funds were to be paid to the beneficiary on a particular date. A proposal was made that the concept of "pay date" should be replaced by that of "payment date". The following draft was suggested:

"'Payment date' means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary."

84. The Working Group was in agreement that the question should be reconsidered together with articles 9 and 12. In the meantime, it decided to adopt the above proposal as an interim draft.

Article 3

85. The Working Group noted that it had decided to delete former article 3 at its twentieth session. It also noted that at that session it had decided to address in some other provision the need for payment orders to disclose to receiving banks that the payment order formed part of an international credit transfer (A/CN.9/329, para. 93). It decided to return to that problem at another time.

Article 4

Paragraph (2)

86. The Working Group noted that the *chapeau* to paragraph (2) could be interpreted to mean that paragraph (2) was to apply to a payment order even though the sender was bound under paragraph (1). Therefore, it decided to redraft the *chapeau* as follows:

"When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is, nevertheless, bound if:"

87. The Working Group discussed whether subparagraph (b) should be retained. In support of its deletion it was said that it was not possible to implement subparagraph (b) from the point of view of the operations of a bank because the bank normally could not know, at the time a payment order was received, whether the order was covered by a withdrawable credit balance. It would be able to do so only if all debits and credits to the account were entered on-line real-time. However, in even the most highly automated banks some types of payment orders were processed in batch with the resulting debits and credits entered to the accounts periodically, and often at the end of the working day. Furthermore, it was stated, subparagraph (b) led to an inequitable result since the purported sender of an unauthorized but authenticated payment order would be bound by the order if there was a sufficient withdrawable credit balance at the time the payment order was accepted but would not be bound if the balance was insufficient at that time.

88. In reply it was said that subparagraph (b) was a risk allocation rule and not an operational rule. The basic rule in paragraph (1) that a purported sender was bound by a payment order only if it had been issued by him or by another person who had the authority to bind him was reversed by paragraph (2) in the case of an authenticated order only if the conditions specified in paragraph (2) had been met. Subparagraph (b) was said to be an important condition because it would protect certain senders from being bound by unauthorized payment orders.

89. A suggestion was made to establish separate rules that would not include subparagraph (b) for high-speed electronic transfers whereas the rules for other credit transfers might include the subparagraph. In opposition to that suggestion, it was stated that high-speed transfers were precisely the transfers where the current balance of the sender's account could most easily be verified, since technology permitted on-line real-time monitoring of accounts used for such transfers. A contrary view was expressed that such monitoring of accounts was not consistent with prevailing international banking practice.

90. Another suggestion was that subparagraph (b) should apply when the sender was not a bank but should not apply when the sender was a bank. In support it was stated that the limitation of the responsibility of the purported sender for an unauthorized payment order was of greatest importance for non-bank originators.

91. During its discussion of paragraph (2) the Working Group decided to limit the application of subparagraph (b) to non-bank senders. Subsequently, in connection with its discussion of paragraph (3), it decided to delete subparagraph (b) entirely (see paragraph 101 below).

92. The Working Group noted that subparagraphs (a) and (c) were cumulative conditions to the application of paragraph (2) and decided to join them by the word "and".

93. The Working Group noted that at its eighteenth session it had decided that a sender and a receiving bank could not agree upon an authentication procedure that was less than commercially reasonable within the context of paragraph (2), but that it had not included a provision to that effect in the text of the Model Law. It also noted that at the current session it had adopted a new article 16 that stated a general principle of freedom of contract unless otherwise provided in the Model Law, and that it had decided to review each of the substantive articles to determine whether the previous statements as to the effect of an agreement should be retained.

94. Under one view the previous decision should be affirmed and incorporated into the text of the Model Law. It was stated that, since the receiving bank would determine the type of authentication it was prepared to receive from the sender, it should be the receiving bank's responsibility to assure that the authentication procedure was at least commercially reasonable. If the receiving bank was willing to accept payment orders even though there was not a commercially reasonable authentication, it should accept the risk that the payment order had not been authorized in accordance with paragraph (1).

95. Under another view the freedom to agree that the sender would be bound by an unauthorized payment order even though there had been no commercially reasonable authentication should come as an application of the general principle of party autonomy, which the Working Group had previously adopted (see paragraph 52 above). It was also stated that, in case of litigation, there would be uncertainty as to the commercial reasonableness of the method of authentication used until the final court decision unless parties were allowed to determine by their agreement what constituted such a procedure.

96. After discussion, the Working Group decided to include in paragraph (2) a provision to the effect that parties would not be allowed to agree on the use of an authentication procedure that was not commercially reasonable.

Paragraph (3)

97. A proposal was made to adopt the following text of paragraph (3):

"(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender."

98. The proponents of the proposal also stated that, if the proposal was adopted, subparagraph (2)(b) (which at that stage applied to non-bank senders) should be deleted.

99. In support of the proposal it was pointed out that paragraph (3) dealt with the relatively rare case when there had been an unauthorized payment order that had been authenticated in accordance with paragraph (2). In such a case the purported sender would bear the loss unless he could show that the payment order resulted from the actions of a person other than a present or former employee of the purported sender. In order to meet that burden it would not be necessary to show who had sent the payment order; the fact that it could not have resulted from the actions of a present or former employee might be proved by other means. Once that burden had been met by the purported sender, he might still be bound by the payment order if the receiving bank could show that the authentication had been procured by the fault of the purported sender.

100. A suggestion was made that the general rule that had been adopted by the Working Group in article 16 that the provisions of the Model Law could be varied by agreement should be limited in paragraph (3) so that the agreement could not be to the detriment of non-bank senders. Another suggestion was that there should be no limitation on the extent to which paragraph (3) could be modified by agreement, but that the agreement could not be in the general conditions of the receiving bank; the agreement would have to be in an individual contract between the purported sender and the receiving bank.

101. After discussion the proposal set out in paragraphs 97 and 98 above was adopted. Although several delegations expressed strong disagreement, the Working Group decided that nothing needed to be said in the paragraph about the extent to which it could be modified by agreement, because article 16 would automatically be applicable. Those delegations were concerned that extensive provisions giving the parties freedom to vary the provision by contract would seriously reduce the likelihood that the Model Law would be found acceptable by national legislatures.

Errors

102. The Working Group noted that at its twentieth session it had said that, if it was intended that the Model Law should relieve the sender of the responsibility for the erroneous content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that would detect the error or corruption, that intention should be set out separately (A/CN.9/329, para. 79). The Working Group requested the Secretariat to propose a text that would implement this idea for consideration at its twenty-second session.

Paragraph (4)

103. The paragraph was not considered.

Article 12

Paragraph (1)

104. It was noted that the Working Group at its twentieth session had decided to retain the principle of paragraph (1), but to place it in square brackets in the expectation that it might be substantially redrafted. At the current session it was decided to delete the paragraph since the same matter was covered by paragraph (2).

Paragraph (2)

105. It was noted that paragraph (2) was one of the most important provisions in the Model Law because it stated which banks were responsible to the originator or to the sender for any damages that might be payable for the non-execution or improper execution of the credit transfer. It was also noted that the types of damages and the extent of the damages that might be payable to the originator or other claimant were set forth in paragraph (5). It was recognized, however, that there was a relationship between the type and the extent of damages that could be claimed and the appropriate rules for determining which bank or banks should be responsible to the originator for those damages.

106. It was suggested that the Working Group should discuss paragraph (2) as it was set forth in a proposed redraft of article 12 that had been submitted by a delegation and printed in A/CN.9/WG.IV/WP.46, comment 28 to article 12. However, the Working Group decided that it would be a more appropriate procedure to discuss the original text of article 12, including paragraph (2), and to

use the suggested redraft as a source of ideas for improving the text.

107. The discussion centred on two questions: whether the originator's bank should be responsible to the originator when the non-execution or improper execution of a payment order that constituted part of the credit transfer was done by a bank that was down-stream from the originator's bank and whether the originator should have a direct claim against the intermediary bank. It was noted that paragraph (2) provided for such responsibility and provided a means by which the damages that the originator's bank would have to pay to the originator could be collected from bank to bank until the liability reached the bank where the problem had occurred.

108. In favour of changing the text to provide that a bank was responsible to the originator or the sender only for its own failures, it was said that in some countries that result would follow from the general principle of law that no one should be responsible for the actions of third parties. Furthermore, an originator's bank was often not in a position to decide what route a credit transfer should take on its way to the beneficiary's bank in a foreign country, nor even to know what route the transfer might take. It was said that when the originator requested his bank to transfer funds to a foreign country, he should know that it was likely that independent intermediary banks might have to be used.

109. Furthermore, in favour of changing the text, it was said that the originator's bank would be held responsible to the originator for the actions of intermediary banks or of the beneficiary's bank in foreign countries when those banks acted in ways that would constitute non-execution or improper execution of the payment order under the standards of the Model Law, but would constitute proper execution according to the standards of the country in question. The example given was that article 9 of the Model Law required the receiving bank to execute the payment order on the day it was received (subject to having received payment for the order) whereas banking law and practice in some countries provided only for next day execution. Not only would the originator's bank be responsible to the originator in such a situation, but it would not be able to recover from the bank in that foreign country the damages it had paid to the originator. It was stated that the final result would be that banks in the State that had adopted the Model Law would stop sending payment orders to banks in the State with laws or banking practice that were inconsistent with the Model Law. It was also said that it would be improper for a State, such as a State that had enacted the Model Law, to attempt to impose its law and banking practices on other States.

110. However, it was also said that the interpretation given to paragraph (2) was not correct since, under the choice of law provision in article 15(1), the standard of performance of the receiving bank would be determined by the law of the receiving bank. To the extent that the period of time for giving value referred to giving value to the beneficiary, it had been decided that the credit transfer came to an end when the beneficiary's bank accepted the payment order. The question as to when the beneficiary's

bank had to give value to the beneficiary was, therefore, of no relevance to the operations of the Model Law.

111. In favour of retaining the rule currently in paragraph (2) that the originator would be able to claim the damages either directly from the bank at fault or from a prior bank in the chain, including the originator's bank, it was said that the originator's bank provides a service to the originator that depends on it having established correspondent relations with other banks. If, as had been said, the originator's bank might not be able to determine or even to know the entire chain that would be used to send the credit transfer to the beneficiary's bank, the originator was even less able to determine or to know the route. The liability of the originator's bank was described as primary only, with ultimate liability being upon the intermediary bank that was at fault. Furthermore, it was said, the procedure envisaged by paragraph (2) was well known in other similar types of economic activity, such as the international transport of goods, where it was common for the carriage to be effected by several different carriers. In some, though not all, conventions on international carriage of goods the claim might be made either against the original contracting carrier or against the carrier where the damage had occurred. The procedure envisaged by paragraph (2), similar to the procedure used in those conventions, would ease the procedural problems for the originator since he would not have to claim against a bank in a foreign country with whom he had no business relationship. However, it would allow the originator's bank to have recourse against its receiving bank, a bank with which it normally had a continuing business relationship.

112. It was also said that article 12 represented a balanced compromise. The extent of consequential damages that might be recovered by the originator had been severely restricted, but the ability to recover other types of damage had been eased. In response, it was said that this so-called compromise would allocate to the originator's bank new risks arising out of international credit transfers. The so-called compromise was to the detriment of the originator's bank.

113. As to the argument that banks in some countries might not meet the standards of performance expected by the Model Law, it was said that one of the functions of the Model Law should be to establish the standards necessary for high-speed international credit transfers to be effective. It was said that receiving banks that did not meet those standards would soon learn that it was to their advantage to do so.

114. After extensive discussion the Working Group noted that the differences between the opposing views had not been reconciled. It decided, therefore, that the present text would be retained. It noted that retention of paragraph (2) did not imply any judgment on the other paragraphs of article 12, and particularly on paragraph (5). Subsequently, the Working Group decided that it should be made clear that in respect of consequential damages, only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender.

115. After a discussion on the meaning of the second sentence of paragraph (2), there was agreement that, since it had been agreed that the first sentence would be retained, the second sentence stated the correct policy and was necessary. It was observed, however, that its meaning was not clearly stated and the Secretariat was requested to propose to the Working Group at its next session a revised draft that was more easily understood. It was suggested that the Secretariat might also propose a revision of the first sentence.

Paragraph (3)

116. The Working Group noted that paragraph (3) had a technical function to make it clear that no bank subsequent to the bank where the problem occurred was liable to the originator for damages. It was noted that there were matters of drafting and of substance that were contained in the redraft proposed in the working paper to which the Working Group would have to return at a later time.

Paragraph (4)

117. It was decided that subparagraph (a) should include a reference to failure to perform one of the obligations under article 8. Although a preference was expressed for choosing the first of the two alternative formulations in square brackets, i.e., "account relationship", the Working Group decided not to enter into such drafting details at this time.

Paragraph (5)

Subparagraph (a)

118. The Working Group noted that the current draft of the Model Law provided for interest to be payable to the originator and to the sender, but that at its nineteenth session it had decided that in appropriate situations the beneficiary should be able to recover interest when completion of the credit transfer was delayed because of a delay by one of the banks in the chain. However, no text had been adopted to implement that decision. It was also noted that the interest was to be payable because of the fact of delay and not because of the fault of the bank. Where there had been delay, the bank had had the use of funds for a period of time that was longer than it should have been and the bank should not be able to keep the benefit arising out of the delay. It had been decided that where the transfer had been completed, but had been completed late, it was the beneficiary who should have a direct right to claim for the loss of interest, since it was the beneficiary who had been deprived of the use of the funds for the period of the delay. He should receive the interest, whether or not the beneficiary had had a right, as against the originator, for the transfer to be completed on a particular day. It was stated, however, that where the credit transfer was not completed and the originator had the right to get his funds back under article 11(b), the originator should also be entitled to receive the interest.

119. It was noted that the typical way in which banks compensated one another for interest due was to adjust the date of the credit to the account so that it showed "as of"

the date on which the credit should have been entered. By changing the date of the credit, appropriate interest would be given automatically to the bank receiving the credit. It was stated that, in practice, delay in executing a payment order was almost always because the payment order had been executed improperly. As soon as the error was brought to the attention of the bank, it would immediately execute the order correctly for the original amount. Interest adjustments would be made later, usually by way of an "as of" adjustment, although that method was less often used where the person receiving the adjustment did not maintain an account with the bank. It was noted that in the United States there was a proposed rule that would require the sender or receiving bank that was the recipient of an "as of" adjustment, but that was not the ultimate party entitled to the interest, to pass on the benefit of the "as of" adjustment to the ultimate originator or beneficiary in the form of interest.

120. It was stated that, while the payment of interest to the beneficiary would usually be satisfactory compensation for the delay, it might not be adequate compensation when the delay in the execution of the credit transfer caused the originator to be late in his payment to the beneficiary. In such a case the beneficiary as creditor of an obligation might have a claim against the originator as debtor of the obligation for interest as a result of the late payment that was at a higher rate than any rate that might be applicable to the interbank relationship. It was stated that in such a case the bank that had caused the delay should have to pay to the beneficiary or to the originator (if the originator had reimbursed the beneficiary) an additional amount equal to the interest due as a result of the late payment, less the amount already paid. In reply, it was stated that such an additional amount was in the nature of consequential damages and should be treated as such under the Model Law.

121. The suggestion was made that the Model Law should indicate the appropriate rate of interest to be paid when a bank was late in executing a payment order. The Working Group recognized that it would not be possible to provide either an appropriate rate in numerical terms or to be specific as to the means of determining the rate. Nevertheless, it was suggested, the Model Law should provide that the interest would be calculated at the interbank rate in the currency in which the payment order was expressed. It was stated that with the open capital markets currently existing, those rates for any given currency tended to be essentially the same throughout the world.

122. Other suggestions were made in respect of the rate of interest that the beneficiary should receive. It was stated that, if a non-bank beneficiary's account was adjusted "as of" the date the credit should have been made, the effective amount of interest it would receive would depend on whether the account was in debit or in credit during that period of time, since the rate charged on a debit balance was always higher than the rate the beneficiary would receive if the account was in credit. One suggestion made was that the beneficiary should receive the current rate for a sight deposit. It was also noted that under the proposed rule in the United States the beneficiary would receive the interbank rate.

123. After discussion the Working Group decided that it would provide only that interest was payable without indicating how that interest should be calculated.

Subparagraph (b)

124. Although there was some support for retaining the subparagraph providing that damages might include exchange losses, the Working Group decided to delete it and to consider any possible recovery for such losses in its consideration of consequential damages.

Subparagraph (c)

125. The Working Group considered that the issues raised in the subparagraph were of minor importance that should be left for discussion at a later stage.

Subparagraph (d)

126. The Working Group noted that it had previously decided that, in respect of consequential damages, only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender (see paragraph 114 above).

127. Under one view subparagraph (d) should be deleted. It was said that a consequential damage provision would be inconsistent with the operation of modern wire transfer of funds systems. It was stated that a receiving bank could not anticipate the extent to which it might be held liable for consequential damages. Consequently, it would not be able to obtain appropriate insurance to cover any possibility that it might be held liable. In any case, potential liability for consequential damages would substantially increase the cost of credit transfers, a cost that would have to be borne by all users. It was suggested that the Model Law might indicate that banks were free to contract for such an increase in their responsibility if they so chose. It was noted that banks that offered two different services with different levels of responsibility would charge more for the higher level.

128. Under another view subparagraph (5)(d) should be retained. It would be a rare case in which a bank acted with the intent to cause improper execution of or failure to execute a payment order or acted recklessly and with knowledge that such improper execution or failure to execute would probably result. However, if such a case were to occur, it would be unconscionable for the bank not to be responsible for the consequences of its acts. It was stated that that proposition was so fundamental in many legal systems that the Model Law would be unlikely to be adopted if it were to deny such a result.

129. The current drafting of the subparagraph was criticized as making it too easy for a party to allege a bank's wrongful intent or recklessness. It was suggested that, particularly when the bank was large and foreign, there might well be a tendency for a jury to find the ordinary negligence of the bank to have been reckless behaviour. Suggestions were made that were intended to make it clear that the party alleging the reckless behaviour of the bank would have the burden of proving that the behaviour had

been reckless in fact. However, it was stated that none of the suggestions achieved the desired result.

130. A suggestion was made to delete both subparagraph (5)(d) and paragraph (8). Under that proposal the Model Law would not provide for consequential damages under any circumstances, but a party would not be precluded from relying on other doctrines of law that might be available in the relevant legal system to claim such damages. A similar suggestion was that subparagraph (5)(d) and paragraph (8) might be combined so that banks would be subject to other relevant doctrines of law when they acted in the ways described in the current text of subparagraph (5)(d). In opposition to both suggestions it was pointed out that the purpose of paragraph (8) was to preserve the unity of the law in regard to international credit transfers, a unity that the Model Law sought to achieve. It was also stated that one of the purposes of paragraph (8) was to protect the banking system from unexpected claims for substantial amounts based on doctrines of law outside the Model Law.

131. The Working Group was in agreement that it would need more time to study the implications of the suggestions that had been made. It decided that it would place both texts in square brackets and reconsider them at the next session.

II. FUTURE WORK

132. The Working Group noted that it would hold its next session at Vienna from 26 November to 7 December 1990. It also noted that the Commission had requested the Working Group to finish its task of preparing a draft of the Model Law so that the Commission could consider the draft at its twenty-third session to be held at Vienna from 10 to 28 June 1991.

ANNEX

Draft Model Law on International Credit Transfers resulting from the twenty-first session of the Working Group on International Payments*

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

- (1) This law applies to credit transfers where a sending bank and its receiving bank are in different States.
- (2) For the purpose of determining the sphere of application of this Law, branches of a bank in different States are considered to be separate banks.

*This Model Law is subject to any legislation dealing with the rights and obligations of consumers.^b

^aAt the twenty-first session the Working Group considered articles 1 to 4, 12 and 14 to 16. In addition to specific changes in the text of those articles, the Working Group made a number of decisions that the text should be changed, leaving to a later time the drafting of a specific text. All such decisions are signalled by a note indicating their location in the report. Draft proposals to implement those decisions will be submitted by the Secretariat in A/CN.9/WG.IV/WP.49.

^bThe Working Group decided that the footnote to article 1 should be reworded to state that the Model Law was not intended to deal with issues related to the protection of consumers (see para. 65).

Article 2. *Definitions*

For the purposes of this law:

(a) "Credit transfer" means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a designated person. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order.

(b) "Payment order" means an unconditional instruction by a sender to a receiving bank to place at the disposal of a designated person a fixed or determinable amount of money if:^c

- (i) Deleted
- (ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and
- (iii) the instruction is to be transmitted either directly to the receiving bank, or to an intermediary, a funds transfer system, or a communication system for transmittal to the receiving bank.^d
- (iv) Deleted

(c) "Originator" means the issuer of the first payment order in a credit transfer.

(d) "Beneficiary" means the person designated in the originator's payment order to receive funds as a result of the credit transfer.

(e) "Sender" means the person who issues a payment order, including the originator and any sending bank.

(f) "Bank" means an entity which, as an ordinary part of its business, engages in executing payment orders.^e

(g) A "receiving bank" is a bank that receives a payment order.

(h) "Intermediary bank" means any receiving bank other than the originator's bank and the beneficiary's bank.

(i) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this Law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(j) "Authentication" means a procedure established by agreement to determine whether all or part of a payment order [or a revocation of a payment order] was issued by the purported sender.

^cThe Working Group decided that a provision should be included in the Model Law so that the sender of a conditional payment order would have the rights of an originator of a credit transfer under the Model Law where the execution of the conditional payment order eventually resulted in an unconditional credit transfer. It was also agreed that the condition itself as well as the fulfilment or non-fulfilment of the condition would remain outside the scope of the Model Law (see para. 75).

^dA proposal was to replace the words "the instruction is to be transmitted" by the words "the instruction is transmitted". Another proposal was to reword the subparagraph as follows: "the payment order is to be transmitted to the receiving bank, either directly [, using or not a communication system established between banks,] or indirectly, using a funds transfer system established between banks". The Working Group referred the proposals to the drafting group (see paras. 77 and 78).

^eThe Secretariat was requested to reconsider the possibility of using a word other than "bank" (see para. 70). The Working Group also agreed that the definition should exclude telecommunications carriers and other similar entities that carried payment orders but did not perform a credit transfer service (see paras. 66 and 68).

(k) "Execution date" means the date when the receiving bank is to execute the payment order in accordance with article 9.

(l) "Payment date" means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary.^f

Article 3. Deleted

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

(1) A purported sender is bound by a payment order [or a revocation of a payment order] if it was issued by him or by another person who had the authority to bind the purported sender.

(2) When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless bound if:^g

(a) the authentication provided is a commercially reasonable method of security against unauthorized payment orders and,

(b) Deleted

(c) the receiving bank complied with the authentication.

(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.^h

(4) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the execution date, unless otherwise agreed.

Article 5. *Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bankⁱ*

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

^fThis wording was adopted as an interim draft (see para. 84).

^gThe Working Group decided to include in paragraph (2) a provision to the effect that parties would not be allowed to agree on the use of an authentication procedure that was not commercially reasonable (see para. 96).

^hThe Working Group noted that at its twentieth session it had said that, if it was intended that the Model Law should relieve the sender of the responsibility for the erroneous content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that would detect the error or corruption, that intention should be set out separately (A/CN.9/329, para. 79). The Working Group requested the Secretariat to propose a text that would implement this idea for consideration at its twenty-second session (see para. 102).

The Working Group agreed that the Model Law should take account of the use of netting. It recalled that at its nineteenth session it had decided to wait for the study on the topic that was expected from the Bank for International Settlements (BIS) (A/CN.9/328, para. 65). The Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not available soon (see para. 53).

(2) A receiving bank accepts the sender's payment order at the earliest of the following times:

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given, provided that acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it gives notice to the sender of acceptance, or

(d) when it issues a payment order intended to carry out the payment order received.

(3) A receiving bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (2)(a), is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Article 6. *Obligations of receiving bank that is not the beneficiary's bank*

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 9, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

(3) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the receiving bank shall give notice to the sender of the misdirection, within the time required by article 9.

(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(5) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 9 if, in the time required by that article, it inquires of the sender as to the further actions it should take in light of the circumstances.

(7) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Article 7. Acceptance or rejection by beneficiary's bank

(1) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given, provided that acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it notifies the sender of acceptance,

(d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary,

(e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit,

(f) when the bank otherwise applies the credit as instructed in the payment order,

(g) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

(2) A beneficiary's bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (1)(a), is required to give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Article 8. Obligations of beneficiary's bank

(1) The beneficiary's bank is, upon acceptance of a payment order received, obligated to place the funds at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary.

(2) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the beneficiary's bank shall give notice to the sender of the misdirection, within the time required by article 9.

(3) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(4) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the beneficiary's bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(5) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank shall give notice, within the time required by article 9, to its sender and to the originator's bank, if they can be identified.

(6) The beneficiary's bank shall on the execution date give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, if the bank has sufficient information to give such notice.

Article 9. Time for receiving bank to execute payment order and give notices

(1) A receiving bank is required to execute the payment order on the day it is received, unless

(a) a later date is specified in the order, in which case the order shall be executed on that date, or

(b) the order specifies a pay date and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the pay date.

(2) A notice required to be given under article 6(3), (4) or (5) or article 8(2), (3), (4) or (5) shall be given on the day the payment order is received.

(3) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank executes that type of payment order.

(4) If a receiving bank is required to take an action on a day when it is not open for the execution of payment orders of the type in question, it must take the required action on the following day it executes that type of payment order.

(5) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Article 10. Revocation

(1) A revocation order issued to a receiving bank other than the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before the execution of the payment order to enable the receiving bank, if it acts as promptly as possible under the circumstances, to cancel the execution of the payment order, and

(c) it was authenticated in the same manner as the payment order.

(2) A revocation order issued to the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before acceptance of the payment order to enable the beneficiary's bank, if it acts as promptly as possible under the circumstances, to refrain from accepting the payment order, and

(c) it was authenticated in the same manner as the payment order.

(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received by an earlier point of time than provided in paragraphs (1) and (2).

(4) If a revocation order is received by the receiving bank too late to be effective under paragraph (1), the receiving bank shall, as promptly as possible under the circumstances, revoke the

¹See footnote i under article 5 above.

payment order it has issued to its receiving bank, unless that payment order is irrevocable under an agreement referred to in paragraph (3).

(5) A sender who has issued an order for the revocation of a payment order that is not irrevocable under an agreement referred to in paragraph (3) is not obligated to pay the receiving bank for the payment order:

(a) if, as a result of the revocation, the credit transfer is not completed, or

(b) if, in spite of the revocation, the credit transfer has been completed due to a failure of the receiving bank or a subsequent receiving bank to comply with its obligations under paragraphs (1), (2) or (4).

(6) If a sender who, under paragraph (5), is not obligated to pay the receiving bank has already paid the receiving bank for the revoked payment order, the sender is entitled to recover the funds paid.

(7) If the originator is not obligated to pay for the payment order under paragraph (5)(b) or has received a refund under paragraphs (5)(b) or (6), any right of the originator to recover funds from the beneficiary is assigned to the bank that failed to comply with its obligations under paragraphs (1), (2) or (4).

(8) The death, bankruptcy, or incapacity of either the sender or the originator does not affect the continuing legal validity of a payment order that was issued before that event.

(9) A branch of a bank, even if located in the same country, is a separate bank for the purposes of this article.

CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS

Article 11. *[Assistance and refund]*

A receiving bank other than the beneficiary's bank that accepts a payment order is obligated under that order:

(a) where a payment order is issued to a beneficiary's bank in an amount less than the amount in the payment order issued by the originator to the originator's bank—to assist the originator and each subsequent sending bank, and to seek the assistance of its receiving bank, to obtain the issuance of a payment order to the beneficiary's bank for the difference between the amount paid to the beneficiary's bank and the amount stated in the payment order issued by the originator to the originator's bank.

(b) where a payment order consistent with the contents of the payment order issued by the originator and containing instructions necessary to implement the credit transfer in an appropriate manner is not issued to or accepted by the beneficiary's bank—to refund to its sender any funds received from its sender, and the receiving bank is entitled to the return of any funds it has paid to its receiving bank.

Article 12. *Liability and damages*

(1) *Deleted*

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent

with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 9.^{*}

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and the intermediary bank executed the payment order received by it within the time required by article 9.

(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank], and¹

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date or execution date stated in the order, as provided in article 9.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

(a) loss of interest,

(b) *Deleted*

(c) expenses incurred for a new payment order [and for reasonable costs of legal representation],^{*}

[(d) [any other loss] that may have occurred as a result, if the improper [or late] execution or failure to execute [resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result].]

(6) If a receiving bank fails to notify the sender of a misdirected payment order as provided in articles 6(2) or 8(1), and the credit transfer is delayed, the receiving bank shall be liable:

(a) if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank, or

(b) if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days.

(7) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)(d). A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

[(8) The remedies provided in this article do not depend upon the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available.]

^{*}Consideration may be given to allowing recovery of reasonable costs of legal representation even if they are not recoverable under the law of civil procedure.

¹The Working Group requested the Secretariat to prepare a revised draft of the paragraph to make it clear that in respect of consequential damages under subparagraph (5)(d) only the receiving bank that had committed the error that caused losses could be held responsible to the originator or to its sender (see paras. 114 and 115).

The Working Group decided that subparagraph (a) should include a reference to failure to perform one of the obligations under article 8 (see para. 117).

Article 13. *Exemptions*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 12 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to have taken into account at the time of the credit transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

CHAPTER IV. CIVIL CONSEQUENCES OF CREDIT TRANSFER

Article 14. *Payment and discharge of monetary obligations; obligation of bank to account holder^m*(1) *Deleted*

(2) If the transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash.

(2 bis) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges."

^mThe Working Group decided that the title should be changed to reflect the new content of the article (see para. 23).

ⁿThe Working Group decided that paragraph (3) should state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (see para. 20).

(4) *Deleted*

CHAPTER V. CONFLICT OF LAWS

[Article 15. *Conflict of laws*

(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.^o

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an originator and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.^p

Article 16.

Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party.

^oThe Working Group decided to retain a provision based upon article 15(1) (see para. 37). It decided that article 15(1) should continue to be drafted so as to apply to individual segments of the transfer (see para. 40). It decided that article 15(1) should contain a general rule that, except where otherwise provided in the Model Law, parties were free to choose the applicable law (see para. 45). It decided that, unless otherwise agreed, the law of the receiving bank should apply to that segment of the transfer and that article 15(1) should make it clear that it did not apply to the law applicable to the authority of the actual sender to bind the purported sender (see para. 47).

^pThe Working Group decided that, since a rule had been retained as to the time when an obligation would be discharged by a credit transfer, paragraph (2) should be retained provisionally (see para. 48).

D. Working papers submitted to the Working Group on International Payments at its twenty-first session

1. International credit transfers: comments on the draft Model Law on International Credit Transfers: report of the Secretary-General (A/CN.9/WG.IV/WP.46 and Corr.1) [Original: English]

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[A/CN.9/WG.IV/WP.46]

INTRODUCTION

1. The Commission, in conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers (A/CN.9/SER.B/1) as a product of the work of the Secretariat, decided to begin the preparation of model rules on electronic funds transfers and to entrust the task to the Working Group on International Payments (A/41/17, para. 230).

2. The Working Group undertook the task at its sixteenth session held at Vienna from 2 to 13 November 1987 at

which it considered a number of legal issues set forth in a report prepared by the Secretariat (A/CN.9/WG.IV/WP.35). At the conclusion of the session the Working Group requested the Secretariat to prepare draft provisions based on the discussions during that session for its consideration at its next meeting (A/CN.9/297, para. 98).

3. At its seventeenth session held in New York from 5 to 15 July 1988 the Working Group considered a text of the draft provisions prepared by the Secretariat (A/CN.9/WG.IV/WP.37). At the close of the session the Working Group requested the Secretariat to prepare a revised draft of the provisions (A/CN.9/317, para. 10).

4. At its eighteenth session held at Vienna from 5 to 16 December 1988 the Working Group began its

consideration of the redraft of the Model Rules prepared by the Secretariat in A/CN.9/WG.IV/WP.39. It renamed the draft Model Rules as the draft Model Law on International Credit Transfers (A/CN.9/318). The Working Group continued its consideration of the draft provisions at its nineteenth session held in New York from 10 to 21 July 1989. During the session a drafting group prepared a restructured text of the draft Model Law (A/CN.9/328, annex I). The restructured text was discussed at the twentieth session of the Working Group. A drafting group revised articles 1 to 9 of the draft Model Law but left articles 10 to 15 unchanged.

5. This report contains a commentary on the draft articles of the text as it emerged from the twentieth session of the Working Group (A/CN.9/329, annex), indicating their history and their relation to other provisions. In some places where the text was not considered at the twentieth session, or was considered but not changed, the commentary may be identical to that in prior reports of the Secretary-General. The report also contains suggestions as to changes that might be made in the text. In some cases the suggestions originated in a communication sent by the delegation of France or of the United Kingdom to the Secretary of the Working Group.

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Title of the Model Law

Prior discussion

A/CN.9/318, paras. 10 to 19
A/CN.9/329, paras. 11 to 15

Comments

1. The current title was adopted by the Working Group at its eighteenth session. The Working Group decided that the words "Model Law" should be used in the title to reflect the fact that the text was for use by national legislators and that the text should not for the time being be in the form of a convention (A/CN.9/318, paras. 12 and 13).

2. The use of the words "Credit Transfers" reflected the decision that only credit transfers and not debit transfers should be included (A/CN.9/318, para. 14). The decision is set forth as a rule in article 1(1). Credit transfers are defined in article 2(a).

3. The word "electronic" is not used in the title as a result of the decision that the Model Law would be applicable to paper-based credit transfers as well as to those made by electronic means (A/CN.9/318, paras. 15 to 17).

4. The Working Group decided that the Model Law should be restricted to international credit transfers and that that decision should be reflected in the title (A/CN.9/318, para. 18). At its twentieth session the Working Group reaffirmed its decision to restrict the sphere of

application of the Model Law to international credit transfers (A/CN.9/329, paras. 12 to 15). It noted that even though the preparation of a model law applicable to domestic credit transfers was within its mandate, and that some States might wish to apply the Model Law to both domestic and international credit transfers, there were differences between the two types of transfers that justified different treatment of some of the legal issues that arose. Furthermore, appropriate solutions might not be the same in all States for domestic credit transfers. As a result it was believed to be preferable not to confront the difficult political problems that might be created by providing in the Model Law that it applied to all credit transfers.

5. The criteria for determining whether a credit transfer is international are to be found in article 1.

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

(1) This law applies to credit transfers where the originator's bank and the beneficiary's bank are in different States or, if the originator is a bank, that bank and the beneficiary's bank are in different States.

(2) For the purpose of determining the sphere of application of this Law, branches of a bank in different States are considered to be separate banks.

*This law is subject to any national legislation dealing with the rights and obligations of consumers.

Prior discussion

A/CN.9/297, paras. 12 to 23 and 29 to 31
A/CN.9/317, paras. 16 to 24, 30 and 95 to 97
A/CN.9/318, paras. 20 to 34, 53 and 54
A/CN.9/329, paras. 12 to 25 and 194

Comments

1. The general scope of article 1 was adopted by the Working Group at its eighteenth session (A/CN.9/318). It was reconsidered at the twentieth session, where several amendments were adopted (A/CN.9/329).

Internationality of a transfer

2. As indicated by the title, the Model Law will apply only to credit transfers that are international. The basic test of internationality in paragraph (1), and the only test according to article 1 as it was adopted at the eighteenth session, is that the originator's bank and the beneficiary's bank are in different countries. The Working Group decided at its twentieth session to eliminate the result pointed out in A/CN.9/WG.IV/WP.44, article 1, comments 4 to 6 that, since a bank that originated a credit transfer for its own account was an originator and not an originator's bank, a transfer by such a bank to a second bank through a mutual correspondent bank would not fall within the sphere of application of the Model Law even if all three banks were in different States. In order to carry out its

decision, the Working Group decided to add the words "or, if the originator is a bank, that bank and its receiving bank are in different countries" (A/CN.9/329, paras. 16 to 23). That formulation was submitted to the drafting group, which changed it to the current formulation. However, during the adoption of the report of the session, the "Working Group noted that the drafting group appeared not to have correctly implemented the idea expressed . . . above" (A/CN.9/329, para. 194).

3. In a communication to the Secretariat the delegation of the United Kingdom has suggested that the test of internationality adopted at the twentieth session is unsatisfactory because (a) there is an apparently arbitrary distinction between originators that are banks and originators that are not, and (b) unless information about an originator is included on a payment order, it will probably not be possible to tell if the payment order is covered by the Model Law or not. In order to overcome those problems the following text was suggested:

"(1) This law applies to credit transfers where the first sending bank to issue a payment order and the beneficiary's bank are in different States."

4. In some cases involving a transfer from a customer's account in a financial institution in State A to an account in a financial institution in State B, application of this Law will depend on whether both financial institutions are considered to be banks under the definition of a bank in article 2(f). If either financial institution was considered not to be a bank because it did not as an ordinary part of its business engage in credit transfers for other persons, the other financial institution would be both the originator's bank and the beneficiary's bank and the Model Law would not apply. Such a situation might arise where one of the financial institutions was a broker which would, on instructions of a customer, transfer a credit balance in a customer's brokerage account but which did not engage in credit transfers for its customers as an ordinary part of its business. See comments 22 and 23 to article 2.

5. A determination as to whether a credit transfer was international would also depend on how the transfer was structured. An example was given in the eighteenth session of the Working Group where the originator's bank in State A reimbursed the beneficiary's bank in State B by several different means. It was stated that those different means of reimbursing the beneficiary's bank for the transfer would determine whether some or all of the activities comprising the transfer would be considered to be international and fell within the sphere of application of the Model Law or would be considered to be domestic and fell outside of it (A/CN.9/318, paras. 25 to 26). It was said in the Working Group that that result was not appropriate since the transfer would otherwise be identical from an economic point of view. This aspect of the criteria of internationality was not further considered at the twentieth session of the Working Group.

6. International credit transfers may be denominated in the currency of the country where the originator's bank is located, in the currency of the country where the beneficiary's bank is located, or in some other currency or unit of account. If the originator's bank and the beneficiary's

bank were in the same country, the Model Law would not apply to the transfer even if it was denominated in the currency of a third country. That result was adopted because, while the settlement between the originator's bank and the beneficiary's bank might have to pass through banks in the country of the currency in which the transfer was denominated, it might also be possible for settlement to be effected within the country where the two banks were located (A/CN.9/318, para. 21).

7. Since the application of the Model Law depends on the existence of two banks in different countries, normally it would not apply where the originator and the beneficiary had their accounts in the same bank. However, according to paragraph (2), for the purposes of the sphere of application of this Law, branches of banks in different countries are considered to be separate banks. Therefore, a transfer may be within the application of this Law even though only one bank is involved if the accounts are in branches of that bank in different States.

8. Restricting application of the Model Law to international credit transfers means that a State that adopts the Model Law will potentially have two different bodies of law governing credit transfers, one applicable to domestic credit transfers and the Model Law applicable to international credit transfers. In some countries there are no domestic credit transfers or the domestic elements of international transfers are segregated from purely domestic transfers. In other countries domestic credit transfers and the domestic elements of international transfers are processed through the same banking channels. In those countries it would be desirable for the two sets of legal rules to be reconciled to the greatest extent possible.

9. Since the Model Law is being prepared for international credit transfers, questions of conflict of laws naturally arise. Draft provisions on the territorial application of the Model Law are contained in article 15. Further consideration was given to the question in a report that was prepared for the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80.

Consumer transfers

10. The Working Group decided at its eighteenth session that the Model Law should apply to all international credit transfers, including transfers made for consumer purposes. Not only would that preserve the basic unity of the law, it would avoid the difficult task of determining what would be a credit transfer for consumer purposes. That was also thought to be of importance since special consumer protection legislation affecting credit transfers currently exists, and could be envisaged in the future, in only some of the countries that might consider adopting the Model Law.

11. At the same time, it was recognized that the special consumer protection legislation that exists in some countries, and that may be adopted in others, could be expected to affect some international credit transfers as well as domestic credit transfers. To accommodate that possibility, the footnote to article 1 was adopted to indicate that the Model Law would be subject to any national

legislation dealing with the rights and obligations of consumers, whether the provisions of that legislation supplemented or contradicted the provisions of the Model Law (A/CN.9/318, paras. 30 to 33). The footnote was reconsidered at the twentieth session where there was no support for a suggestion that the footnote needed to be made clearer that the Model Law did not cover consumer protection issues or for a suggestion to move the footnote into the body of the article (A/CN.9/329, para. 24).

Effect of contractual agreement

12. At its eighteenth session the Working Group decided that the extent to which the Model Law would be subject to the agreement of the interested parties would be considered in connection with the individual provisions (A/CN.9/318, para. 34). In the current draft mention of the effect of contractual rules is made in articles 2(j), 4(2)(b), 4(4), 5(2)(b), 6(5), 7(1)(b), 8(4), 10(3), 10(4), 10(5), 12(7), 14(1), 14(3), 15(1) and 15(2).

Article 2. Definitions

For the purposes of this law:

(a) "Credit transfer" means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a designated person. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order. [A credit transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.]

(b) "Payment order" means an instruction by a sender to a receiving bank to place at the disposal of a designated person a fixed or determinable amount of money if:

- (i) the instruction contains no conditions other than conditions imposed by the originator that are to be satisfied on or before the issue of a payment order by the originator's bank,
- (ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender,
- (iii) the instruction is to be transmitted either directly to the receiving bank, or to an intermediary, a funds transfer system, or a communication system for transmittal to the receiving bank, and
- (iv) the instruction is not intended to establish a letter of credit.

(c) "Originator" means the issuer of the first payment order in a credit transfer.

(d) "Beneficiary" means the person designated in the originator's payment order to receive funds as a result of the credit transfer.

(e) "Sender" means the person who issues a payment order, including the originator and any sending bank.

(f) "Bank" means an entity which, as an ordinary part of its business, engages in executing payment orders [and moving funds to other persons].

(g) A "receiving bank" is a bank that receives a payment order.

(h) "Intermediary bank" means any receiving bank other than the originator's bank and the beneficiary's bank.

(i) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this Law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(j) "Authentication" means a procedure established by agreement to determine whether all or part of a payment order [or a revocation of a payment order] was issued by the purported sender.

(k) "Execution date" means the date when the receiving bank is to execute the payment order in accordance with article 9.

(l) "Pay date" means the date specified by the originator when funds are to be placed at the disposal of the beneficiary.

Prior discussion

A/CN.9/297, paras. 24 to 28

A/CN.9/317, paras. 26 to 47

A/CN.9/318, paras. 35 to 59, 75, 76, 94 and 106

A/CN.9/328, paras. 79 and 88

A/CN.9/329, paras. 26 and 82

Comments

1. The Working Group at its sixteenth session expressed the view that, in order to harmonize to the greatest extent possible the terms as used by bankers and as used in legal rules governing credit transfers, an effort should be made to use the terminology adopted by the Committee on Banking and Related Financial Services of the International Organization for Standardization in ISO 7982-1 (A/CN.9/297, paras. 25 to 28). However, in view of the fact that the ISO terminology had not been adopted with legal considerations in mind, some deviation from both the terminology and the definitions had to be envisaged. Various definitions have been considered at the seventeenth, eighteenth, nineteenth and twentieth sessions.

2. The comments below indicate the extent to which the terms used and their definitions differ from those in ISO 7982-1.

Chapeau

3. At the twentieth session the Working Group decided to introduce article 2 with the words "For the purposes of this law", especially since some of the terms such as "bank" may be defined in other ways in the statutory

law of a State that adopts the Model Law (A/CN.9/329, para. 26).

"Credit transfer"

4. The definition as adopted by the Working Group at its eighteenth session was based upon the definition of "funds transfer" in ISO 7982-1. However, certain amendments were made to the ISO definition in order to clarify its meaning. (See A/CN.9/318, paras. 36 to 38 and A/CN.9/WG.IV/WP.44, article 2, comments 4 to 6.)

5. At the twentieth session the Working Group reconsidered the definition, recognizing that it and the associated definition of "payment order" were of particular importance since article 1 on the sphere of application provided that the law applied to credit transfers (A/CN.9/329, paras. 27 to 33). Therefore, the definition of the term serves in part to determine the sphere of application of the Model Law.

6. The first two sentences define a credit transfer in terms of the actions taken in regard to payment orders, and not in terms of the movement of funds as in the prior definition. The types of transfers to be covered by the Model Law are also affected by the definition of "payment order".

7. The third sentence was included in the definition because (a) while the current draft of articles 11 and 14 implied the time of completion of the credit transfer, that time is not clearly stated and (b) since the definition would state when a credit transfer began, it would be logical for it to state when the credit transfer was completed. In opposition it was said that the time of completion was too important to be found in a definition; it should be in a completely separate provision. Opposition was also expressed to the particular event chosen as the time of completion of the credit transfer. Therefore, the placing of the third sentence in square brackets was intended to indicate that neither the substance of a rule as to when a credit transfer was completed nor the location of such a rule had been decided by the Working Group (A/CN.9/329, para. 33). See also article 14, comments 5 to 11.

"Payment order"

10.* In accordance with a suggestion made at the seventeenth session of the Working Group, the minimum data elements necessary to constitute a payment order were included in the definition of the term submitted to the eighteenth and nineteenth sessions (A/CN.9/317, para. 54). At the nineteenth session the drafting group separated the definition into two elements, a definition in article 2 and the requirements as to the minimum data elements in a payment order in article 3 (A/CN.9/328, para. 145 and annex).

11. At the twentieth session of the Working Group the minimum data elements in a payment order as set out in

article 3 were deleted from the draft Model Law (A/CN.9/329, paras. 89 to 93). Nevertheless, the existence of an incomplete payment order has consequences in regard to the credit transfer. Those consequences are considered in articles 5 to 8.

12. The current definition of "payment order" was adopted at the twentieth session to accord with the new definition of "credit transfer" adopted at that session (A/CN.9/329, paras. 34 to 58).

13. It was decided not to make any reference to the form in which the payment order might exist, i.e. written, oral, magnetic, or in which it might be transmitted from the sender to the receiving bank. On the one hand, any listing might exclude new technological advances. On the other hand, in some countries restrictions on the use of particular forms for the existence or transmission of a payment order might be of a regulatory nature. In the absence of any provision on this point in the Model Law, it would be settled under other applicable provisions of national law.

14. The Working Group agreed that the Model Law should not govern conditional payment orders that were to be sent from one bank to another, and decided that such orders would not be considered to be "payment orders" (A/CN.9/329, paras. 40 to 42 and 50 to 53). However, a conditional payment order issued by the originator is a "payment order" if the condition is to be satisfied on or before the issue of a payment order by the originator's bank. The payment order issued by the originator's bank would be a payment order even if the condition set out in the originator's payment order was repeated by mistake in the payment order issued by the originator's bank. Furthermore, it was intended by the Working Group that the receiving bank of the payment order from the originator's bank would have no obligation to inquire whether the condition had been fulfilled. The payment order it received should be considered to be clean. This limited recognition of conditional payment orders was adopted since a complete exclusion of conditional payment orders issued by the originator was thought to have the potentiality of excluding the entire credit transfer from the application of the Model Law.

15. Nevertheless, opposition was expressed in the Working Group to even such a restricted recognition of conditional payment orders as falling within the sphere of application of the Model Law. It was noted that article 5(1) did not give the originator's bank any extra time within which to consider whether it wished to be bound by a conditional payment order before the bank was deemed to have accepted the order (A/CN.9/329, para. 52). In the subsequent discussion of article 9, various periods were considered for the time available to the originator's bank to consider whether to accept or reject a conditional payment order, but resolution of the question was deferred (A/CN.9/329, paras. 173 and 174 and article 9, comment 13, below).

16. Subparagraph (iii) is intended to draw a distinction between debit transfers, which are excluded from the sphere of application of the Model Law, and credit transfers, which are included. In a communication to the

*Paragraph numbers 8 and 9 of the comments are missing due to an error in numbering and no substance was omitted.

Secretariat the delegation of the United Kingdom has questioned whether the desired result is achieved, since a cheque given to a payee could be said to be transmitted "directly . . . to an intermediary . . . for transmittal to the receiving bank". It suggested that the intended policy might be better expressed by the following words:

- "(iii) the instruction does not provide that payment is to be made at the request of the designated person."

17. It may be questioned whether subparagraph (iv) is necessary. An instruction to a bank to establish a letter of credit is not an instruction to pay a sum of money but an instruction to issue a promise to pay under the specified conditions. The bank pays the beneficiary because of its own promise, even if that promise was inconsistent with the instruction it received.

"Originator"

18. The definition differs from the wording of the definition in ISO 7982-1, but not from its meaning. It was approved by the Working Group at its seventeenth, eighteenth and twentieth sessions (A/CN.9/317, para. 32; A/CN.9/318, para. 41; A/CN.9/329, para. 59). Under the definition a bank that issues a payment order for its own account is an originator. See comments 2 to 4 to article 1 for the consequences on the sphere of application of the Model Law.

"Beneficiary"

19. The definition differs from the wording of ISO 7982-1 in that the beneficiary is the person named as beneficiary in the originator's payment order and a person whose account is credited in error is not a beneficiary (A/CN.9/318, para. 42; A/CN.9/329, para. 69). For the situation where the identity of the beneficiary is expressed both by words and by account number and there is a discrepancy between them, see article 8(5). Similarly to the rule in regard to an originator, a bank may be the beneficiary of a transfer.

"Sender"

20. The Working Group decided at its seventeenth and eighteenth sessions that the term should include the originator as well as any sending bank (A/CN.9/317, para. 46; A/CN.9/318, para. 44; see also A/CN.9/329, para. 61). ISO 7982-1 defines "sending bank" as the "bank that inputs a message to a service" but it has no term that includes the originator as a sender. Such a term is not necessary in the context of ISO 7982-1.

"Bank"

21. The Working Group at its eighteenth session agreed to use the word "bank" since it was short, well-known and covered the core concept of what was intended (A/CN.9/318, para. 46). The definition in the Model Law will necessarily differ from that used in national legislation since there are different definitions in various countries and in some countries there are two or more definitions for different purposes.

22. The definition in ISO 7982-1 is that a bank is "a depository financial institution". The Working Group at its eighteenth session was of the view that the test as to whether a financial institution should have the rights and obligations of a bank under the Model Law should depend on whether "as an ordinary part of its business it engaged in credit transfers for others", rather than whether it engaged in the totally unrelated activity of taking deposits. As a result, some individual financial institutions that would not normally be considered to be banks, such as dealers in securities that engage in credit transfers for their customers as an ordinary part of their business, would have been considered to be banks for the purposes of the Model Law under the definition adopted at the eighteenth session.

23. The Working Group at its twentieth session made three changes in the definition (A/CN.9/329, paras. 62 to 68). First, it replaced the words "financial institution" by the word "entity". It was said that the Model Law was intended to govern a service and not particular systems. The change in the definition was specifically intended to bring under the Model Law those post offices that provide a credit transfer service, even though they may otherwise be governed by different rules because of their administrative status. Secondly, the definition focuses on the execution of payment orders rather than on whether the entity engages in credit transfers. Thirdly, the final words were placed in square brackets by the drafting group.

24. An earlier version of the definition of "bank" provided that "for the purposes of these Rules a branch of a bank is considered to be a separate institution". At the eighteenth session of the Working Group the sentence was deleted and it was decided that consideration would be given in each of the substantive articles whether branches should be treated as banks (A/CN.9/318, para. 54). Paragraphs indicating that branches of a bank are considered as separate banks have been added to articles 1(2), 6(7), 9(5) and 10(9) (A/CN.9/318, paras. 53 and 54; A/CN.9/328, paras. 82 and 110; A/CN.9/329, para. 141).

"Receiving bank"

25. Although the Working Group at its eighteenth session modified the wording of the definition from that found in ISO 7982-1, the meaning remained the same (A/CN.9/318, paras. 55 to 57). A bank that receives a payment order is a receiving bank even if the payment order was not addressed to it. Such a bank must react to the fact of having received the order. (The problem of mis-directed payment orders is addressed in articles 6(3) and 8(2).) A bank to which a payment order is addressed but which does not receive it is not a receiving bank. It would not be appropriate to place upon it the obligation of a receiving bank in regard to a payment order that it did not know about.

"Intermediary bank"

26. The definition was proposed by the Working Group at its seventeenth session and modified at its twentieth session by the drafting group (A/CN.9/317, para. 41;

A/CN.9/329, para. 72). It differs from the definition in ISO 7982-1 in three substantial respects: first, it includes all receiving banks other than the originator's bank and the beneficiary's bank, whereas ISO 7982-1 includes only those banks between the given receiving bank and the beneficiary's bank; secondly, ISO 7982-1 includes only those banks between the receiving bank and the beneficiary's bank "through which the transfer must pass if specified by the sending bank"; and thirdly, reimbursing banks are included in this definition, even though the transfer may be considered not to pass through them and they are not in the chain of payment orders from the originator to the beneficiary's bank (A/CN.9/329, paras. 70 and 71).

"Funds" or "money"

27. The definition is modelled on the definition of "money" or "currency" contained in article 5(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/318, para. 59). However, it specifies that the term includes credit in an account, as is proper in the context of this Model Law. The definition was modified by the drafting group at the nineteenth session in accordance with the suggestion contained in A/CN.9/WG.IV/WP.41, article 2, comment 16. At the twentieth session it was noted that the definition included the ECU (A/CN.9/329, para. 73).

"Authentication"

28. The purpose of an authentication procedure is to permit the receiving bank to determine whether the payment order was issued by the purported sender. Even if the payment order was not authorized, the purported sender will be bound if the requirements of article 4(2) are met, including the requirement that "the authentication provided is a commercially reasonable method of security against unauthorized payment orders".

29. The definition makes it clear that an authentication of a payment order does not refer to formal authentication by notarial seal or the equivalent, as it might be understood in some legal systems.

30. The definition differs from the definition of "message authentication" in ISO 7982-1 in that authentication as here defined does not include the aspect of validating "part or all of the text" of a payment order, even though most authentication techniques that rely upon the use of computers do both. This position was confirmed by the Working Group at its twentieth session because the problems of authentication of a payment order as to its source and verification of the accuracy of its contents were two different legal concepts. In respect of the source of a message, the basic rule in article 4(1) is that the purported sender is not bound by a payment order unless he had in fact issued it or authorized its issue. The concept of authentication and its use in article 4(2) served to describe situations in which the purported sender might be bound by a payment order in spite of the fact that it had not been issued or authorized by him. In respect of errors, the Working Group noted that the general rule was that the

sender was bound by what was received by the receiving bank (A/CN.9/329, paras. 77 to 79) (although that conclusion is not specifically stated in the current draft of article 4(1) or of any other provision of the Model Law). The Working Group went on to say that if it was intended that the Model Law should relieve the sender of that responsibility because of the availability of a procedure agreed between the sender and the receiving bank that would detect errors in a payment order or corruption of the contents of a payment order, that intention should be set out separately in the Model Law. The Working Group has not as yet considered the question as to whether such an exception to the responsibility of the sender should be included in the Model Law.

31. The Working Group was in agreement at its twentieth session that, if article 10 was retained, the definition of authentication should apply to the revocation of payment orders. However, since there was opposition to the basic scheme of article 10, the words "or a revocation of a payment order" were placed in square brackets (A/CN.9/329, paras. 76 and 184 to 186).

32. The definition as adopted by the Working Group at its eighteenth session and modified at its twentieth session includes the provision that the authentication procedure is established by agreement (A/CN.9/318, paras. 75, 76 and 94; A/CN.9/329, paras. 74 and 76). That agreement may be embodied in the rules of a clearing house or message system or it may be in the form of a bilateral agreement between the sender and the receiving bank. Under article 4(2) the authentication procedure must be "commercially reasonable" in order for a purported sender to be bound by an unauthorized payment order; a sender cannot agree to be bound by a commercially unreasonable procedure. See article 4, comments 4 and 5.

"Execution date"

33. There is no equivalent term in ISO 7982-1. The execution date is the date on which a given payment order is to be executed by the receiving bank. Since a credit transfer may require several payment orders, each of those payment orders may have an execution date, and each of the execution dates may be different.

34. The Working Group at its eighteenth and nineteenth sessions engaged in an extensive effort to define properly the term "execution date", especially in connection with its use in article 9 (A/CN.9/318, paras. 104 to 106; A/CN.9/328, paras. 76 to 91; see also A/CN.9/WG.II/WP.44, article 2, comments 27 to 31 where the earlier discussion is summarized). The current definition was adopted by the Working Group at its twentieth session (A/CN.9/329, paras. 81 and 182). As to the date when article 9 requires the receiving bank to execute the payment order, see article 9, comments 5 and 12.

35. The definition makes it clear that the execution date is the date the receiving bank is required to execute the payment order and not the date the receiving bank did execute it, if those dates are not the same.

36. The current draft of the Model Law does not define what constitutes execution of the payment order by the receiving bank. When the bank is not the beneficiary's bank, an order can be assumed to be executed when the receiving bank issues a payment order intended to carry out the order received (compare article 5(2)(d) with article 6(2)). When the receiving bank is the beneficiary's bank, execution is probably best understood as acceptance of the order in any of the ways specified in article 7(1). If the sender wishes to specify when the funds are to be placed at the disposal of the beneficiary, a "pay date" should be specified. The term "execute" in one of its various forms is used throughout the draft Model Law in connection with payment orders. In addition, in article 12(2) reference is made to execution of the credit transfer, and a definition is there given of that concept.

"Pay date"

37. The term "pay date" is also used by ISO 7982-1 to indicate the date when the funds are to be available to the beneficiary. ISO 7982-1 uses the term "payment date" to indicate the date when a payment was executed. Such a term was included in the text before the seventeenth session of the Working Group but, since the term was not used further, it was deleted in the revision by the Secretariat submitted to the eighteenth session.

38. The definition of "pay date" differs from that in ISO 7982-1 in that in the latter the pay date is the "date on which the funds are to be available to the beneficiary for withdrawal in cash". In the Model Law definition the pay date is the date "when funds are to be placed at the disposal of the beneficiary". (See A/CN.9/317, para. 43.) The definition leaves open the question when and under what circumstances funds are placed at the disposal of the beneficiary, but they may be at the disposal of the beneficiary even though they are not available for withdrawal in cash. The most obvious example is when the transfer is in a unit of account that may be at the disposal of the beneficiary for further transfer in that form but not available in cash either as a unit of account or, perhaps, even in the local currency.

39. The definition provides that the pay date is the date specified by the originator. This raises a question as to the significance of a date that purports to be a pay date in an order issued by the originator's bank or an intermediary bank but which is different from the date specified by the originator. See article 9, comments 17 and 18.

Article 3. Contents of payment order

(Deleted)

Prior discussion

A/CN.9/297, paras. 37 and 38

A/CN.9/317, paras. 49 to 68

A/CN.9/329, paras. 87 to 93

Comments

1. Article 3 of the draft Model Rules prepared by the Secretariat and submitted to the seventeenth session of

the Working Group was entitled "form and content of payment order". In the light of the discussion at that session (A/CN.9/317, paras. 49 to 68), the substance of paragraphs (1) and (2) of article 3 were included in the definition of "payment order" in the redraft prepared for the eighteenth session of the Working Group. In particular, in accordance with a suggestion made in the seventeenth session of the Working Group, the minimum data elements necessary to constitute a payment order were included in the definition of the term (A/CN.9/317, para. 54). Inclusion of the minimum required data elements in the Model Law was expected to have an educational function.

2. At the nineteenth session the drafting group decided to delete the minimum required data elements from the definition of a payment order, since a message might be considered not to be a payment order if any one of the listed data elements was omitted (A/CN.9/328, para. 145; see A/CN.9/WG.IV/WP.41, article 2, comment 18), and to set out the required minimum data elements in article 3.

3. At the twentieth session the Working Group considered whether additional data elements should be made mandatory, and particularly information on cover, and the identification of the originator and the originator's bank (A/CN.9/329, paras. 87 and 88). At the end of the discussion the Working Group decided to delete article 3 entirely (A/CN.9/329, para. 93). Problems of incomplete instruments are now considered in articles 6(4) and 8(3).

4. The Working Group also decided to address in some other provision the need for payment orders to disclose to receiving banks that the payment order formed part of an international credit transfer.

CHAPTER II. DUTIES OF THE PARTIES

Article 4. Obligations of sender

(1) A purported sender is bound by a payment order [or a revocation of a payment order] if it was issued by him or by another person who had the authority to bind the purported sender.

(2) Notwithstanding anything to the contrary in paragraph (1) of this article, when a payment order is subject to authentication, a purported sender of such an order is bound if:

(a) the authentication provided is a commercially reasonable method of security against unauthorized payment orders,

(b) the amount of the order is covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank or there is an agreement between the sender and the receiving bank that such payment orders may be executed despite the absence of such balances or overdrafts, and

(c) the receiving bank complied with the authentication.

(3) Variant A

A purported sender [that is not a bank] is, however, not bound by a payment order under paragraph (2) of this article if

(a) the actual sender was a person other than a present or former employee of the purported sender, and

(b) the actual sender had gained access to the authentication procedure without fault on the part of the purported sender.

Variant B

No sender may become bound under paragraph (2) of this article if the sender proves that the payment order was executed by

(a) a present or former employee or agent of the receiving bank, or

(b) a person acting in concert with a person described in subparagraph (a), or

(c) any other person who, without the sender's authorization, obtained confidential information about the authentication from a source controlled by the receiving bank, regardless of fault.

(4) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the execution date, unless otherwise agreed.

Prior discussion

A/CN.9/297, paras. 39 to 45 and 69

A/CN.9/317, paras. 57, 69 to 79 and 84

A/CN.9/318, paras. 70 to 109

A/CN.9/329, paras. 94 to 111

Comments

1. Paragraphs (1) to (3) set forth the situations in which a purported sender of a payment order is bound by the order. Paragraph (4) sets forth the only obligation of the sender in regard to a payment order on which it is bound, i.e. to pay the receiving bank for it.

Paragraph (1)

2. Paragraph (1) states the basic rule that a purported sender is bound by a properly authorized payment order. Pursuant to the words "or revocation of a payment order" the purported sender is also bound by a properly authorized revocation of a payment order. Those words have been placed within square brackets subject to a determination whether article 10 will be retained (A/CN.9/329, para. 96).

Paragraph (2)

3. Paragraph (2) has been drafted as an exception to paragraph (1), but from the viewpoint of banking operations it provides the basic rule. In almost all cases a

payment order must be authenticated. Proper authentication indicates proper authorization and the receiving bank will act on the payment order. Even if the payment order was not properly authorized under paragraph (1), the purported sender is bound by the order if the three requirements of paragraph (2) are met.

4. The first requirement, set out in subparagraph (a), is that the authentication provided is commercially reasonable. The discussion in the eighteenth session of the Working Group proceeded on the basis that it was the receiving bank that determined the type of authentication it was prepared to receive from the sender. Therefore, it was the receiving bank's responsibility to assure that the authentication procedure was at least commercially reasonable. The sender and the receiving bank could not provide for a lower standard by agreement (A/CN.9/318, para. 75).

5. No attempt has been made to set a standard as to what constitutes a commercially reasonable authentication procedure. The standard would depend on factors related to the individual payment order, including such factors as whether the payment order was paper-based, oral, telex or data transfer, its amount and the identity of the purported sender. The standard as to what was commercially reasonable could be expected to change over time with the evolution of technology. At the twentieth session of the Working Group it was suggested that, in view of the imprecision of the term "commercially reasonable" and the unfamiliarity of many legal systems with the concept, any commentary that might be written to accompany the Model Law when it is adopted by the Commission might give a suggestion as to factors to be taken into account (A/CN.9/329, para. 98).

6. The second requirement, set out in subparagraph (b), that the amount of the payment order is covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank, affords a protection for originators in some countries. By limiting the amount that can be debited to an account, a customer can limit the amount of potential loss. Such a limitation also furnishes to a limited degree an indication that an excessively large payment order may be in error or fraudulent (A/CN.9/318, paras. 82 and 85 to 87; A/CN.9/329, paras. 100 and 101).

7. The last clause was added to be sure that the provision would not cause problems in a net settlement system where a sending bank would have no account relationship with the receiving bank (A/CN.9/318, paras. 85 and 86). The clause would also seem to apply to the situation where a receiving bank was to receive reimbursement by credit in its account at a third bank. Because of the use of the words "may be", the clause governs the situation in some countries where the agreements between banks and their customers provide that the bank is permitted, but not required, to create an overdraft when it receives a payment order from its customer (A/CN.9/318, paras. 84 and 86; A/CN.9/329, para. 102).

8. At the twentieth session a proposal to delete subparagraph (b) was rejected (A/CN.9/329, paras. 100 and 101).

In a subsequent communication to the Secretariat the delegation of the United Kingdom again suggested the deletion of subparagraph (b) on the grounds that the subparagraph would impose an unreasonable burden on the receiving bank. The United Kingdom said that it was not possible in practice for a bank to monitor a customer's withdrawable credit balance or authorized overdraft during the day. It was suggested that as an alternative a sender who was concerned about his potential liability for uncovered unauthorized payment orders could require a more stringent method of authentication, such as specific telephone confirmation, for payment orders over a given amount.

9. The third requirement is that the receiving bank complied with the authentication. If the bank complied with the authentication but the sender had not, the bank would know that the payment order was not authenticated by the sender and should reject it. It was intended that, if the bank did not comply with the authentication but the payment order was in fact authorized, the purported sender would be bound nevertheless under paragraph (1). However, the words "Notwithstanding anything to the contrary in paragraph (1)" may lead to the contrary result. To avoid that interpretation the *chapeau* to paragraph (2) might read "When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is, nevertheless, bound if:".

Paragraph (3)

10. The paragraph was prepared in two versions at the eighteenth session of the Working Group. In general, those who were in favour of placing on the receiving bank the major risk that an authentication had been falsified by a known or unknown third person favoured Variant A. That was said to be appropriate because it was the receiving bank that usually designed the authentication procedure (see comment 4, above). In general, those who were in favour of placing the major risk on the sender favoured Variant B. That was said to be appropriate because it was the sender who chose the means of transmission of the particular payment order. Moreover, Variant B would act as an incentive to senders to protect the authentication or encryption key in their possession (A/CN.9/318, paras. 88 to 90).

11. At the eighteenth session it was suggested that in order to compare better the advantages or disadvantages of the two variants, Variant A should be re-written to state, as does Variant B, what would have to be proven and by whom. Since even the supporters of Variant A seemed to assume that it would be the sender who had the burden of proving the exonerating conditions (see A/CN.9/318, para. 91), the suggestion was made in A/CN.9/WG.IV/WP.44, article 4, comment 12, that the introductory words to Variant A might read as follows:

"A purported sender [that is not a bank] is not bound under paragraph (2) if he proves that

(a) . . .".

12. At the twentieth session a third proposal was made based upon the *chapeau* of Variant A, subparagraphs (a) and (b) of Variant B followed by subparagraph (b) of

Variant A (A/CN.9/329, para. 103, where the text of the proposal can be found). The proposal was understood by the proponents of the two original variants in different ways and was not further pursued. During the discussion it was also suggested that the Working Group should have before it article 4A-203(2) and (3) of the Uniform Commercial Code in the form in which it had recently been adopted in the United States. Those two paragraphs are set out in A/CN.9/329, para. 107.

13. As a result of the inability to reach agreement, the Working Group left the text unchanged and decided to return to the question at its next session (A/CN.9/329, para. 108).

14. In a subsequent communication to the Secretariat the delegation of the United Kingdom noted that, while it preferred Variant B, it proposed the following text, which it thought might prove to be more acceptable to the Working Group:

"(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from:

(a) The actions of a person who had gained access to the authentication procedure through the fault of the purported sender, or

(b) the actions of a person other than

(i) a present or former employee or agent of the receiving bank, or

(ii) a person who obtained confidential information about the authentication procedure from a source controlled by the receiving bank.

This paragraph is subject to any agreement between the sender and the receiving bank, excluding, limiting, or extending its effect."

15. The delegation of the United Kingdom noted that the wording at the end of its proposal would allow either the sender or the receiving bank to obtain better terms than those set out in article 4(3).

Errors in payment order or corruption of its contents

16. In the working paper submitted to the twentieth session of the Working Group suggestions were made as to how the authentication defined in article 2 and used in article 4 in respect of identification of the sender might also be used in respect of errors in a payment order or corruption of the contents of a payment order during its transmission (A/CN.9/WG.IV/WP.44, article 2, comment 23 and article 4, comment 10). The Working Group did not accept the suggestion that an authentication as defined should be used for both purposes. It said that, if it was intended that the Model Law should relieve the sender of the responsibility for the content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that

would detect the error or corruption, that intention should be set out separately in the Model Law (A/CN.9/329, para. 79). If it would be the desire of the Working Group to include such a rule, it would seem appropriate that it be in article 4 following current paragraph (3).

Paragraph (4)

17. The distinction between creation of the obligation of the sender to pay the receiving bank when the receiving bank accepts the payment order and the maturing of the obligation to pay on the execution date is relevant when the execution date is in the future. The provision raises two separate problems: the obligation of the sender when the receiving bank fails to execute on the execution date and the obligation of the sender when the receiving bank accepts the payment order prior to the execution date.

18. At the eighteenth and twentieth sessions the use of the execution date as the date when the sender should be obligated to make the funds available to the receiving bank was questioned on the grounds that the execution date was defined in article 2(k) as the date the receiving bank was obligated to act and not the date the receiving bank had performed its obligation (A/CN.9/318, para. 104; A/CN.9/329, para. 109). At the twentieth session it was stated in reply that, while the sender should be obligated to pay on the execution date, the sender should receive interest under article 12 for the period of any delay by the receiving bank in executing the order. The latter suggestion appears to have been thought to have been the natural consequence of the text of the Model Law as currently drafted.

19. At the twentieth session it was stated that the sender's obligation to pay should extend only to the amount of the payment order and not to any costs or charges. That issue, however, was not resolved. Reference was made to the treatment of the issue in article 14(3) (A/CN.9/329, para. 110). Compare suggestions in regard to article 14(3) in article 14, comments 12 and 13, below.

20. It can be doubted whether receiving banks will often accept payment orders for future execution prior to the execution date, unless the sender has already paid for the order. However, if the receiving bank executes the payment order prior to the execution date, it accepts the order at the time of its execution. While the sender can no longer revoke the order (article 10(1) and (2)), and becomes obligated to pay for it, the receiving bank may not debit the sender's account or otherwise require payment for the order until the execution date. See, however, article 14(4), which was said at the twentieth session to be incompatible with article 4(4) (A/CN.9/329, para. 110). See article 14, comments 14 and 15, which includes a suggestion in regard to possible amendment of article 4(4).

Article 5. Acceptance or rejection of a payment order by receiving bank other than a beneficiary's bank

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank accepts the sender's payment order at the earliest of the following times:

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given, provided that acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it gives notice to the sender of acceptance, or

(d) when it issues a payment order intended to carry out the payment order received.

(3) A receiving bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (2)(a), is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Prior discussion

A/CN.9/297, paras. 46 to 51
A/CN.9/317, paras. 80 to 84
A/CN.9/318, paras. 110 to 120 and 126 to 134
A/CN.9/WG.IV/WP.42, paras. 7 to 16
A/CN.9/328, paras. 12 to 16
A/CN.9/329, paras. 112 to 127

Comments

1. The drafting group at the nineteenth session substantially restructured the portion of the draft Model Law dealing with acceptance of a payment order by a receiving bank and the statement of the obligations of a receiving bank. Under the new structure articles 5 and 6 deal with a receiving bank that is not the beneficiary's bank while articles 7 and 8 deal with the beneficiary's bank. Since a "receiving bank" is defined in article 2(g) in such a way as to include a "beneficiary's bank", it was necessary to include paragraph (1) in this article to make it clear that article 5 does not apply to a beneficiary's bank.

Concept of acceptance

2. In the draft prepared by the Secretariat for the eighteenth session of the Working Group a number of the substantive rules depended on the acceptance of a payment order by the receiving bank. Discussion at that session showed that the Working Group was strongly divided on the desirability of using such a concept. Its use was advocated as a convenient means to describe in a single word a number of different actions of different receiving banks that should have the same legal consequences, making it possible to use the word in various substantive provisions. In response, it was said that use of the term "acceptance" was not necessary and that it would

cause difficulties in many legal systems because it seemed to suggest that a contract was created as a result of the receiving bank's actions.

3. In order to help resolve the controversy, the Secretariat prepared a report for the nineteenth session of the Working Group that described the criteria for determining when a receiving bank had accepted a payment order and the consequences of acceptance (A/CN.9/WG.IV/WP.42, paras. 2 to 42). The matter was discussed at length by the Working Group at its nineteenth session, at the conclusion of which the Working Group decided to retain the use of the concept (A/CN.9/328, para. 52).

4. A proposal was made at the twentieth session to define the term "acceptance". The proposal received no support (A/CN.9/329, paras. 112 and 113).

Paragraph (2)

Subparagraph (a)

5. Subparagraph (a) is a combination of paragraphs (1) and (2)(a) of the text as it emerged from the nineteenth session (A/CN.9/328, annex). Paragraph (1) of that text was in turn composed of elements that had been in articles 5(1) and 7(1) of the text that had emerged from the eighteenth session (A/CN.9/318, annex). Throughout these various forms of presentation the policy, first established at the eighteenth session, has remained unchanged.

6. Except for certain obligations of notification of error set out in articles 6 and 8, the receiving bank is normally not required to act upon a payment order it receives unless it accepts the order. Nevertheless, since the expectation is that a receiving bank will execute a payment order it has received, paragraph (3) provides that the receiving bank is required to notify the sender if it does not accept the order under paragraph (2)(b) or (d). Subparagraph (2)(a) then provides that the payment order is accepted if no notice of rejection is given.

7. The need to give notice of rejection exists even if the sender has no account relationship with the receiving bank or has even had no prior dealings with it of any kind (A/CN.9/318, paras. 114 to 116; A/CN.9/329, para. 118). There is no requirement that the notification give any reason for the rejection of the payment order.

8. While paragraph (3) states no exception to the need for the receiving bank to notify the sender of the rejection of the payment order, the effect of subparagraph (2)(a) is that the bank does not accept the order by reason of a failure to notify if one of its reasons for rejecting the order is insufficient funds. The exception applies even if the receiving bank had additional reasons for rejecting the order (A/CN.9/318, para. 119). At the twentieth session the Working Group considered whether the rule should differentiate between the various fact situations that might constitute insufficient funds, and decided that the receiving bank should never be considered to have accepted a payment order under subparagraph (2)(a) until it had received payment from the sender under article 4(4) (A/CN.9/329, paras. 119 to 123 and 175).

9. In a subsequent communication to the Secretariat the delegation of the United Kingdom suggested the deletion of the words "in accordance with article 4(4)". It noted that those words gave rise to a circular problem since article 4(4) provides that the sender is obligated to pay the receiving bank only when the receiving bank accepts the payment order. The sender is always permitted to pay the receiving bank prior to acceptance, which is the situation envisaged in article 5(2)(a).

Subparagraph (b)

10. Subparagraph 2(b) was originally in prior article 6(2)(a) and was applicable only to the beneficiary's bank. At the eighteenth session of the Working Group it was decided that the provision should be modified by adding to it a requirement that the beneficiary's bank had exhibited a volitional element before the beneficiary's bank was deemed to have accepted the payment order (A/CN.9/318, para. 137). However, the required volitional element was not added to the text at that session. At the nineteenth session of the Working Group the original provision was discussed at length in the context of the beneficiary's bank (A/CN.9/328, paras. 45 to 49). In favor of retaining the original text without any volitional element it was stated that contracts between banks that the receiving bank would execute payment orders when received even if funds were not yet available existed both in regard to multilateral net settlement systems and bilateral banking relations. They were entered into to increase the security of the operation of the funds transfer system. The legal security provided by those contractual obligations would be increased if the receiving bank was considered to have accepted the payment order as soon as it was received.

11. At the conclusion of the discussion at the nineteenth session it was decided to retain the original text as it applied to the beneficiary's bank and to extend the rule to receiving banks that were not the beneficiary's bank (A/CN.9/328, paras. 32 and 49; see also A/CN.9/329, para. 126).

Subparagraph (c)

12. Subparagraph 2(c) providing that a receiving bank might expressly accept a payment order was added by the Working Group at its nineteenth session (A/CN.9/328, paras. 29 to 31). In the discussion doubts were raised as to the likelihood that a receiving bank would expressly accept a payment order for future implementation, but it was suggested that in the case of a large transfer a bank might be asked whether it would be prepared to handle the transaction. Its agreement would function as an express acceptance of the order.

Subparagraph (d)

13. Subparagraph 2(d) provides for the normal way in which a receiving bank that is not the beneficiary's bank would accept a payment order it had received, i.e. by sending its own payment order intended to carry out the payment order received. If the payment order sent is consistent with the payment order received, the undertaking of obligations by the receiving bank and the execution of

the most important of those obligations under article 6(2) are simultaneous. However, a receiving bank accepts a payment order even when it sends its own order for the wrong amount, to an inappropriate bank or for credit to the account of the wrong beneficiary, so long as the payment order sent was intended to carry out the payment order received. If such an inconsistent payment order is sent, the undertaking of obligations and the failure to carry out those obligations are also simultaneous.

Paragraph (3)

14. The text of article 7(4) following the eighteenth session of the Working Group provided that "a notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order" (A/CN.9/318, annex). The drafting group at the nineteenth session moved the rule as to when the notice must be given by a receiving bank that is not the beneficiary's bank to article 5(1). In conformity with a decision of the Working Group it deleted the requirement that the notice must be given on the day the decision is made (A/CN.9/328, para. 86). At the twentieth session the rule was moved by the drafting group to the second sentence of paragraph (3).

15. Paragraph (3) now states that, if the receiving bank does not accept the payment order under subparagraph (2)(b), (c) or (d), it must give a notice of rejection and that notice of rejection must be given by the execution date. If no required notice of rejection is given, subparagraph (2)(a) provides that the receiving bank accepts the payment order (see comments 6 to 8 above). In this case "given" should probably be understood to mean "issued", since the requirement to give notice is linked to the time when the receiving bank should otherwise have executed the payment order. If the word "give" is understood to mean "issue", the provision should also be understood to require the notice to be given by an expeditious means, which would normally mean by telecommunications. Paragraph (3) adds that no notice of rejection need be given if there is insufficient information to identify the sender (A/CN.9/329, para. 117).

16. The text of article 5(1) following the eighteenth session of the Working Group stated that the obligation of the receiving bank to notify the sender of its decision that it would not comply with the sender's payment order was subject to the contrary agreement of the sender and receiving bank. Although the drafting group deleted those words from the current text, the deletion did not indicate a change in policy on the part of the Working Group. At the twentieth session the Working Group took note of the above statement, which had originally been made in A/CN.9/WG.IV/WP.44, comment 9 to article 5 (A/CN.9/329, para. 124).

Article 6. Obligations of receiving bank other than beneficiary's bank

- (1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.
- (2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment

order, within the time required by article 9, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

(3) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the receiving bank shall give notice to the sender of the misdirection, within the time required by article 9.

(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(5) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 9 if, in the time required by that article, it enquires of the sender as to the further actions it should take in light of the circumstances.

(7) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 88
 A/CN.9/318, paras. 60 to 69, 121, 122 and 144 to 154
 A/CN.9/328, paras. 17 to 20 and 75
 A/CN.9/329, paras. 128 to 141

Comments

Paragraph (2)

1. Paragraph (2) is prior paragraph (4), drafted in essentially the current form as article 5(3)(a) at the eighteenth session (A/CN.9/318, paras. 152 and 154) and redrafted by the drafting group at the nineteenth session. The paragraph states the basic obligation of a receiving bank other than the beneficiary's bank that has accepted a payment order, i.e. to send its own proper order to an appropriate bank within an appropriate period of time. On most occasions when a receiving bank is held liable to its sender it will be for failure to comply with the requirements of

this paragraph. When the receiving bank sends its own payment order to its receiving bank, it becomes a sender and undertakes the obligations of a sender under article 4.

Paragraph (3)

2. Paragraph (3) is identical to prior paragraph (2), which in turn was identical to the first sentence of article 5(1 *bis*) as it was adopted at the eighteenth session, with the exception that at the twentieth session the reference to sending the notice within the time required by article 9 was added.

3. The Working Group decided at its eighteenth session that a receiving bank should be required to notify the sender when the payment order received indicated that it had been misdirected. The imposition of such a duty will help assure that the funds transfer system will function as intended (A/CN.9/318, para. 122). The duty applies whether or not the sender and the receiving bank have had any prior relationship, whether or not the receiving bank accepted the order and whether or not the bank recognized that the payment order had been misdirected (see A/CN.9/328, para. 18).

4. As the result of a concern expressed at the nineteenth session that the bank might not be able to fulfil its obligation even if it wished to, paragraph (3) was modified to provide that the receiving bank is required to notify the sender only if the identity of the sender and its address can be readily ascertained (A/CN.9/328, para. 20).

5. Paragraph (3) was retained at the twentieth session in spite of the argument that an excessive burden was being placed on the receiving bank, especially when the error was that of the sender (A/CN.9/329, paras. 129 to 131). In particular, it was said that when modern means of transmitting payment orders were used, the addressing of the payment order was done primarily by bank identification number and not by name.

6. In a subsequent communication to the Secretariat the delegation of the United Kingdom suggested that the present wording did not seem to implement the policy expressed at the twentieth session that the Model Law should not set forth a duty to detect the misdirection but that it was appropriate to require notification once the misdirection had been detected (A/CN.9/329, para. 130). It suggested the following wording to implement the policy there stated:

“(3) A receiving bank that detects that a payment order contains information which indicates that it has been misdirected shall give notice to the sender, if the payment order contains sufficient information to identify the sender, within the time required by article 9.”

7. The United Kingdom delegation further noted that, if a payment order was received with an execution date some time in the future, the fact that it had been misdirected might not be discovered on the date of receipt. It suggested an amendment to article 9(2) (see article 9, comment 10). The amendment suggested to article 9(2) would read as follows:

“A notice required to be given under article 6(3) shall be given by the close of business on the day following the day of detection.”

8. The United Kingdom delegation further suggested that it should be possible to contract out of the duties imposed by paragraph (3). It noted that agreements between banks often provide that a bank can rely on certain elements of a payment order; they agree that notification is not required even where a discrepancy that is discovered indicates that the payment order might have been misdirected. Effectively the sender is agreeing to bear the risk. The following wording was suggested to be added to the paragraph:

“This paragraph does not apply if the sender and the receiving bank have agreed that the bank would rely on only certain elements of the payment order.”

Paragraph (4)

9. Paragraph (4) was added at the twentieth session (A/CN.9/329, para. 132) to cover a situation that did not fall within the scope of the already existing provisions requiring notice when a message is received that purports to be a payment order but that cannot be executed as such.

10. In a subsequent communication to the Secretariat the delegation of the United Kingdom suggested that the provision as drafted presented two difficulties. First, the Model Law applies only if there is a payment order. Therefore, logically it could not apply to a message that did not meet the definition of a payment order. Secondly, and of greater importance, it was suggested that the provision was too widely drawn because it covered an instruction regardless of whether the receiving bank appreciated that the provision applied. The following wording was suggested:

“(4) When an instruction is received that appears to be intended to be a payment order but that does not contain sufficient data to be a payment order or, being a payment order, cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 9.”

Paragraph (5)

11. Paragraph (5) is essentially the same as prior paragraph (3), which in turn was identical to article 3(1) as it was adopted at the eighteenth session (A/CN.9/318, paras. 60 to 69). If the amount is expressed in both words and figures and there is a discrepancy, the receiving bank is required to notify the sender. The obligation to notify exists whether or not the receiving bank has accepted the payment order. If the receiving bank does not give the required notice and it acts upon the incorrect amount, it is responsible for the consequences, even if it had no knowledge of the discrepancy.

12. At the twentieth session arguments were presented in favour of the rule that, in case of discrepancy, the traditional banking rule should be applied that words controlled over numbers. Other arguments were presented

in favour of the opposite rule that, in regard to modern electronic means of transmitting payment order where the orders were processed by number, the numbers should control the words (A/CN.9/329, para. 133). Both arguments were rejected on the grounds that the current rule was a compromise and if a bank did process payment orders by number only, it could contract with its customers to that effect.

13. The rule is expressed in general terms to apply to payment orders between any sender and receiving bank. However, it was the expectation in the Working Group that paragraph (5) would apply in fact only between the originator and the originator's bank, since interbank payment orders in electronic form transmit the amount of the transfer in figures only (A/CN.9/318, paras. 61 and 63).

14. The view was expressed in the twentieth session that the paragraph was too restricted in that the amount might be represented in clear text by numbers but might also be part of a code, as a result of which the conflict might be between two sets of numbers (A/CN.9/329, para. 134). The suggestion was made that the reference should be only to a discrepancy in amount without saying how that discrepancy might appear. That suggestion was not implemented by the drafting group.

Paragraph (6)

15. Although a receiving bank is normally bound to follow any instructions in the payment order specifying an intermediary bank, funds transfer system or means of transmission, it can happen that it is not feasible to follow the instructions or that doing so would cause excessive costs or delay in completing the transfer (A/CN.9/328, para. 75). This paragraph gives the receiving bank an opportunity to make such a determination, so long as it does so in good faith (see other suggestions in A/CN.9/329, para. 139).

16. As an alternative, the receiving bank can inquire of the sender as to the actions it should take, but it must do so within the time required by article 9. In a communication to the Secretariat subsequent to the twentieth session of the Working Group the delegation of the United Kingdom suggested that the second sentence did not clearly state that a receiving bank would not be in breach of article 9 if it inquired of the sender in the time specified in article 9. It suggested that the second sentence might read:

"A receiving bank that is required to take action by a time specified in article 9 shall be taken to have done so if, within that time, it inquires of the sender as to the further actions it should take in the light of the circumstances."

Article 7. Acceptance or rejection by beneficiary's bank

(1) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the time within which a required notice of rejection should have been given has elapsed without

notice having been given, provided that acceptance shall not occur until the receiving [beneficiary's] bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it notifies the sender of acceptance,

(d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary,

(e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit,

(f) when the bank otherwise applies the credit as instructed in the payment order,

(g) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

(2) A beneficiary's bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (1)(a), is required to give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Prior discussion

A/CN.9/297, paras. 46 to 51

A/CN.9/317, paras. 80 to 84

A/CN.9/318, paras. 110 to 120 and 135 to 143

A/CN.9/WG.IV/WP.42, paras. 32 to 42 and 59 to 65

A/CN.9/328, paras. 44 to 51, 59 and 60

A/CN.9/329, paras. 142 to 147

Comments

1. As a result of the restructuring of the draft Model Law by the drafting group at the nineteenth session of the Working Group, the provisions on the acceptance or rejection of a payment order by the beneficiary's bank were placed in an article separate from that containing similar provisions in respect of a receiving bank that is not the beneficiary's bank. The changes made to article 5 at the twentieth session were also introduced into article 7. Consequently, the majority of the provisions are identical, with the exception of the way in which the bank is referred to, and the comments to article 5 relative to use of the concept of acceptance and to paragraphs (2)(a), (b), (c) and (3) are applicable to article 7(1)(a), (b), (c) and (2).

2. Paragraph 1(c), (d), (e), (f) and (g) represent various forms of volitional act by the beneficiary's bank to accept the payment order received by it. Subparagraphs (d) to (g) were carried over from article 6(2) as adopted at the eighteenth session. At the twentieth session a suggestion was made, but was not acted upon, that subparagraphs (d) to (g) could be replaced by words to the effect "when the

beneficiary's bank placed the funds at the disposal of the beneficiary" (A/CN.9/329, paras. 143 and 147).

3. At the nineteenth session the Working Group deleted from what is currently paragraph (1)(d) the words that had been in square brackets "[without reserving a right to reverse the credit if cover is not furnished]" (A/CN.9/328, para. 49). Those words recognized a practice in some countries to allow a receiving bank, including a beneficiary's bank, to give the credit party provisional credit awaiting the receipt of cover from the sending bank.

4. The discussion at the nineteenth session recognized that the granting of provisional credit to the credit party had the advantage of making the processing of credit transfers more efficient in the vast majority of cases in which cover arrived at an appropriate time. Since the receiving bank was never required to grant provisional credit as a matter of law, it would do so only where it made the credit judgment that it was highly likely to receive the cover or that, if it did not, it could recover the provisional credit from the credit party. Such a credit judgment might be reflected in an agreement with a credit party to grant such provisional credit. Such an agreement would always authorize the receiving bank to re-evaluate its decision to grant provisional credit, although the bank might be required to give advance notice of its decision that it would no longer do so.

5. The discussion at the nineteenth session also noted that the possibility that provisional credit might be reversed introduced elements of insecurity into the funds transfer system that affected not only the credit party, but in extreme cases might endanger the functioning of the entire system. Therefore, the Working Group decided that it was undesirable for a receiving bank, including the beneficiary's bank, to be allowed to reverse a credit (A/CN.9/328, paras. 59 to 60).

6. In an associated discussion at the nineteenth session the Working Group engaged in a preliminary discussion of the desirability of introducing a provision on netting into the Model Law. The Working Group noted that important studies on this issue were taking place elsewhere, and particularly in a committee of the central banks of the Group of Ten, presided by the General Manager of the Bank for International Settlements. Therefore, the Secretariat was requested to follow those developments and to report to the Working Group on the conclusions that had been reached, including the submission of a draft text for possible inclusion in the Model Law if that seemed appropriate (A/CN.9/328, paras. 61 to 65; see A/CN.9/WG.IV/WP.42, paras. 47 to 57). No conclusions had been reported by the Bank for International Settlements as of 15 May 1990.

Article 8. *Obligations of beneficiary's bank*

(1) The beneficiary's bank is, upon acceptance of a payment order received, obligated to place the funds at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary.

(2) When a payment order is received that contains information which indicates that it has been

misdirected and which contains sufficient information to identify the sender, the beneficiary's bank shall give notice to the sender of the misdirection, within the time required by article 9.

(3) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(4) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the beneficiary's bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(5) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank shall give notice, within the time required by article 9, to its sender and to the originator's bank, if they can be identified.

(6) The beneficiary's bank shall on the execution date give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, if the bank has sufficient information to give such notice.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 89 to 92

A/CN.9/318, paras. 64, 66 and 156 to 159

A/CN.9/328, paras. 17 to 20

A/CN.9/329, paras. 148 to 167

Comments

Paragraph (1)

1. The Working Group discussed at its nineteenth and twentieth sessions the issue of the extent to which the Model Law should be concerned with the relationship between the beneficiary and the beneficiary's bank (A/CN.9/328, paras. 37 to 43; A/CN.9/329, paras. 151 to 159; see A/CN.9/WG.IV/WP.42, paras. 58 to 68). The majority of the discussion at the nineteenth session related to the extent to which the Model Law should have rules in respect to the civil consequences of the credit transfer as in current article 14, but the discussion was generally relevant to the question as to whether the Model Law should include rules on the obligation of the beneficiary's bank to the beneficiary in respect of the credit transfer. At the conclusion of the discussion at the nineteenth session the Working Group decided to defer any decision on the question until it had discussed the time when acceptance took place. It returned to the question at the twentieth session at which time the current text was adopted.

2. Paragraph (1) provides only that the funds must be placed at the disposal of the beneficiary in accordance with the payment order and the applicable law governing

the relationship between the bank and the beneficiary. The paragraph serves primarily as a reminder that the ultimate purpose of a credit transfer is to make funds available to the beneficiary.

3. A proposal to include a more detailed statement of the obligations of the beneficiary's bank to the beneficiary was rejected at the twentieth session (A/CN.9/329, paras. 151 to 153). The limited approach taken in paragraph (1) conformed to the general policy that the Model Law should set forth the rights and obligations of the parties up to the moment when the beneficiary's bank accepted the payment order. However, the Model Law should not enter into the account relationship between the beneficiary and the beneficiary's bank, including in respect of issues that are closely related to the credit transfer, such as whether the bank must give the beneficiary notice of receipt of the credit (A/CN.9/329, paras. 165 and 166; see comments 12 and 13, below, for the notice requirement when there is no account relationship).

4. Notice by the beneficiary's bank to the beneficiary that it has the right to withdraw the funds or use the credit (or any of the other actions set out in article 7(1)(c) to (g)) would constitute acceptance of the payment order, if the payment order had not already been accepted in some other manner. To that extent the Model Law gives legal significance to the notice, in addition to any legal significance it may have under other applicable rules of law. However, the Model Law leaves it to those other applicable rules of law to determine the circumstances when notice might be required.

Paragraphs (2), (3) and (4)

5. The restructuring of the text by the drafting group at the nineteenth and twentieth sessions of the Working Group led to the duplication in article 8(2), (3) and (4) of the text of article 6(3), (4) and (5) with appropriate changes in the references to the relevant banks. Therefore, the comments to those paragraphs are relevant to the corresponding paragraphs of article 8.

Paragraph (5)

6. Paragraph (5) applies only to a payment order received by the beneficiary's bank containing a discrepancy between the identification of the beneficiary in words and its identification in figures. No bank prior to the beneficiary's bank can be expected to have the information to be able to determine that such a discrepancy exists.

7. Any solution to the case envisaged presents substantial difficulties. While a discrepancy in the identification of the beneficiary may be the result of error, it may also be an indication of fraud. Rather than take the chance that the incorrect account would be credited, the Working Group decided that the transfer should be suspended and the beneficiary's bank should notify its sender and also the originator's bank, if they are identified on the payment order, of the discrepancy (A/CN.9/318, para. 64).

8. In order to reduce to a minimum the time during which the transfer is suspended, the notification to both

the sender and the originator's bank must be done within the time specified in article 9(2), i.e. on the day the payment order is received, subject to articles 9(3) and (4). It is anticipated that within a reasonable time the beneficiary's bank would receive further instructions as to the proper identification of the beneficiary, or an indication that the transfer was fraudulent.

9. In a communication to the Secretariat the delegation of the United Kingdom suggested that banks be permitted to contract out of the notice obligation in paragraph (5) by adding the following words:

"This paragraph does not apply if the sender and the bank have agreed that the bank would rely either upon the words or figures."

10. The delegation of the United Kingdom also noted that paragraph (5) was the only notice provision to require that notice be given directly to the originator's bank. It suggested that if the reason for such a requirement was that a discrepancy in the manner of identifying the beneficiary was particularly indicative of fraud, such a requirement might be included in other notice provisions and particularly article 8(4). Furthermore, it suggested that in any event it seemed sensible to notify the originator's bank when the sender could not be identified.

11. The delegation of the United Kingdom also suggested that there seemed to be an overlap between paragraphs (3) and (5) and that they might be rationalized.

Paragraph (6)

12. Any duty to notify a beneficiary who had an account with the beneficiary's bank could be left to their agreement or to the law applicable to the account relationship. Although the sender may have an interest that the beneficiary's bank notify the beneficiary of the credit, that interest is not recognized in the Model Law (A/CN.9/329, para. 165).

13. However, there is apt to be no rule as to the obligation of the beneficiary's bank to notify a beneficiary who had no account relationship with the bank that the funds were available. Such a duty is set out in paragraph (6), but it applies only if the beneficiary's bank has accepted the payment order and if the bank has sufficient information to give such notice (A/CN.9/329, paras. 165 and 166). Contrary to the rule in article 9(2) in respect of the time when other required notices must be given, the notice specified in this paragraph must be given on the execution date (A/CN.9/329, para. 172; compare the notice requirement in articles 5(3) and 7(2), i.e., "not later than on the execution date").

Beneficiary's right to reject credit transfer

14. At the twentieth session the Working Group decided that in principle the Model Law should provide that the beneficiary would have a right to reject the credit transfer (A/CN.9/329, para. 164). One of the participants was requested to prepare a text, which would deal with the time within which the beneficiary would be permitted to act and the costs of any credit transfer returning the funds. It

is the understanding of the Secretariat that a preliminary draft has been prepared, but as of 15 May 1990 it had not been received for incorporation into this report.

Obligation to make funds available on pay date

15. At the twentieth session the Working Group considered, but did not decide, the issue of whether the beneficiary's bank should have a duty either to its sender or to the originator to make funds available on a pay date specified on the payment order (A/CN.9/329, para. 167).

Article 9. Time for receiving bank to execute payment order

(1) A receiving bank is required to execute the payment order on the day it is received, unless

(a) a later date is specified in the order, in which case the order shall be executed on that date, or

(b) the order specifies a pay date and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the pay date.

(2) A notice required to be given under article 6(3), (4) or (5) or article 8(2), (3), (4) or (5) shall be given on the day the payment order is received.

(3) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank executes that type of payment order.

(4) If a receiving bank is required to take an action on a day when it is not open for the execution of payment orders of the type in question, it must take the required action on the following day it executes that type of payment order.

(5) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Prior discussion

A/CN.9/297, paras. 65 to 68

A/CN.9/317, paras. 94 to 107

A/CN.9/328, paras. 76 to 91

A/CN.9/329, paras. 168 to 183

Comments

1. Following the discussion at the nineteenth session of the Working Group of the draft of prior article 7, which had been prepared by the Secretariat for the eighteenth session, a new draft was prepared by a small group (A/CN.9/328, para. 88). Following discussion of the draft late in the nineteenth session, the small group further revised the draft article for discussion at the twentieth session, taking into account the restructuring of the draft Model Law being undertaken by the drafting group (A/CN.9/328, paras. 89 to 91). Article 9 was further revised at the twentieth session.

Purpose of paragraph (1)

2. The purpose of paragraph (1) is to state the time within which a receiving bank must execute a payment order; it is not intended to state an obligation to execute the order.

Same day execution

3. The general rule stated in the *chapeau* to paragraph (1) is that a payment order is to be executed on the day the payment order is received.

4. The Working Group has at all times accepted the appropriateness of the general rule. Such a rule might not have been appropriate when credit transfers, including international credit transfers, were paper based. However, the vast majority of international credit transfers are currently transmitted by electronic means, and especially by on-line data transfer. In such an environment rapid execution by the receiving bank should normally be expected (A/CN.9/329, paras. 176 and 177).

5. Nevertheless, the rule is strict and it is necessary that it be mitigated by several supplementary provisions. The first, found in paragraph (1) itself, is that the payment order may indicate that later execution is intended, either by specifying a later execution date or by specifying a pay date that indicates that later execution is appropriate.

6. The second is the general rule that a receiving bank is not required to execute any payment order it receives simply by virtue of its reception (article 6, comment 6). Therefore, the obligation to execute the payment order by a certain time arises only if the receiving bank has accepted the order pursuant to article 5(2) or 7(1). A particularly important application of this rule is that, since a bank does not accept a payment order for failure to give notice of rejection under article 5(2)(a) or 7(1)(a) when one of the reasons for the failure to execute is that there were insufficient funds to pay the receiving bank for the payment order received, a receiving bank that receives sufficient funds on a day later than the day the order is received and executes the payment order on that day is not in breach of its obligations under article 9(1). It would be in breach of those obligations if it had agreed with the sender that it would execute payment orders from the sender upon receipt, since in such situations the receiving bank would have accepted the payment order when the order was received (articles 5(2)(b) and 7(1)(b)).

7. The third mitigating rule found in paragraph (3) recognizes that banks establish cut-off times for the processing of payment orders for same day execution. There may be different cut-off times for different types of payment orders, and a bank might establish its cut-off time for certain types of payment orders by adhering to the rules of a funds transfer system. Any order received after the cut-off time is treated as having been received the following day the bank executes that type of payment order. There is no limit on the discretion of a bank (or funds transfer system) in establishing a cut-off time, and it is not unusual for cut-off times to be as early as noon (A/CN.9/329, para. 178).

8. The fourth mitigating rule found in paragraph (5) is that a branch of a bank, even if in the same State, is treated as being a separate bank for these purposes. Where the branches of a bank process payment orders on a decentralized basis, a payment order that is sent from one branch to a second branch requires the same amount of time to be executed at the branch as if the order was to be sent to a different bank (A/CN.9/328, para. 82).

Notices

9. According to paragraph (2), notices must be given on the day the payment order is received, except for the notice required by articles 5(3), 7(2) and 8(6). The notice by the beneficiary's bank to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, required by article 8(6), must be given on the execution date.

10. In a communication to the Secretariat in which the delegation of the United Kingdom suggested several changes to the notice provision in article 6(3) (see article 6, comments 6 to 8), it suggested that the time within which the notice that a payment order received had been misdirected, as required by article 6(3), might be too short. If a payment order was received with an execution date considerably later than the date of receipt, the fact that it had been misdirected might not be discovered on the day of receipt. It suggested that article 9(2) should be amended as follows:

"A notice required to be given under article 6(3) shall be given by the close of business on the day following the date of detection."

11. The delegation of the United Kingdom made a similar suggestion in regard to article 8(2) that it had made in regard to article 6(3). However, since the delegation was of the belief that the beneficiary's bank would generally verify whether it was the correct bank, a somewhat different wording was suggested as follows:

"A notice required to be given under article 8(2) shall be given by the close of business on the day following the date on which it was, or ought reasonably to have been, detected that the payment order contained information indicating that it had been misdirected."

Execution date

12. According to article 2(k), the execution date is the date when the receiving bank is to execute the payment order in accordance with article 9. The execution date may be any of three different dates. Normally the execution date is the day the payment order is received. If a later execution date is specified on the order, the execution date is that date. If a pay date is specified on the payment order, the execution date for a receiving bank other than the beneficiary's bank is the day that is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the pay date.

13. At the twentieth session the Working Group deferred to its next session the question whether any special time

period would have to be given to an originator's bank that received a conditional payment order or whether the proper result would be achieved by an interpretation of paragraph (1) (A/CN.9/329, paras. 173 and 174).

14. If the receiving bank executes the order prior to the execution date, the payment order is accepted (articles 5(2)(d) and 7(2)(d)) and the sender would no longer have the possibility to revoke the order (article 10(1)(b) and (2)(b)). At the nineteenth session it was stated that the sender should not lose its power to revoke its payment order prior to the execution date even if the order had been prematurely executed by the receiving bank (A/CN.9/328, para. 78). However, no provision to that effect was introduced into the draft Model Law by the drafting group. The question was again raised at the twentieth session, where it was said that such a rule would have its most important effects in cases of insolvency. The Working Group decided to keep the issue in mind in its consideration of articles 10 and 12 (A/CN.9/329, paras. 168 and 169). In this regard it should be noted that the sender is not required to pay the receiving bank until the execution date (article 4(4)).

15. If a provision were introduced into the Model Law permitting a sender to revoke its payment order until the execution date, the sender would presumably be entitled to recover any funds it had already paid the receiving bank and the right of the sender to recover funds from the beneficiary would be assigned to the bank (compare article 10(6) and (7)).

16. The receiving bank's failure to execute a payment order on the execution date would lead to liability under article 12. The receiving bank might execute the payment order late because the order was received late. Under the prior text of article 7(2) the bank that received the order late complied with its obligations if it executed the order on the day received. Although no objection was expressed to that paragraph at the nineteenth session (A/CN.9/328, paras. 81 and 82), the paragraph was not included in the article as it was restructured by the drafting group. At the twentieth session the Working Group decided that the substance of prior article 7(2) was currently covered in the *chapeau* of article 9 where it was stated that a receiving bank was required to execute the payment order on the day it was received (A/CN.9/329, para. 170).

Pay date

17. According to article 2(l) the pay date is "the date specified by the originator when funds are to be placed at the disposal of the beneficiary". The pay date is of immediate importance in the payment order issued to the beneficiary's bank, since it is that bank that must place the funds at the disposal of the beneficiary. A pay date in a payment order sent to the beneficiary's bank functions as though it was the execution date.

18. Article 2(l) recognizes that the pay date is originally specified by the originator. The obligation of the originator's bank and any intermediary banks in regard to a payment order they receive that contains a pay date is to execute the order in sufficient time for the beneficiary's

bank to be able to place the funds at the disposal of the beneficiary on the pay date.

Derogation by contract

19. In response to a suggestion made at the twentieth session that the sender and the receiving bank should be able to derogate from the provisions of paragraph (1) by agreement, it was stated that such a possibility would make it impossible for originator's banks to predict how long it would take for international credit transfers to take when they had to go through several intermediary banks (A/CN.9/329, para. 180).

Article 10. *Revocation*

(1) A revocation order issued to a receiving bank other than the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before the execution of the payment order to enable the receiving bank, if it acts as promptly as possible under the circumstances, to cancel the execution of the payment order, and

(c) it was authenticated in the same manner as the payment order.

(2) A revocation order issued to the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before acceptance of the payment order to enable the beneficiary's bank, if it acts as promptly as possible under the circumstances, to refrain from accepting the payment order, and

(c) it was authenticated in the same manner as the payment order.

(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received by an earlier point of time than provided in paragraphs (1) and (2).

(4) If a revocation order is received by the receiving bank too late to be effective under paragraph (1), the receiving bank shall, as promptly as possible under the circumstances, revoke the payment order it has issued to its receiving bank, unless that payment order is irrevocable under an agreement referred to in paragraph (3).

(5) A sender who has issued an order for the revocation of a payment order that is not irrevocable under an agreement referred to in paragraph (3) is not obligated to pay the receiving bank for the payment order:

(a) if, as a result of the revocation, the credit transfer is not completed, or

(b) if, in spite of the revocation, the credit transfer has been completed due to a failure of the receiving

bank or a subsequent receiving bank to comply with its obligations under paragraphs (1), (2) or (4).

(6) If a sender who, under paragraph (5), is not obligated to pay the receiving bank has already paid the receiving bank for the revoked payment order, the sender is entitled to recover the funds paid.

(7) If the originator is not obligated to pay for the payment order under paragraph (5)(b) or has received a refund under paragraphs (5)(b) or (6), any right of the originator to recover funds from the beneficiary is assigned to the bank that failed to comply with its obligations under paragraphs (1), (2) or (4).

(8) The death, bankruptcy, or incapacity of either the sender or the originator does not affect the continuing legal validity of a payment order that was issued before that event.

(9) A branch of a bank, even if located in the same country, is a separate bank for the purposes of this article.

Prior discussion

A/CN.9/297, para. 79 and 92 to 95

A/CN.9/317, paras. 68 and 120 to 133

A/CN.9/328, paras. 92 to 116

A/CN.9/329, paras. 184 to 186

Comments

1. Article 10 provides a framework for the revocation of payment orders after they have been received by the receiving bank. At the nineteenth session of the Working Group it was suggested that, since international credit transfers are almost always sent by on-line telecommunications and are processed by computer, there would be little opportunity for the sender to revoke the payment order before the order was executed by the receiving bank and that it was, therefore, unnecessary to have any provision on the subject. The reply was given that a revocation that did not arrive in time because of the use of high-speed electronic systems would not be effective. That was not, however, considered to be sufficient reason to preclude the originator or other sender from having the opportunity to attempt to revoke the order (A/CN.9/328, paras. 93 and 94).

2. The text presented to the nineteenth session of the Working Group had one set of rules that covered both the revocation and the amendment of payment orders. At the nineteenth session it was noted that the amendment of payment orders might raise additional policy issues to those raised by the revocation of orders (A/CN.9/328, para. 100). As a result article 10 refers only to the revocation of payment orders and no provision is made in the current draft for their amendment.

3. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that the policy not to permit an amendment of a payment order was not sufficiently clear in the text and that the following wording might be added to paragraph (2):

"A revocation order is not effective if it is expressed to cover part only of a payment order."

4. At the twentieth session the Working Group took note of a proposal that would terminate the right to revoke or amend a payment order once it had been received by the receiving bank, but which would also permit a receiving bank that was not the beneficiary's bank to cooperate with the request of the sender regardless of whether or not the payment order had been accepted or a beneficiary's bank to so cooperate if it had not already accepted the payment order (A/CN.9/329, paras. 184 to 186). However, no action was taken since it had been agreed that the discussion of article 10 at that session was to be only exploratory.

5. Also at the twentieth session the words "or a revocation of a payment order" were placed in square brackets in articles 2(j) and 4(1) because of opposition in the Working Group to the basic scheme of article 10 (A/CN.9/329, paras. 76 and 96).

Paragraphs (1) and (2)

6. Paragraphs (1) and (2) provide essentially the same rules for the revocation of a payment order sent to a receiving bank that is not a beneficiary's bank and to a receiving bank that is a beneficiary's bank. In both cases the revocation can be sent only by the sender of the payment order; neither the originator nor an earlier bank in the credit transfer chain can revoke the order even though it may be the party interested in having the order revoked. In a communication to the Secretariat the delegation of the United Kingdom suggested the addition of the words "or other person who had the authority to bind the sender" to both subparagraphs (1)(a) and (2)(a).

7. In both cases the payment order can be revoked only if the revocation is received by the receiving bank in time. In the case of a receiving bank that is not the beneficiary's bank, the event that marks the termination of the right to revoke is the execution of the order by the receiving bank. Although the current draft of the Model Law does not define what constitutes execution of the order by the receiving bank, it can be assumed to be the sending of its own payment order intended to carry out the order received (compare article 5(2)(d) with article 6(2)). While sending its own order would also constitute acceptance of the order received, other forms of acceptance under article 5(2) would not constitute execution of the order received. In the case of the beneficiary's bank, the event that marks the termination of the right to revoke is the acceptance of the order by the bank in any of the ways described in article 7(1).

8. In a communication to the Secretariat the delegation of the United Kingdom suggested that subparagraph (1)(b) should read as follows:

"(b) if it was received in sufficient time to enable the receiving bank, if it acts as promptly as is reasonable in all the circumstances, to refrain from executing the payment order, and"

while subparagraph (2)(b) should read as follows:

"(b) it was received in sufficient time to enable the beneficiary's bank, if it acts as promptly as is reasonable in all the circumstances, to refrain from accepting the payment order, and".

9. The receiving bank is given a certain period of time to act upon the revocation received. This period must be "sufficient" to enable the bank "if it acts as promptly as possible under the circumstances", to cancel the execution of its own order or to refrain from accepting the order received, as the case may be. The length of the period as so defined is by its nature indefinite, since it depends on the ability of the receiving bank to act (A/CN.9/328, paras. 96 and 116). The time required will vary from one bank to another, indeed from one branch of a bank to another, and depend on the nature of the payment order and the means of communication of the revocation.

10. The revocation must be authenticated in the same manner as the payment order. This implies that the revocation must be sent by the same means of communication as was the payment order. When this wording was questioned at the nineteenth session of the Working Group, citing the case of a paper-based payment order that was revoked by a telex, the reply was given that an attempt had been made to draft a requirement that the authentication had to be as good as or better than the authentication of the payment order being revoked, but that it had not proven possible to do so (A/CN.9/328, para. 114).

11. In a communication to the Secretariat the delegation of the United Kingdom suggested that it would be desirable to add to the end of subparagraphs (1)(c) and (2)(c) the words "or as otherwise agreed by the sender and receiving bank".

12. At the nineteenth and twentieth sessions of the Working Group it was stated that the sender should not lose its power to revoke its payment order prior to the execution date even if the order had been prematurely executed by the receiving bank (A/CN.9/328, para. 78; A/CN.9/329, paras. 168 and 169; see article 9, comment 14).

Paragraph (3)

13. Paragraph (3) was introduced into the draft Model Law at the nineteenth session of the Working Group (A/CN.9/328, para. 98). Agreements restricting the right of a sender to revoke a payment order are common in multilateral payment arrangements, especially where there is delayed net settlement, and in batch processing systems where it may be difficult, if not impossible, to extract a single payment order from the batch. Paragraph (3) probably does not apply to a restriction in a telecommunications message system that prohibits the withdrawal of a message once sent. Even a telex cannot be withdrawn as a message from the public telecommunications system once it has been sent; however, the order contained in the message can be revoked under paragraph (1) or (2).

14. When paragraph (3) was introduced at the nineteenth session of the Working Group, concern was expressed over its effect since the originator might not know that there were agreements between particular banks through which the credit transfer might pass that made a payment order between those banks irrevocable (A/CN.9/328, para. 115). An agreement of a clearinghouse, for example, through which the originator's bank sent the payment order to an intermediary bank that restricted the right to revoke the order would preclude the originator from revoking the credit transfer even though the beneficiary's bank had not yet accepted an order to carry out the transfer. That result is explicitly provided in paragraph (4).

Paragraph (4)

15. If a receiving bank has already issued its own payment order intended to carry out the payment order received, paragraph (4) provides that it shall revoke its own order to its receiving bank. The obligation is automatic and is not dependent upon the request of the sender, but it is dependent on there not being an agreement restricting the right of the receiving bank as a sender to revoke its own order as described in paragraph (3). The effectiveness of the revocation is tested under paragraph (1) or (2). The series of messages can go from bank to bank until a payment order is revoked or the beneficiary's bank is reached. The credit transfer can no longer be interrupted by revocation of a payment order once the beneficiary's bank has accepted an order implementing the transfer.

16. In a communication to the Secretariat the delegation of the United Kingdom has suggested a redraft of paragraph (4) in which the most important change would be that the revocation would have to be issued "as promptly as is reasonable in all the circumstances".

Paragraphs (5) and (6)

17. These two paragraphs specify that a sender who has sent a revocation that was or should have been effective is not obligated to pay for the payment order, as he would otherwise be under article 4(4), and is entitled to recover any funds paid. At the nineteenth session it was suggested that the sender should be entitled to receive back the original amount of the transfer less costs. This was said to be a question that arose in respect of the reimbursement of the funds in case of an unsuccessful credit transfer as well and that it would need to be addressed at a later stage (A/CN.9/328, para. 115). It may be thought that a sender who has a right to a refund under paragraph (6) should also have a right to interest on the funds for the period of time the sender was deprived of the use of those funds. Compare article 12, comments 15 to 17.

18. In a communication to the Secretariat the delegation of the United Kingdom suggested that subparagraphs (5)(a) and (b) should be redrafted as follows:

"(a) if, as a result of the revocation, the payment order has not been accepted by the beneficiary's bank, or

(b) if, in spite of the revocation, the payment order has been accepted due to a failure of the receiving bank or a subsequent receiving bank to comply with its obligations consequent upon the operation of paragraphs (1) and (2) or under paragraph (4)."

19. The delegation of the United Kingdom also suggested the addition of the words "from the receiving bank" to the end of paragraph (6).

Paragraph (7)

20. If a bank has executed a payment order in spite of receipt of an effective revocation, there is a likelihood that the funds will eventually be credited to the account of the beneficiary. Paragraph (7) gives the bank that made the error and was required to reimburse its sender the means to recover the funds by being assigned any right the originator may have had to recover the funds from the beneficiary.

21. Under some circumstances paragraph (7) will not give the bank the full protection that was anticipated and the originator may have an unjustified profit. Although the sender has a complete right to recover the funds from the bank that made the error under paragraph (6), the originator may not have a right to recover the funds from the beneficiary because it owed that amount to the beneficiary. The right assigned to the bank that made the error could be no greater than the right of the originator.

22. To some degree paragraph (7) is a replacement for prior article 8(7), that was deleted by the Working Group at its nineteenth session (A/CN.9/328, para. 106). That provision would have given the beneficiary's bank a right to reverse a credit entered to the beneficiary's account that met certain objective criteria of being the result of an error or fraud. (For the origin of prior article 8 see A/CN.9/297, para. 79 and A/CN.9/317, para. 68.) The current text of paragraph (7) is severely restricted in its field of application compared to the earlier provision.

23. In order to avoid the problems mentioned in comment 21 and because the reference in paragraph (7) to paragraph (6) was said to be incorrect, since paragraph (6) refers to paragraph (5), and paragraph (7) cannot apply if subparagraph (5)(a) applies, the delegation of the United Kingdom in a communication to the Secretariat suggested the following redraft:

"(7) If the originator has received a refund under paragraph (5)(b), the bank whose failure to comply with its obligations under paragraphs (1), (2) or (4) resulted in the completion of the credit transfer shall have such rights to recover from the beneficiary as the originator would have had if he had not received a refund. If the originator has not paid for his payment order and under paragraph (5)(b) is not obliged to do so, that bank shall have the same rights under this paragraph as if the originator had paid for the payment order and had received a refund."

Paragraph (8)

24. In order to make the provision clearer and to assure that the word "bankruptcy" is not understood in a restricted

sense (as in English law where it is restricted to personal insolvency), the delegation of the United Kingdom in a communication to the Secretariat suggested the following revision:

"(8) The death, bankruptcy, or incapacity of either the sender or the originator does not, of itself, operate to revoke a payment order or terminate the authority of the sender. The word 'bankruptcy' includes all forms of personal and corporate insolvency."

Paragraph (9)

25. This paragraph should be revised in line with the similar wording in the earlier articles.

New proposal

26. Former article 8(8) provided that a bank has no obligation to release the funds received if ordered by a competent court not to do so. When it deleted that paragraph at its nineteenth session the Working Group decided that it would consider a proposal that was to be presented authorizing courts to restrain a bank from acting on a payment order if proper cause was shown (A/CN.9/328, para. 109).

27. A proposal presented to the nineteenth session but not yet considered by the Working Group provided:

"For proper cause and in compliance with applicable law, a court may restrain:

(a) a person from issuing a payment order to initiate a funds transfer;

(b) an originator's bank from executing the payment order of the originator, or

(c) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing funds.

A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a credit transfer, but a bank has no obligation if it acts in accordance with the order of a court of competent jurisdiction."

CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS

Article 11. *[Assistance and refund]*

A receiving bank other than the beneficiary's bank that accepts a payment order is obligated under that order:

(a) where a payment order is issued to a beneficiary's bank in an amount less than the amount in the payment order issued by the originator to the originator's bank—to assist the originator and each subsequent sending bank, and to seek the assistance of its receiving bank, to obtain the issuance of a payment order to the beneficiary's bank for the difference between the

amount paid to the beneficiary's bank and the amount stated in the payment order issued by the originator to the originator's bank;

(b) where a payment order consistent with the contents of the payment order issued by the originator and containing instructions necessary to implement the credit transfer in an appropriate manner is not issued to or accepted by the beneficiary's bank—to refund to its sender any funds received from its sender, and the receiving bank is entitled to the return of any funds it has paid to its receiving bank.

Prior discussion

A/CN.9/318, paras. 151 to 154

A/CN.9/328, paras. 54 to 58

Comments

1. Article 11 sets forth the basic obligations of a receiving bank to rectify the situation if problems arise in the implementation of a credit transfer. It contains prior article 5(3)(b) and (c) as they were drafted during the eighteenth session (A/CN.9/318, para. 154) with the order of the two subparagraphs reversed. The drafting group at the nineteenth session could not decide on a proper title for this new article, so it placed the provisional title in square brackets. The article was not considered at the twentieth session.

Subparagraph (a)

2. The first obligation of a receiving bank when the credit transfer has not been successfully carried out is to take the necessary steps to cause it to be carried out. If the receiving bank is the cause of the difficulties, it would carry out its obligation under subparagraph (a) by taking the necessary actions itself. If the difficulties occurred at a subsequent bank in the credit transfer chain, the receiving bank would be obligated to assist in causing the transfer to be carried out properly by such actions as finding out where the problem had occurred or sending new instructions to the subsequent bank.

3. Subparagraph (a) was adopted at the eighteenth session of the Working Group and was not discussed at the nineteenth session. However, the drafting group at the nineteenth session made a minor change in the text by referring to the issuance of a payment order for an amount "less" than, rather than an amount "different" from, the amount in the originator's payment order. That change made the provision more precise but did not change its substantive application, since the prior wording could itself have been applied only when the payment order had been for less than the correct amount. Consideration might be given to extending the subparagraph to the case where no payment order has been issued to the beneficiary's bank, a result that cannot be reached by interpretation of the current text.

Subparagraph (b)

4. Subparagraph (b) sets forth one of the most important rules in the draft Model Law; if the credit transfer is not

carried out in a manner consistent with the payment order issued by the originator, the sender has a right to a refund of any funds it has paid to the receiving bank. This right ultimately accrues to the benefit of the originator as the sender of the first payment order in the credit transfer chain.

5. Two different situations are envisaged under subparagraph (b): no payment order was accepted by the beneficiary's bank (perhaps because none was issued to it) and a payment order was accepted but it was inconsistent with the originator's payment order in some manner other than that it was for too small an amount. Subparagraph (b) as drafted would also apply where the payment order was for too small an amount, but in such a case the subparagraph should normally apply only to the deficiency and only if subparagraph (a) does not remedy the situation. It might apply to the entire amount in the rare situation where the transfer of too small an amount rendered the transfer commercially valueless.

6. The reason a credit transfer is not carried out successfully may be that the indication of the beneficiary or of the beneficiary's bank was incorrect on one of the payment orders in the transfer chain by reason of error or fraud. Other reasons why a credit transfer may fail to be carried out successfully are that the imposition of currency restrictions prevents the transfer from being made, for some reason a transfer cannot be made to the beneficiary's bank or to the country where the beneficiary's bank is located, the beneficiary's bank refuses to accept the payment order addressed to it or the account of the beneficiary is no longer open to receive credit transfers. In most cases where the indication of the incorrect beneficiary or beneficiary's bank was the result of an error, it could be expected that the error would be corrected and the credit transfer would be carried out as directed, though perhaps late. If the credit to the beneficiary's account is for an amount greater than the amount specified in the originator's payment order, subparagraph (b) should be interpreted to permit the sender to recover the payment it had made in excess of the correct amount, and it might be desirable to say so explicitly.

7. Although the general policy decision made by the Working Group at its sixteenth session, and affirmed by it on several occasions, that the originator should be able to hold its bank responsible for proper performance of the credit transfer is still open to discussion (A/CN.9/297, paras. 55 to 60; see A/CN.9/328, paras. 66 to 74 and 144 and A/CN.9/329, para. 188, question 4), the application of that policy to the return of the principal sum where the credit transfer failed was strongly endorsed at the nineteenth session (A/CN.9/328, paras. 54 to 58). The obligation of the receiving bank is absolute and the exemptions of article 13 would not apply. At the eighteenth session the Working Group rejected a suggestion that the obligation of a receiving bank should be to assign to its sender the right of reimbursement it would have from its receiving bank (A/CN.9/318, para. 153). The result of that suggestion would have been to place on the originator the obligation to pursue its claim for reimbursement from a subsequent bank in the transfer chain and to bear the risk that the reimbursement could not be fully recovered.

8. At the nineteenth session a suggestion was made that the amount of the funds to be returned should be the original amount of the transfer less costs. It was said that this issue would have to be addressed at a later time (A/CN.9/328, para. 115). The Working Group may also wish to consider whether the sender would have a right to interest on the amount to be repaid to it. Compare the discussion at the nineteenth session, (A/CN.9/328, paras. 121 to 132.)

9. In a communication to the Secretariat the delegation of the United Kingdom suggested a revision of the article as follows:

"(1) If no payment order consistent with the payment order issued by the originator to the originator's bank and containing instructions necessary to implement the credit transfer in an appropriate manner is issued to the beneficiary's bank, each receiving bank shall:

(a) assist the originator and each subsequent sending bank, and seek the assistance of its receiving bank, to obtain the issue to the beneficiary's bank of a payment order which is so consistent and contains such instructions;

(b) refund to its sender any funds received from its sender for payment for the payment order, or, where excess funds are received, refund the excess.

(2) Paragraph (1)(b) also applies where a payment order is rejected by the beneficiary's bank."

Article 12. *Liability and damages*

[(1) A receiving bank that fails in its obligations under article 5 is liable therefor to its sender and to the originator.]

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 9.

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and it executed the payment order received by it within the time required by article 9.

(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank], and

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date or execution date stated in the order, as provided in article 9.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

- (a) loss of interest,
- (b) loss caused by a change in exchange rates,
- (c) expenses incurred for a new payment order [and for reasonable costs of legal representation],*
- (d) any other loss that may have occurred as a result, if the improper [or late] execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result.

(6) If a receiving bank fails to notify the sender of a misdirected payment order as provided in article 6(2)[(3)] or 8(1)[(2)], and the credit transfer is delayed, the receiving bank shall be liable:

- (a) if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank, or
- (b) if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days.

(7) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)(d). A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

(8) The remedies provided in this article do not depend upon the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available.

Prior discussion

A/CN.9/297, paras. 55 to 63 and 70 to 72
 A/CN.9/317, paras. 137 to 150
 A/CN.9/328, paras. 66 to 74 and 117 to 144
 A/CN.9/329, paras. 187 and 188

Comments

1. The current text of article 12 is essentially the text as prepared by the Secretariat for the eighteenth session in A/CN.9/WG.IV/WP.39 on the basis of the discussion at the seventeenth session (A/CN.9/317). Certain amendments introduced at the nineteenth session are referred to below at the appropriate places. At the twentieth session a small group consisting of four delegations was asked to consider the liability provisions in general and to attempt to formulate an agreed position that might be considered by the Working Group, but they were unable to reach such

an agreed position. Instead they identified four major issues and each of the delegations submitted their separate views for the consideration of the Working Group (A/CN.9/329, paras. 187 and 188). The Working Group did not have the opportunity to consider the matter further at the twentieth session.

2. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested a redraft of article 12. The suggested redraft is set out at comment 28.

Paragraph (1)

3. Paragraph (1) provides that a receiving bank is liable for its failure to fulfil its own obligations under article 5. Since there is a reference to article 5, the receiving bank contemplated is not the beneficiary's bank. The liability of the beneficiary's bank is considered in paragraph (4). At its nineteenth session the Working Group decided to retain the principle of paragraph (1), but to place it in square brackets until it had completed its consideration of the entire article on liability and damages in the expectation that it might be substantially redrafted (A/CN.9/328, para. 131).

Paragraph (2)

4. The general system of liability in paragraph (2) is that the originator can hold the originator's bank liable for the proper performance of the credit transfer. That means that the bank would be responsible to the originator for loss wherever the loss occurred. In order to avoid liability the originator's bank would have to show that one of the exempting conditions in article 13 was relevant. If the loss for which the originator's bank is liable to the originator was caused by events that occurred at a subsequent bank in the credit transfer chain, the originator's bank could recover the loss from its receiving bank and each bank in turn could recover from its receiving bank until, under paragraph (3), a bank could show that the payment order received by the beneficiary's bank was consistent with the payment order received by the bank in question.

5. It was decided at the seventeenth session of the Working Group that the originator should also be able to hold an intermediary bank directly liable for the losses suffered, since there may be occasions when recovery from the originator's bank may not be possible (A/CN.9/317, para. 139).

6. This system of liability was discussed at length at the nineteenth session without a final decision being reached as to whether it should be retained, abandoned or modified (A/CN.9/328, paras. 66 to 74 and 144). At the twentieth session the four delegations requested to reach an agreed position in respect of article 12 were in general in agreement that the responsibility for loss should be that of the bank where the events occurred that caused the loss (A/CN.9/329, para. 188, question 4).

7. Other decisions that have been made by the Working Group in respect of liability and damages, especially at the nineteenth session, may have a bearing on the significance

*Consideration may be given to allowing recovery of reasonable costs of legal representation even if they are not recoverable under the law of civil procedure.

of the provision. It has been decided that when a credit transfer is not carried out successfully, the originator has a right to a return of the principal sum transferred without regard to the reasons for the failure (article 11(b)). Although article 11(b) could be considered to implement the policy of paragraph (2), it is not considered to be a liability provision.

8. At the nineteenth session the Working Group decided that it would consider providing in the Model Law that, when there was a delay in a credit transfer, the beneficiary would have a direct right to recover interest resulting from the delay against the bank that had caused the delay. A similar right to recover for exchange losses is also to be considered (A/CN.9/328, paras. 131 and 132). A text that might implement those suggestion can be found in the working paper submitted by the Secretariat to the twentieth session (A/CN.9/WG.IV/WP.44, article 12, comment 17). If those proposals were accepted, the only remaining losses that would be subject to the procedures envisioned in paragraph (2) would be the expenses for a new payment order and reasonable costs of legal representation under paragraph (5)(c), the indirect losses envisioned under paragraph (5)(d) and any interest or exchange losses that were not fully compensated by payment to the beneficiary.

Paragraph (3)

9. Paragraph (3) places a limit on the effect of paragraph (2) when the credit transfer is completed in a manner inconsistent with the originator's payment order. No bank that is subsequent to the error or fraud that caused the inconsistency has any liability for the fact that the credit transfer was carried out improperly. However, such a bank would have obligations under article 11 to assist in correcting the situation.

Paragraph (4)

10. The beneficiary's bank might cause loss to the beneficiary by such actions as failing to fulfil its obligations under article 8(4), by failing to accept a payment order it is obligated by contract with the beneficiary to accept or by accepting a payment order the beneficiary has instructed it not to accept.

11. It is a matter of judgment whether the Model Law should contain provisions covering such losses. On the one hand the losses would arise out of the failure in respect of the credit transfer. On the other hand it may be thought that it is not necessary to establish rules on the liability of the beneficiary's bank to the beneficiary, especially when those rules might differ from the domestic rules governing liability for an otherwise identical failure by the bank. Paragraph (4)(a) takes a middle position by referring to the existence of such liability but leaves the substance of the rules governing the liability to the law that governs the account relationship. At the seventeenth session the Working Group decided to defer any decision whether to retain or to delete the subparagraph until it had a more complete view of the entire text (A/CN.9/317, para. 150). The paragraph has not been subsequently considered by the Working Group. However, at the twentieth session

the Working Group considered a similar problem in connection with article 8 (see article 8, comments 1 to 4).

12. The beneficiary's bank might cause loss to the sender or to the originator by failing to give one of the notices required by article 8. Failure to give a notice of rejection required by article 7(2) would not cause loss to the sender or to the originator since it would lead to acceptance of the payment order by the beneficiary's bank. In addition, as indicated in paragraph (4)(b), the beneficiary's bank might cause loss to the sender or to the originator by failing to place funds at the disposal of the beneficiary in accordance with an execution or pay date. Compare article 8, comment 15.

Paragraph (5)

13. In essence, paragraph (5) applies to losses caused by late or non-completion of a credit transfer. In this sense, timely completion of a transfer for less than the full amount may be considered to be a late transfer for the difference between the proper amount and the amount transferred in fact.

14. Losses arising out of unauthorized payment orders are allocated by article 4(2) and (3). Liability for losses arising out of failure to give the notice required by articles 6(3) and 8(2) is set out in paragraph (6). The obligation of each receiving bank to refund to its sender any funds received from the sender where the transfer was not successfully completed is set forth in article 11(b).

Interest, subparagraph (a)

15. Interest losses may be suffered in several different ways as a result of a credit transfer that does not work as intended. If a receiving bank receives funds from its sender but delays execution of the payment order, the sender (who may be either the originator or a sending bank) may be said to have suffered a loss of interest because it has been deprived of funds earlier than was necessary for the bank to execute the payment order. If the receiving bank receives funds late from its sender but executes the order without waiting for the funds, the receiving bank suffers the loss of interest. If the result of a delay or error of any kind at a receiving bank is that the entire credit transfer is delayed, the beneficiary could be said to have suffered the loss of interest. If the beneficiary could recover loss of interest from the originator because of late payment of the underlying obligation, the originator would be able to recover it from the bank where the delay occurred under paragraph (1) or from the originator's bank under paragraph (2).

16. The Working Group considered the problem extensively at the nineteenth session (A/CN.9/328, paras. 122 to 131). It agreed that, in any case where the beneficiary had been credited later than it should have been because of a delay in the transfer, the receiving bank causing the delay should not benefit from the use of the funds during the period of the delay (paragraph 122). It noted that it was current banking practice in many important banking centres for a bank at which a transfer was delayed to add an appropriate amount of interest to the amount being

transferred. As a result the beneficiary would automatically receive it. This was said to be efficient and expeditious, not requiring any inquiry into the facts of the underlying transaction but giving a remedy that would normally be approximately equal to the loss suffered, and a practice that the legal system should recognize (paragraph 126).

17. At the conclusion of the discussion the Working Group decided that it would be useful to consider providing in the Model Law that the beneficiary would have a direct right to recover interest resulting from the delay against the bank that caused the delay. Since the proposal raised a number of questions that would require consultation, the Working Group requested the Secretariat to prepare a draft of a provision for its consideration at its twentieth session (paragraph 131). A provision was suggested in the working paper submitted by the Secretariat to the twentieth session, A/CN.9/WG.IV/WP.44, article 12, comment 17, but it was not considered at that session.

Exchange losses, subparagraph (b)

18. The second most likely form of loss arising out of delayed international credit transfers are exchange losses, as provided in subparagraph (5)(b). There was strong opposition in the nineteenth session of the Working Group to providing that exchange losses would be recoverable, especially in view of the fact that such losses were rare, usually arising only when the originator's bank was a small bank that did not often engage in international transfers or when the currency of the transfer was in a currency that was not frequently used for international transfers, and that neither the fact that such losses would occur nor the potential amount of loss was foreseeable (A/CN.9/328, paras. 133 and 134). Nevertheless, it was decided that the Secretariat should include in the provision it was to prepare giving the beneficiary a direct right to recover for interest losses a right to recover for loss caused by a change in exchange rates during the delay (paragraph 132).

19. At the twentieth session the four delegations that were to reach an agreed position in respect of article 12 divided equally as to whether exchange losses could under any circumstances be considered to be an item of loss that should be recoverable (A/CN.9/329, para. 188, question 2).

Proposed new provision

20. In the working paper submitted to the twentieth session the Secretariat included a proposed text to reflect the decisions that had been taken in respect of liability for interest and exchange losses (A/CN.9/WG.IV/WP.44, article 12, comment 17). The Working Group may wish to consider the Secretariat's suggested text at the current session. Several of its features have been included in the text proposed by the delegation of the United Kingdom in comment 28.

Expenses of new payment order and legal representation, subparagraph (c)

21. It was suggested at the nineteenth session of the Working Group that the first part of subparagraph (5)(c) was not of great importance because the amounts of

money involved were minor, and the receiving bank might well have to bear the expenses of a new payment order as part of its obligation under article 11(a) to help rectify a credit transfer that had not been carried out properly. The second part of the subparagraph was put in brackets and the footnote was added because of the difficulties of formulating a rule that reflected the various means by which the costs of legal representation were distributed in the different legal systems (A/CN.9/328, paras. 137 to 139).

Other losses, subparagraph (d)

22. In respect of paragraph (5)(d) the Working Group decided at its seventeenth session that, in exchange for a relatively strict regime of liability, the bank liable would not be responsible for indirect losses unless more stringent requirements were met than for the other elements of loss (A/CN.9/317, paras. 115 to 117). That decision was reaffirmed in another context at the eighteenth session of the Working Group (A/CN.9/318, paras. 146 to 150). As suggested at the seventeenth session the formula used in the current text was taken from article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). In order to recover the indirect losses, the claimant would have to prove the intent or the reckless behaviour of the bank.

23. At the nineteenth session retention of the essence of the provision was again reaffirmed (A/CN.9/328, paras. 140 to 143). However, the formulation of the subparagraph was criticized as being imprecise. It was said that the subparagraph was not clear as to the types of losses that were to be covered or that those losses should have been the direct consequence of the failure on the part of the bank. The formula taken from article 8 of the Hamburg Rules for limiting the right to recover was said not to reflect properly the problems of making credit transfers (paragraph 142). After discussion the Working Group decided to place square brackets around the words "any other loss" and around the words taken from the Hamburg Rules to indicate its intention to redraft the provision.

24. At the twentieth session three of the four delegations that were asked to formulate an agreed position were in favour of retaining the provision in one form or another, while one delegation was in favour of deleting the provision (A/CN.9/329, para. 188, question 3).

Paragraph (6)

25. In most cases of breach of duty under the Model Law the harm that is suffered is reasonably clear and the remedy of the injured party can be left to the general provisions of paragraph (5). When the Working Group adopted the provision requiring a receiving bank to notify its sender of a misdirected payment order, articles 6(3) and 8(2) in the current draft, it noted that the harm suffered might not always be easy to measure. Nevertheless, it was of the view that there should be a sanction for a bank's failure to notify the sender where that failure to notify delayed the transfer (A/CN.9/318, para. 122). Where the receiving bank was in possession of funds during the period it failed to notify the sender of the misdirection, the obligation to pay interest is in the nature

of restitution of what the bank can be assumed to have earned from having been in possession of the funds as well as what the sender can be assumed to have lost. Where the receiving bank was not in possession of funds, the requirement to pay interest for up to 30 days serves only as a measure of the loss the sender can be assumed to have suffered.

Paragraph (7)

26. Paragraph (7) provides an important rule setting forth the extent to which the provisions of this article can be varied by agreement of the parties.

Paragraph (8)

27. Paragraph (8), making the liability provisions of this article not dependent on a contractual relationship and making them exclusive, was added at the suggestion of the Working Group at its seventeenth session (A/CN.9/317, para. 119). Without such a provision some legal systems might permit other remedies based on general theories of obligation, thereby destroying the uniformity of law the Model Law seeks to achieve.

Suggested redraft presented by the delegation of the United Kingdom

28. In a communication to the Secretariat the delegation of the United Kingdom has suggested the following redraft of the entire article following the basic numbering of the current text:

“(1) [This paragraph has been deleted.]

(2) A receiving bank is liable to its sender and to the originator for the losses as set out in paragraphs (5) and (6) caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. A credit transfer is improperly executed if any receiving bank fails to comply with any obligation imposed by this law in the time required by this law.

(3) A receiving bank is not liable under paragraph (2) if the payment order received by each subsequent receiving bank was consistent with the payment order received by it and neither it nor any subsequent receiving bank failed to execute the payment order it received within the time required by article 9 or comply with any notification obligation mentioned in paragraph (6). A receiving bank that does not accept a payment order is liable under paragraph (2) only in respect of its failure to notify rejection in accordance with article 5(3).

(4) [This paragraph has been deleted. Subparagraph (a) is now paragraph (6C) and subparagraph (b) is included in paragraph (2) above.]

(5) If a bank is liable under this article to the originator or to its sender, and paragraph (6) does not apply to it, it is obliged to compensate for

(a) loss of interest,

(b) expenses incurred for a new payment order,

(c) any other loss that has occurred as a result, if the improper or late execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such loss, or recklessly and with knowledge that such loss might result.

(6) This paragraph applies to a receiving bank which is liable only in respect of its failure or the failure of a subsequent receiving bank to comply with any of the following notification obligations:

(a) to notify rejection in accordance with article 5(3) or 7(2), where payment has not been received from the sender;

(b) to notify misdirection in accordance with article 6(3) or 8(2);

(c) to notify a lack of sufficient data in accordance with articles 6(4) or 8(3);

(d) to notify an inconsistency between the words and figures that describe the amount of money in accordance with article 6(5) or 8(4).

If a bank to which this paragraph applies is liable under this article to the originator or to its sender, it is obliged to compensate only for loss of interest for a maximum of 7 days or the period during which it held the funds, whichever is the longer.

(6A) If a sender delays paying its receiving bank, the sender is liable to compensate the receiving bank for loss of interest.

(6B) If a credit transfer is delayed by the improper execution of a payment order that has been accepted by a receiving bank other than the beneficiary's bank, the bank is liable to compensate the beneficiary for loss of interest. The liability of the bank to the beneficiary is discharged to the extent that it transfers to its receiving bank an amount in addition to that it received from its sender.

(6C) The beneficiary's bank is liable to the beneficiary, to the extent provided by the law governing the relationship between them, for its improper execution or its failure to execute a payment order it has accepted or, if the beneficiary does not maintain an account with the bank, for its failure to notify him in accordance with article 8(6) that it is holding funds for his benefit.

(6D) In this article 'loss of interest' includes interest which the person entitled to compensation is obliged to pay a third party.

(6E) If the non-execution or improper execution of the credit transfer was caused by more than one bank, any bank obliged to pay compensation under this article shall be entitled to an appropriate contribution from the other bank or banks. The total liability of a bank under paragraph (6) and this paragraph shall be limited to the amount specified in paragraph (6).

(7) Banks may vary the provisions of this article by agreement so as to increase, reduce or exclude their liability to other banks but not so as to reduce or exclude their liability under paragraph (5)(c). A bank may agree to increase its liability to an originator that is not a bank but may not reduce or exclude its liability to such an originator.

(8) The remedies provided in this article do not depend upon the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available."

Article 13. *Exemptions*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 12 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to have taken into account at the time of the credit transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

Prior discussion

A/CN.9/297, para. 60

A/CN.9/317, paras. 151 to 156

Comments

1. Since the liability of a receiving bank for the interest loss, loss caused by a change in exchange rates and expenses incurred for a new payment order would arise out of the simple fact of failure of the transfer, article 13 provides the receiving bank with its sole basis of defence in such cases.

2. Article 13 does not apply to the obligation of a receiving bank under article 11(b) to refund to its sender any funds received from the sender when a payment order consistent with the contents of the payment order issued by the originator was not issued or accepted by the beneficiary's bank. It also does not seem to apply to the bank's obligation to pay "any other loss" under article 12(5)(d), since that provision has its own strict limitation on liability. (See article 12, comments 22 to 24.) Furthermore, it can be questioned whether the application of article 13 to loss of interest would be consistent with the decision of the Working Group at its nineteenth session that a bank that caused a delay in a credit transfer should not be allowed to earn interest on the funds that were in its possession because of the delay (A/CN.9/328, para. 122) or with the decision at the seventeenth session that the receiving bank that fails to notify its sender of a misdirected payment order should be liable for interest. See article 12, comment 25.

3. Under article 13 the bank must prove the exempting condition. Although there is a list of specific circumstances that might exempt the bank from liability, the reference to "other circumstances" indicates that the list is not exhaustive. The current draft of article 13 has not been discussed by the Working Group.

4. In a communication to the Secretariat the delegation of the United Kingdom has suggested a redraft as follows:

"A receiving bank and any bank to which the receiving bank is liable under article 12 is exempt from liability for a failure to perform any of its obligations under that article if the bank proves that the failure was due to circumstances which were beyond the bank's control and which it could neither avoid nor overcome."

CHAPTER IV. CIVIL CONSEQUENCES OF CREDIT TRANSFER

Article 14. *Payment and discharge of monetary obligations; obligation of bank to account holder*

(1) Unless otherwise agreed by the parties, payment of a monetary obligation may be made by a credit transfer to an account of the beneficiary in a bank.

(2) The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank when the payment order is accepted by the beneficiary's bank.

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.

(4) To the extent that a receiving bank has a right of reimbursement from a sender by debit to an account held by the receiving bank for the sender, the account shall be deemed to be debited when the receiving bank accepts the payment order.

Prior discussion

A/CN.9/317, paras. 157 to 164

A/CN.9/328, paras. 37 to 43

A/CN.9/329, paras. 189 to 192

Comments

1. This article contains a number of important provisions that are associated with the credit transfer, though they do not have to do with the credit transfer itself. In many countries such provisions would not be included in a law governing credit transfers, while in others they would be included. They are included in this draft because it is important to keep them in mind even if it is decided at a later time to exclude some or all of this article from the final text of the Model Law. Furthermore, if any portion of this article is excluded from the final text, consideration might be given to preparing a separate text containing provisions on these issues so as to be sure that these rules would be consistent with the rules on the credit transfer itself (A/CN.9/328, para. 41).

2. At the end of the short discussion on article 14 held at the twentieth session, delegations were invited to propose alternative texts for an article 14 that would fulfil the

needs of the Model Law for a rule on the effect of a completed credit transfer without raising the kinds of concerns that had been raised about the current text. The delegation of France has proposed a text which is set out at comment 11.

Paragraph (1)

3. Paragraph (1) deals with the important rule that monetary obligations can be discharged by interbank credit transfers leading to credit to an account. While this general proposition is widely recognized today, remnants of the objections arising out of legal tender legislation still arise on occasion. Furthermore, in some countries it is not clear that any person other than the account holder has the right to deposit funds to an account. As a result the Working Group agreed at its seventeenth session that it would be appropriate to include such a rule (A/CN.9/317, para. 158).

4. The Working Group agreed at its seventeenth session that paragraph (1) should be restricted to providing that an obligation could be discharged by a transfer without considering to what account the debtor-originator might have the funds sent (A/CN.9/317, para. 159). At the nineteenth session the question was raised as to whether the provision would limit the beneficiary's right to require payment to it in legal tender or to reject a specific payment made by means of a credit transfer (A/CN.9/328, para. 38). In reply it was pointed out that some States had tax laws that required commercial payments to be made by cheque, credit transfer or other similar means, while many other States had statutory provisions similar to paragraph (1) (A/CN.9/328, para. 40). At the twentieth session the general view was that paragraph (1) should be deleted because it attempted to state a rule that might be generally followed in practice, but that violated deeply held feelings about the appropriate legal rules on the subject (A/CN.9/329, para. 190). However, since it had been decided that the discussion was to be only for the purpose of laying a foundation for a more thorough discussion at the twenty-first session, no action was taken.

Paragraph (2)

5. Paragraph (2) provides that the obligation of the debtor is discharged when the beneficiary's bank accepts the payment order. At the same time the beneficiary's bank becomes indebted to the beneficiary.

6. In the seventeenth session of the Working Group it was pointed out that in some countries an obligation was considered to be discharged when the originator's bank received the payment order with cover from the debtor-originator. It was thought that other countries might provide that the discharge would be later in time than as provided in paragraph (2). Therefore, the Working Group decided to consider at a future session what effect such national laws on discharge of the underlying obligation should have on the appropriate rules on finality of the credit transfer, keeping in mind its position that the rules on discharge, whether under the Model Law or under national law, and the rules governing finality should be

consistent (A/CN.9/317, paras. 160-162). At the nineteenth session the desirability of having the beneficiary's bank become indebted to the beneficiary at the same time any obligation of the originator was discharged was restated (A/CN.9/328, para. 41).

7. Nevertheless, at the nineteenth session of the Working Group the text of paragraph (2) was said to raise problems. Although some obligations could be partially discharged by payment of a part of the money due, other obligations were indivisible. Furthermore, the law governing the means by which and the extent to which an obligation could be discharged might be that of a State in which neither the originator's bank nor the beneficiary's bank was located (A/CN.9/328, para. 39). In reply it was suggested that the provision on discharge might indicate that the obligation would be discharged to the extent that payment of the same amount of money would discharge the obligation, thereby taking no position as to whether an obligation could be partially discharged (A/CN.9/328, para. 42).

8. In the working paper submitted to the twentieth session the Secretariat suggested two possible reformulations of paragraph (2), one of which provided a specific rule on discharge and the other of which stated only when the transfer was completed (A/CN.9/WG.IV/WP.44, article 14, comments 7 and 8). The second approach would leave to other rules of law any conclusions as to the effect on the discharge of the obligation, if the transfer was for the purpose of discharging an obligation.

9. At the twentieth session both proposals received some support, but the view was also expressed that the first one would be unacceptable in some States as a matter of legislative policy because of the very fact that it set out a rule for the discharge of obligations (A/CN.9/329, para. 191). In a communication to the Secretariat the delegation of France raised additional objections, i.e., that a rule on discharge is applicable only if the transfer is for the purpose of discharging an obligation and not, for example, a cash consolidation operation; a rule on discharge should be subject to the parties agreement specifying a different means of discharge of the obligation or transfer to a different account than the one to which the transfer was made; the methods of discharge of an underlying obligation are already exhaustively specified by law in some legal systems and the proposed rule on discharge would change the law of contract, even though that should be beyond the scope of the Model Law.

10. As a result of these objections raised to the inclusion in the Model Law of any rule on discharge of an obligation by funds transfer, only the second of the two Secretariat proposals submitted to the twentieth session is repeated here:

"The beneficiary's bank becomes indebted to the beneficiary and the transfer of funds from the originator to the beneficiary is completed when the beneficiary's bank accepts a payment order ordering payment to the beneficiary."

11. In the communication to the Secretariat referred to in comment 9 the delegation of France proposed a

different formulation for what is presently paragraph (2). In the French proposal paragraphs (1), (3) and (4) as well as the third sentence of article 2(a) would be deleted. The French proposal is as follows:

"Unless otherwise agreed by the sender and the beneficiary, a transfer is completed when the beneficiary's bank places the funds at the beneficiary's disposal or notifies him that it is holding the funds for his benefit, in accordance with article 8(1) or (6)."

Paragraph (3)

12. Paragraph (3) is concerned with a difficult problem when credit transfers pass through several banks. The originator is responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international credit transfer, it cannot provide for that eventuality. Therefore, paragraph (3) provides that the obligation is discharged by the amount of the charges that have been deducted as well as by the amount received by the beneficiary's bank; the originator would not be in breach of contract for late or inadequate payment. Nevertheless, unless the beneficiary agrees to pay the charges, which often occurs, the originator would be obligated to reimburse the beneficiary for them.

13. In a communication to the Secretariat the delegation of the United Kingdom suggested that paragraph (3) did not seem to be sensible either commercially or as a matter of legal principle. It said that the statement that the beneficiary may then recover the shortfall from the sender is likely merely to lead to a further credit transfer and more confusion. The delegation of the United Kingdom, as well as the delegation of France in a separate communication, recommended the deletion of the paragraph. See also article 4, comment 19, above, for the converse question as to whether the sender should be responsible to pay for the costs and charges.

Paragraph (4)

14. Paragraph (4) is the corollary to paragraph (2) in that it provides the rule as to when the account of a sender, including but not limited to the originator, is to be considered debited, and the amount owed by the bank to the sender reduced or the amount owed by the sender to the bank increased. That point of time is when the receiving bank accepts the payment order which, in the usual situation for a receiving bank that is not the beneficiary's bank, is when it executes the payment order by sending a new payment order to the next bank. It may be before or after the bookkeeping operation of debiting the account is accomplished. Paragraph (4) may have its most important application in determining whether credit is still available in the account holder's account if legal process has been instituted against the account or insolvency proceedings have been instituted against the sender. This paragraph should be considered in the light of article 4(4) (see article 4, comment 20, above).

15. At the twentieth session it was suggested that paragraph (4) was not entirely consistent with article 4(4) since article 14(4) spoke of the acceptance of the payment order by the receiving bank (A/CN.9/329, para. 110). In a communication to the Secretariat the delegation of the United Kingdom made essentially the same point that the two were inconsistent, but stated that it was because payment under article 4(4) was not due until execution. It suggested that if that objection was overcome, and if it was felt by the Working Group that a statement about when a sender's account should be deemed to have been debited was needed (for example for the reasons given above), the provision should be adapted and incorporated in article 4(4). In a separate communication to the Secretariat the delegation of France recommended the deletion of paragraph (4).

CHAPTER V. CONFLICT OF LAWS

Article 15. Conflict of laws

(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an originator and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.

Prior discussion

A/CN.9/297, paras. 34 to 36

A/CN.9/317, para. 165

A/CN.9/WG.IV/WP.42, paras. 69 to 80

Comments

1. The Working Group at its seventeenth session requested the Secretariat to prepare a draft provision on conflict of laws (A/CN.9/317, para. 165). The draft provision set out above was prepared for the eighteenth session of the Working Group, but it has not been considered by the Working Group as yet.

2. The problem of conflict of laws is considered in more detail in the report of the Secretary-General to the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80. That report considers the issues especially in light of the decisions of the Working Group

at its eighteenth session that the text under preparation should be in the form of a model law for adoption by national legislative bodies and that it should be restricted to international credit transfers.

3. The report states that the Model Law might include a provision on its territorial application and that, in addition, consideration might be given to a provision governing the conflict of laws where the dispute arises in a State that has adopted the Model Law but the other State or States concerned have not, or where the text of the Model Law does not govern the issue at hand (paragraph 71). The report concludes that in general the law applicable to any given segment of the credit transfer should be the law of the receiving bank, but goes on to give illustrations from the text of the draft Model Law as it was before the eighteenth session of cases in which the law of a different State might be appropriate (paragraphs 75 to 77). While the text of the draft Model Law has changed substantially in presentation since that time, the conclusions as to the appropriate law to be applied to the different problems would seem to remain valid.

4. In a communication to the Secretariat the delegation of the United Kingdom suggested that paragraph (1) be amended to add the words "or of the State in which the place of sending or receipt is situated" after "denominated" and the words "law of the State where the payment order is received" be substituted for "the law of the State of the receiving bank" in the penultimate line.

5. If the Working Group was to decide to redraft article 14(2) so as to delete any rule on discharge of an obligation (see article 14, comments 7 to 11), it would seem to be clear that article 15(2) would be deleted from the Model Law.

[A/CN.9/WG.IV/WP.46/Corr.1]

Article 2

Paragraph numbers 8 and 9 of the comments are missing due to an error in numbering and no substance was omitted.

2. International credit transfers: proposal of the United States of America: note by the Secretariat (A/CN.9/WG.IV/WP.47) [Original: English]

INTERNATIONAL CREDIT TRANSFERS

Proposal of the United States of America Note by the Secretariat

1. At the twentieth session of the Working Group the delegation of the United States suggested the possibility of restructuring the Model Law into two parts: one applicable to high-speed systems and another applicable to slower systems (A/CN.9/329, para. 197). The delegation has now submitted its proposal as to how such a restructuring might be accomplished.

2. This note contains in the annex the covering letter from the United States delegation plus its proposal with explanatory comments.

ANNEX

Covering letter from the United States, dated 6 June 1990

We have enclosed several proposed modifications to the draft Model Law for international credit transfers being prepared by the Working Group on International Payments.

Together with many other delegations, we have seen the preparation of this Model Law as an important opportunity for UNCITRAL to be among the first international bodies to achieve harmonization in international trade law in the new field of electronic commerce. A project of this nature is of course difficult, since it must deal with the conflict between newly emerging commercial practices and traditional laws and obligations.

At the conclusion of the last Working Group session on this subject, which took place in Vienna, 27 November-8 December 1989, the US delegation expressed serious concern as to the direction the draft Model Law was taking, and whether as then drafted it was compatible with new electronic banking and clearing systems. We believe that any proposed international

rules must recognize high-speed systems and the changed legal relationships that result. Otherwise, the rules if adopted would have the effect of impeding new commercial methods, rather than facilitating world trade. In the latter case, such rules may be unlikely to achieve widespread acceptance by States, and UNCITRAL would have lost an opportunity to be a leader in setting norms for modern electronic commerce.

Bank credit transfers, which are an important part of the new electronic commerce, can play a role in expanding services and lowering costs for commercial parties in all nations, regardless of their state of economic development or particular trade interest. With respect to commercial users, as distinct from consumers, modern electronic transfers today offer the option of high-speed, low cost transactions. Such transactions may depend on electronic clearing houses which, through computer-assisted high-speed systems, are able to handle very large volumes of transactions daily. At the same time, these computer-assisted systems, because of their very high volume, operate on a "best-efforts" basis and cannot undertake the same obligations that may accompany traditional funds transfers.

The latter may involve conditional payments, bank verification of transactions, reversibility, indeed many other facets may involve direct intervention by bank personnel. Commercial customers are likely to want the option of using either more traditional transfer methods, which may also use electronic means but would involve a wider range of responsibilities by banks and involve higher costs, or the newer high-speed systems at low cost. In the latter case, customers are likely to absorb certain risks in order to use those services; for example, computer-assisted systems at high speed and volume cannot normally accommodate reversal and do not allow for individual transaction monitoring and consequent exposure to responsibilities for errors or failures in the same manner as do traditional credit transfer methods. The sheer volume of transactions places real burdens on banks and clearing houses with respect to notice obligations and liability for damages, which must be taken into account if any proposed rules are to be compatible with the newly emerging electronic clearing systems.

At the conclusion of the last Working Group session, the US delegation suggested that the Working Group might wish to consider preparing two sets of rules, rather than one, in order to separate the rights and obligations of parties to banking transactions into two options—the first dealing with emerging practices in high-speed electronic transfers, and the second covering traditional transactions, which could accommodate paper-based as well as more rapid methods of transacting commerce. In the latter, originators would expect a broader range of responsibilities in return for greater cost and less speed.

There are several ways to achieve this “two-track” system. We have attached one proposal that would accomplish this by assuring through choice of law and conflict of law provisions the right of parties to engage in transactions under rules developed for electronic commerce. Such an approach could leave in place the present draft as modified by further work of the Working Group and the Commission. At the same time, it would allow for application of rules designed for high-speed transfers and therefore assure the relevance of the Model Law to commerce as it is likely to be practised by an increasing number of commercial parties and States. A separate method would be to draft two sets of rules by declaring certain provisions of the present draft inapplicable to high-speed transactions, as defined, and by writing new rules to cover those transactions.

These suggestions are being made in order to facilitate the discussion of the Working Group. We remain committed to the importance of the Commission finishing its work on this subject as early as possible.

Proposal by the United States delegation to amend the draft Model Law on International Credit Transfers to accommodate high-speed electronic transfers

At the twentieth session of the Working Group on International Payments, the US delegation expressed its concern that the text of the draft Model Law would not be suitable for credit transfers made over systems that have been designed to accomplish a transfer with high speed, maximum security, and low cost. Accordingly, the US delegation suggests that the Model Law be amended so that it would be flexible enough to accommodate this type of system, which might be referred to as a system for effecting “high-speed electronic payments”. Each proposed revision is set forth below, and is explained in a short comment.

Proposed new paragraph (3) of article 1

“(3) If a credit transfer is a ‘high-speed electronic transfer’, this law applies if any payment order comprising the credit transfer is sent from a sender located in one State to a receiving bank in another State.”

Comment

Funds transfer systems like the Clearing House Interbank Payments System (“CHIPS”) process high-speed electronic transfers. Typically, these transfers are initiated by banks that may be located outside of the United States, but that transmit by wire payment orders that are to be executed by banks located within the United States. Such a CHIPS payment might terminate with a credit to the account of a beneficiary at a bank located within the same State as the originator’s bank. This type of transfer would not be covered under the draft Model Law, because under article 1, section (1), the originator’s bank and the beneficiary’s bank are in the same State. Proposed section (3) of the draft Model Law increases the scope of the Model Law so that it covers what are defined in article 2 as “high-speed electronic transfers”.

Proposed new subparagraphs (m) and (n) of article 2

“(m) ‘High-speed electronic transfer’ means a credit transfer involving any payment order that is sent through a funds transfer system, which system is used primarily to process payment orders that are (i) sent electronically between banks or between businesses, (ii) intended to transfer value on the same day, and (iii) settled on the books of a bank or a Central Bank.”

“(n) ‘Funds transfer system’ means an electronic transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order may be transmitted to the bank to which the order is addressed.”

Comment

Section (m) defines the characteristics of the “high-speed electronic transfer” which will merit coverage under the draft Model Law, subject to the “contracting out” provision which is recommended for article 16. Note that such a credit transfer must contain at least one payment order that is processed by a special type of funds transfer system. That funds transfer system must be one that is used primarily for processing payment orders that are communicated electronically (that excludes instruments which are widely used in some States), and are primarily commercial transfers (that excludes most giro and point of sale systems, which are primarily consumer systems). Further, such a funds transfer system must be used primarily for payments that are not for a future value (which would eliminate most conditional payments), and settlement of the order would be on the books of a bank or a Central Bank. The purpose of the definition is to identify credit transfers like transfers made through CHIPS, which will need to be subject to rules that accommodate their high speed, maximum security, and low cost nature.

Section (n) defines what is a funds transfer system. No credit transfer can be a “high-speed electronic transfer” unless at least one payment order is effected through such a system. Again, the definition is sufficiently broad to encompass organizations like CHIPS and SWIFT.

Proposed new paragraph (3) of article 15

“(3) A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high-speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail.”

Comment

Because a high-speed funds transfer system may involve parties located in several States, and because the rights and liabilities of one party may be affected by the action taken by another, it is particularly important to have one set of rules govern all parties to a high-speed credit transfer. These factors led CHIPS to announce the following rule in April of 1990.

“The rights and obligations of participants and all other parties to a funds transfer of which a CHIPS payment message is a part, arising from the funds transfer or from these Rules, shall be governed by the law of the State of New York. A ‘funds transfer’ means the series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order and includes any payment order issued by the originator’s

bank or an intermediary bank intended to carry out the originator's payment order."

Proposed article 15(3) enables funds transfer systems to promulgate rules like new CHIPS rule 3. It avoids the possibility of a single funds transfer being subject to conflicting substantive provisions of State law, thereby increasing the predictability and certainty of result that are the hallmarks of commercial law.

Proposed new article 16

"Article 16. Variation by agreement and effect of funds transfer system rule"

(1) Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party.

(2) 'Funds transfer system rule' means a rule of an association of banks (i) governing transmission of payment orders by means of a funds transfer system of the association or

rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a Central Bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this law, a funds transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this law and indirectly affects another party to the funds transfer who does not consent to the rule."

Comment

It is possible that a funds transfer system processing high-speed credit transfers, or two parties to a part of a credit transfer, might want to adopt the Model Law, with some variation. Article 16 permits this, and embodies a policy judgement that parties to a credit transfer should be able to contract out of those provisions which are unsuitable to their specific purposes.

E. Report of the Working Group on International Payments on the work of its twenty-second session (Vienna, 26 November-7 December 1990) (A/CN.9/344) [Original: English]

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INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to begin the preparation of Model Rules on electronic funds transfers and to entrust that task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments.¹

2. The Working Group undertook the task at its sixteenth session (Vienna, 2-13 November 1987), at which it considered a number of legal issues set forth in a note by the Secretariat (A/CN.9/WG.IV/WP.37). The Group requested the Secretariat to prepare draft provisions based on the discussions during its sixteenth session for consideration at its seventeenth session (A/CN.9/297). At its seventeenth session (New York, 5-15 July 1988) the Working Group considered the draft provisions prepared by the Secretariat (A/CN.9/WG.IV/WP.39). At the close

¹See *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 230.

of its discussions the Working Group requested the Secretariat to prepare a revised draft of the Model Rules (A/CN.9/317). At its eighteenth session (Vienna, 5-16 December 1988) the Working Group began its consideration of the redraft of the Model Rules, which it renamed the draft Model Law on International Credit Transfers (A/CN.9/318). At its nineteenth, twentieth and twenty-first sessions it continued its consideration of the draft Model Law (A/CN.9/328, A/CN.9/329 and A/CN.9/341).

3. The Working Group held its twenty-second session at Vienna from 26 November to 7 December 1990. The Group was composed of all States members of the Commission. The session was attended by representatives of the following States members: Argentina, Bulgaria, Cameroon, Canada, Chile, China, Czechoslovakia, Denmark, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Singapore, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America.

4. The session was attended by observers from the following States: Australia, Austria, Bolivia, Colombia, Democratic People's Republic of Korea, Dominican Republic, Finland, Indonesia, Kuwait, Lebanon, Oman, Peru, Philippines, Poland, Republic of Korea, Saudi Arabia, Sweden, Switzerland, Thailand, Turkey, Uganda, United Arab Emirates, and Zaire.

5. The session was attended by observers from the following international organizations: International Monetary Fund, Asian-African Legal Consultative Committee, Bank for International Settlements, Commission of the European Communities, Hague Conference on Private International Law, Banking Federation of the European Community, Latin American Federation of Banks and Society for Worldwide Interbank Financial Telecommunication S.C.

6. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora
(Mexico)

Rapporteur: Mr. Bradley Crawford (Canada).

7. The following documents were placed before the Working Group:

(a) Provisional agenda (A/CN.9/WG.IV/WP.48);

(b) International Credit Transfers: Comments on the draft Model Law on International Credit Transfers, Report of the Secretary-General (A/CN.9/WG.IV/WP.49).

8. The Working Group adopted the following agenda:

(a) Election of officers.

(b) Adoption of the agenda.

(c) Preparation of Model Law on International Credit Transfers.

(d) Other business.

(e) Adoption of the report.

9. The following documents were made available at the session:

(a) Report of the Working Group on International Payments on the work of its sixteenth session (A/CN.9/297);

(b) Report of the Working Group on International Payments on the work of its seventeenth session (A/CN.9/317);

(c) Report of the Working Group on International Payments on the work of its eighteenth session (A/CN.9/318);

(d) Report of the Working Group on International Payments on the work of its nineteenth session (A/CN.9/329);

(e) Report of the Working Group on International Payments on the work of its twentieth session (A/CN.9/329);

(f) Report of the Working Group on International Payments on the work of its twenty-first session (A/CN.9/341).

I. CONSIDERATION OF DRAFT PROVISIONS FOR THE MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

10. The text of the draft Model Law before the Working Group was that set out in the report of the twenty-first session of the Working Group (A/CN.9/341, annex) and reproduced with comments in A/CN.9/WG.IV/WP.49.

Article 12

Subparagraph (5)(d) and paragraph (8)

11. The Working Group recalled that at its twenty-first session there had been a discussion of subparagraph (5)(d) and that a suggestion had been made to delete it as well as paragraph (8). A similar suggestion had been to combine subparagraph (5)(d) and paragraph (8). Under that proposal the Model Law would not provide a standard by which to determine whether a party to the credit transfer could recover consequential damages from a bank that had acted improperly. Instead, a bank would be subject to such rules of law otherwise existing in the national legal system when it acted in the ways described in the current text of subparagraph (5)(d). In opposition to both suggestions it had been pointed out that the purpose of paragraph (8) was to preserve the unity of the law in regard to the remedies available to a party to an international credit transfer, a unity that the Model Law sought to achieve in general. It had also been stated that one of the purposes of paragraph (8) was to protect the banking system from unexpected claims for substantial amounts based on rules of law outside the Model Law. The Working Group had agreed that it needed more time to study the implications of the suggestions that had been made. It had decided to place both texts in square brackets for reconsideration at the current session (A/CN.9/341, paras. 126-131).

12. At the current session the Working Group considered a new proposal to delete subparagraph (5)(d) and to add at the end of the current text of paragraph (8) the following words based upon subparagraph (5)(d):

"save any under which a bank is liable to compensate for loss because the improper or late execution or failure to execute resulted from an act or omission of that bank done with the intent to cause such loss, or recklessly and with knowledge that such loss might result."

13. In support of the proposal it was stated that, if subparagraph (5)(d) and paragraph (8) were simply deleted, it would be unclear whether remedies arising out of other rules of law would be available in cases where a bank acted wilfully with the intention of causing harm or recklessly with the knowledge that harm might result. It was also said that it was appropriate for the Model Law to contain a provision making it clear that in case of intentional or reckless behaviour, the bank might have to pay consequential damages in addition to an obligation to compensate for loss of interest and for expenses incurred for a new payment order, as otherwise provided in paragraph (5).

14. In opposition to the proposal, it was stated that any provision allowing for consequential damages would imply that in case of litigation an attempt would be made to determine the intent of the bank. It was also said that in some legal systems a party was deemed to have intended the consequences of its acts. In those systems it would be at least a question for the trier of fact, which might be a jury of ordinary citizens, whether the bank intended the harm when harm resulted from a failure by a bank to act with due care. It was said that an attempt to determine the intent of the bank would not be compatible with the operation of automated high-value, high-speed funds transfer systems. Therefore, it was stated, subparagraph (5)(d) should be deleted and paragraph (8) should be retained without change.

15. Another view was that subparagraph (5)(d) should be maintained to state the principle that a bank should be responsible for the consequences of its acts and that responsibility for intentional or reckless acts was the minimum that the Model Law should envisage. It was stated that this should be done even if paragraph (8) was amended as suggested.

16. The discussion in the Working Group focused on the specific wording of the proposal. A concern was expressed by some delegates that the concept of doing an act "recklessly", used in both the current text of subparagraph (5)(d) and the new proposal, was unclear and would lead to difficulties of interpretation, especially in legal systems where the concept was not currently in use. It was stated that the concept might be interpreted differently in different jurisdictions. For example, it was stated that in some jurisdictions failure to execute a given payment order might be interpreted as reckless behaviour even though the situation should be treated as ordinary negligence of the bank. In order to avoid those difficulties, it was suggested that the concept should either be defined within the Model Law or deleted altogether. In response

to that suggestion, it was noted that the current wording of subparagraph (5)(d) had been used in several international texts, including for example the Convention on Certain Rules Relating to International Carriage by Air (Warsaw, 1929) and the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) and, it was stated, no significant difficulties of interpretation had arisen. Furthermore, the aim of the proposal was not to create a general regime of liability for consequential loss applying in the cases where the banks had acted recklessly or with intent to cause the loss. In effect, the proposed deletion of subparagraph (5)(d) combined with the amendment of paragraph (8) would only allow the individual States whose law other than the Model Law provided such a remedy to apply that remedy to a bank that had acted improperly in the ways described in the proposed wording of paragraph (8). The crucial question would be whether and under what conditions the law of the State, other than the Model Law as adopted by that State, would provide for consequential damages. Therefore, it was not necessary to be assured that the word "recklessly" would be applied in exactly the same way in all States, or even that the concept of "recklessness" existed in the law of all States. A view was expressed that analogies between the international texts cited and credit transfers were inappropriate because of the high-speed, high-volume nature of credit transfers and other differences in the subject-matter.

17. A suggestion was made that a general provision on the uniform interpretation of the Model Law should be included to help overcome possible difficulties in the use of the concept of recklessness, but there was no support for that suggestion.

18. It was stated that the proposed text was appropriate because under many national laws parties to a contract could not validly agree to exclude liability for their own intentional misconduct. The proposed text would retain such a rule in those States.

19. A proposal was made to amend the proposed addition to paragraph (8) to delete the words "or recklessly". Under that proposal the end of paragraph (8) would read "resulted from an act or omission of that bank done with the intent to cause such loss and with knowledge that such loss would result." The proposal was objected to on the grounds that it would put an excessive burden on the bank customer to have to prove both the intent of the bank and knowledge by the bank of the effect that would result from its failure to execute properly. No support was expressed in favour of the proposal.

20. Another proposal would have deleted the words "or recklessly and with knowledge that such loss might result" so that the end of paragraph (8) would have read "resulted from an act or omission of that bank done with the intent to cause such loss." In response to the proposal it was said that, if paragraph (8) were to address only the case of intentional failure to execute, it could be interpreted as excluding the availability of consequential damages in the cases where the bank acted without caring at all but with no actual intent to cause the loss. It was said that the simple deletion of paragraph (8) would be preferable to such a result. A concern was expressed that the word

"might" was so broad as to leave the last clause without any standard, thereby creating an unacceptably large scope for liability.

21. At the end of its discussion the Working Group recalled that it had to decide: whether a provision of the Model Law should state that consequential damages would be available, for example under the circumstances described in the current version of subparagraph (5)(d); whether the Model Law should state that consequential damages would never be available; or whether the Model Law should leave the matter to national law outside the Model Law. It was noted that this last policy could be implemented either by deleting both subparagraph (5)(d) and paragraph (8) from the Model Law or by deleting subparagraph (5)(d) and rewording paragraph (8) in the manner set forth in paragraph 12 of the present report. After discussion and consideration of the reservations expressed by several delegations, the Working Group decided to adopt the text set forth in paragraph 12.

22. The Working Group noted that the deletion of subparagraph (5)(d) would entail consequential drafting changes to paragraph (7).

Paragraph (6)

23. The Working Group considered a proposal to redraft paragraph (6) to read as follows:

"(6) This paragraph applies to a receiving bank which is liable only in respect of its failure or the failure of a subsequent receiving bank to comply with any of the following notification obligations:

(a) to notify rejection in accordance with article 5(3) or 7(2), where payment has not been received from the sender;

(b) to notify misdirection in accordance with article 6(3) or 8(2);

(c) to notify a lack of sufficient data in accordance with article 6(4) or 8(3);

(d) to notify an inconsistency between the words and figures that describe the amount of money in accordance with article 6(5) or 8(4).

If a bank to which this paragraph applies is liable under this article to the originator or to its sender, it is obliged to compensate only for loss of interest for a maximum of 7 days or the period during which it held the funds, whichever is the longer."

24. It was stated by its proponents that the proposal was intended to include sanctions for all failures to give a notice required by the Model Law, except for the duty of a receiving or beneficiary's bank that had received payment to notify the sender of a rejection of the payment order (for which articles 5(2)(a) and 7(1)(a) provided the consequences) and the duty of the beneficiary's bank to notify an intended beneficiary who did not maintain an account at the bank that it was holding funds for his benefit (article 8(6)). It was also stated that the proposal aimed at reducing the maximum period of time that interest would be due by the bank to the sender in case of a misdirected payment order where no funds had been made

available to the bank from 30 days (as in the current text of article 12(6)(b)) to 7 days. It was noted that the reference to "payment" in subparagraph (a) would have to be made consistent with the wording adopted in articles 5(2)(a) and 7(1)(a) (see paragraph 68).

25. It was suggested that the Working Group should not discuss the sanctions for a failure to give a required notification before a final decision had been made as to the contents of the duties to notify and the time when those duties would have to be complied with. Although the view was expressed that the contents of the duties should be considered first, the prevailing view was that consideration of the sanctions might help to understand the nature of the obligations and the advisability of imposing them.

26. A discussion took place as to whether there existed a need for the Model Law to address the issues arising from the misdirection of payment orders. Under one view the duties to notify should be limited to the two cases where a bank decided to reject a payment order and where a bank had to provide assistance to the sender of a payment order under article 11(a). Another view was that there was no need to consider the issue of misdirected payment orders because they were rare in practice. Furthermore, obligations should be created only when a bank had received a payment order addressed to it. In reply it was stated that, however rare misdirected payment orders might be, it was appropriate for the Model Law, as a matter of public policy, to protect the sender against the consequences of a misdirected payment order. Furthermore, it was said, misdirected payment orders were not that rare in international credit transfers, particularly when two banks had similar names.

27. It was suggested that different solutions might be needed where the sender and the receiving bank of the misdirected payment order had an account relationship and where there existed no such relationship. It was stated that where the sender and the receiving bank had an established relationship, there was no need to create a new duty binding upon the receiving bank because the bank would already have an implied contractual duty to notify misdirection of the payment order. It was also stated that where no established relationship existed between the sender and the receiving bank, it might be particularly appropriate for the Model Law, as a matter of public policy, to create such a duty to give notice to the sender.

28. A view was expressed that the Working Group should consider the situation where a payment order was mistakenly sent to a receiving bank where the sender had an interest bearing account but the account had an insufficient credit balance to cover the payment order. It was stated that, in this case, the provisions in articles 5(2)(a) and 7(1)(a) deeming an acceptance to occur upon failure to notify the sender of rejection of the payment order would not apply. The question was raised as to whether the proposed sanction in case of a failure to notify would modify the amount of interest normally accruing to the account. In response, it was stated that the duty to notify the sender of a misdirected payment order did not provide a claim for damages if no loss had been suffered by

the sender. It was stated that, under the proposed text, the obligation of the receiver of a misdirected payment order was to "compensate for loss of interest". It was stated that no duty and therefore no sanction would apply unless funds had been transmitted for the purpose of funding the particular payment order.

29. It was recalled that where the receiving bank had received funds with the misdirected payment order, it would in any circumstances be under an obligation to return the funds with interest under article 11(b) (see paragraphs 105 to 111). A view was expressed that, since the receiving bank would be under the obligation to return the funds with interest under article 11(b), there was no need to specify any sanctions under article 12. The prevailing view was that article 12 should contain a provision in respect of misdirected payment orders so as to prevent unjustified enrichment of the receiving bank.

30. As regards the situations described in subparagraphs (b) to (d) of the proposal where no funds had been received by the receiving bank, a view was expressed that the principle of liability under article 12 should also be retained. It was stated that such liability would not overburden the banks since it would arise only in rare cases and would lead to limited sanctions. That suggestion was objected to on the grounds that no interest should be recoverable from the receiving bank where it had not received funds. The Working Group decided that the proposed provisions of paragraph (6)(b) to (d) should not apply where no funds had been received by the receiving bank. In furtherance of that approach, it was decided that the liability should be imposed only upon the bank that received the funds, so that banks would have no responsibility for failures of subsequent banks to notify of a misdirected payment order.

31. As regards subparagraph (a) of the above stated proposal, a view was expressed that a duty to notify rejection of the payment order should be maintained as a matter of public policy so as to protect the sender, for example in the situation where a bank would unduly delay payment by refusing to make the appropriate entries into an account. In response, it was stated that in such a situation where funds had effectively been sent to the receiving bank, the sender was sufficiently protected by the fact that the receiving bank would be regarded as having accepted the payment order. After discussion, the Working Group decided not to retain subparagraph (a) of the proposal.

32. It was stated that subparagraphs (b), (c) and (d) placed liability on a receiving bank even though the error was the sender's and, given the liability for errors in execution elsewhere in article 13, penalizing an innocent receiving bank for a sender's error was inappropriate.

33. At the conclusion of the discussion the Working Group decided to retain the proposed text of subparagraphs (b) to (d) of article 6 where the receiving bank had received the funds to pay for the payment order.

34. A discussion took place as to the definition of the interest and the applicable rate. The Working Group re-

called that, at its twenty-first session, it had decided not to attempt to define a rate of interest or a means of determining that rate (A/CN.9/341, paras. 121 to 123).

35. The Working Group then turned to the question as to whether a bank should be responsible for the failure of a subsequent receiving bank to give a required notice, as set forth in the *chapeau* of the proposal. The Working Group decided to delete the words "or the failure of a subsequent receiving bank".

Paragraph (7)

36. The Working Group noted that it had decided to delete subparagraph (5)(d) (see paragraph 21) and that the reference to that subparagraph should therefore be deleted from the text of paragraph (7).

37. The attention of the Working Group was drawn to the fact that the principle of freedom of contract set forth in the first sentence of paragraph (7) was currently expressed in article 16. It was therefore agreed that at least the first sentence could be deleted as being unnecessary.

38. It was proposed that the entire text of paragraph (7) should be deleted because it reflected a lack of confidence regarding the banks. In support of that proposal it was stated that, in the context of the paragraph, the Model Law should not attempt to give special protection to bank customers, whose bargaining power might well be equal or superior to that of the banks. Under another view the general principle of freedom of contract in article 16 should be deleted. The prevailing view, however, was that the second sentence should be maintained as there existed a need to set a minimum standard for the protection of bank customers.

39. Another suggestion was that express reference should be made to the possibility that the parties might exercise their right under paragraph (7) to modify the liability regime by use of standard contractual clauses. In explanation it was said that in certain States it was not possible to modify the legal regime of responsibility except by an express contract and that clauses of non-responsibility found in standard form contracts were not enforceable. After discussion, the Working Group decided that such an amendment would be useful and referred the matter to the Drafting Group.

Paragraph (2)

40. The Working Group recalled that the general system of liability set forth in paragraph (2) was that the originator could hold the originator's bank liable for the improper performance of the credit transfer. That made the originator's bank responsible to the originator for loss wherever the loss occurred. The originator's bank and each successive receiving bank could in turn hold its receiving bank liable for the improper performance of the transfer when the improper performance occurred at that bank or at a subsequent bank in the credit transfer chain. The types and extent of the losses for which the originator's bank would be liable were those set forth in paragraph (5).

41. The Working Group based its discussion on a draft it had requested the Secretariat to prepare for the implementation of the policy decisions made at its twenty-first session. The proposed draft read as follows:

"A receiving bank that is not the beneficiary's bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by a delay in the completion of the credit transfer, a failure to complete the credit transfer or a failure to complete it as instructed in the originator's payment order. A receiving bank is liable under subparagraph (5)(d) only to the extent that its actions caused the loss."

42. The Working Group noted that as a result of the decision to delete subparagraph (5)(d) (paragraph 21 above) the second sentence of the proposal could be deleted. The Working Group also noted that following the decision to delete subparagraph (5)(d) the originator's bank would be liable to the originator only for loss of interest and for expenses incurred for a new payment order.

43. A view was expressed that, since the deletion of subparagraph (5)(d) would, in essence, restrict the applicability of the liability regime set forth in paragraph (2) to loss of interest, there might be little justification left for the regime. It was recalled that, at previous sessions, the Working Group had decided that the interest due for delay in the execution of the credit transfer should be passed down the credit transfer chain to the beneficiary. It was noted that that policy decision had not as yet been implemented in the text of the Model Law.

44. The Working Group discussed the relationship between the obligation under article 11(b) to refund the principal amount of the transfer to the originator when the credit transfer was not completed and the liability for interest under article 12. The example was given of an intermediary bank that issued to its receiving bank a payment order for a smaller amount than the amount in the payment order it had received from the originator's bank. It was said that, if the intermediary bank subsequently sent a second payment order for the missing amount, the beneficiary should receive the interest for the delay in regard to that amount. However, if the missing amount was not sent forward so as to complete the credit transfer as instructed by the originator, the missing amount should be returned to the originator under article 11(b) and, it was said, interest should be paid to the originator on that amount. It was said that the beneficiary should not be able to recover interest while the originator recovered the principal sum. If the beneficiary had a right to interest from the originator for delaying in paying the underlying obligation, it should recover that interest from the originator, along with the amount not transferred to it in the original transfer.

45. In accord with the analysis set forth in the previous paragraph, a proposal was made to amend article 11(b) to provide that, where a credit transfer was not completed, the duty should be to refund "with interest". In reply it was said that such an obligation regarding interest would be appropriate in article 12 as a rule on liability, but not

in article 11, which operated so as to guarantee the completion of the credit transfer. In response, it was said that it was only logical that the receiving bank that had retained funds for some time in a credit transfer that was not completed should not only refund those funds to its sender, but that it should pay interest on those funds for the period of time during which it had had use of them. After discussion, the Working Group adopted the proposal to add the words "with interest" to article 11(b).

46. The Working Group noted that, having added the words "with interest" to article 11(b), it had provided that the originator would receive the interest in case of a credit transfer that was not completed. It therefore reaffirmed the decision it had taken at an earlier session that the beneficiary should receive the interest allowable as damages under article 12 in case of a credit transfer that was completed, but was delayed.

47. It was said that, even if the beneficiary should have the primary right to receive interest for a delayed transfer, the originator should have a residual right to recover the interest. The example was given of a beneficiary to whom the interest was not paid and who recovered interest from the originator because of the delay in payment of the underlying obligation as suggested in paragraph 44. In reply it was said that, although the originator should undoubtedly be able to recover the interest in such a case, such a right should not be available under the Model Law. Instead, it was said, the originator's right to exercise the claim of the beneficiary should be left to the otherwise applicable law of subrogation or other appropriate doctrine. That solution was objected to on the grounds that it would deprive the originator of the vicarious liability of the originator's bank provided for in paragraph (2).

48. It was suggested that it should be clear in the Model Law that the failure of a sending bank to furnish cover to its receiving bank, as a result of which the receiving bank delayed its execution of the payment order, was one failure for which the sending bank should be liable for interest. In reply it was said that the duties of the sending bank, in its capacity as receiving bank of the order it had received, should be set forth in article 6 and not in article 12. In any case, its obligation as a sending bank under article 4(4) was to pay its receiving bank for the payment order when that receiving bank accepted it. It was agreed that further study of the question was needed.

49. The question was raised as to the party from whom the beneficiary should have the right to receive the interest. It was stated that it would be appropriate for the Model Law to provide a mechanism similar to that in the current text of paragraph (2) to the effect that, in case of late execution of the credit transfer, the beneficiary's bank would be liable to the beneficiary for interest wherever the delay occurred. It would then be necessary to provide that the beneficiary's bank had a right of recourse against its sender and that the liability would be passed up the credit transfer chain to the bank that was responsible for the delay. The objection was raised that making the beneficiary's bank liable for the actions of an intermediary bank up the credit transfer chain would make it liable for actions that had occurred before it had had any awareness

of the existence of the transfer and would possibly discourage it from accepting a payment order to complete a credit transfer that had been delayed. Moreover, while it had a contractual relationship both with the beneficiary and with its sender, it had no such relationship with a remote intermediary bank.

50. While it was acknowledged that there was the same lack of contractual relationship between the beneficiary and an intermediary bank, the Working Group was of the view that it was more appropriate to give the beneficiary a direct right against the bank at which the delay in the transfer occurred than to impose liability upon other banks for delays occurring before they acted in a credit transfer.

51. The Working Group recognized that good banking practice would call for the bank at which the delay occurred to forward the appropriate amount of interest to its receiving bank. It would be difficult and relatively expensive for the beneficiary to make its claim directly against the intermediary bank, especially when that bank was in a foreign country. It would be much better for all concerned if the intermediary bank were to pay any interest incurred by it without the need for a claim to be made against it. In order to foster such a desirable practice, the Working Group adopted in principle the following proposal:

"The liability of the bank to the beneficiary is discharged to the extent that it transfers to its receiving bank an amount in addition to that it received from its sender."

52. In further support of the decision that the interest due from the intermediary bank that had delayed the execution of a payment order should be passed forward to the beneficiary through the banking system, the Working Group adopted the following provision:

"If the receiving bank that is the recipient of interest for delay [including by means of an appropriate adjustment in the date of the entry of the debit or credit to an account] is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to its receiving bank."

53. The question was raised whether the Model Law should specifically state that one way for a sending bank to pay interest to its receiving bank was to make an appropriate adjustment in the date of the credit. An objection was raised that the date of the credit might be adjusted in an account that did not bear interest, thereby being of no benefit to the receiving bank. In response, it was stated that the reference to an "appropriate" adjustment made it clear that such adjustment should lead to the production of interest. The substance of the proposal was adopted by the Working Group. However, it was stated that adjustment in the date of the credit might not be the only way by which a bank might pay the interest due. Reference was made to the possible use of a set-off mechanism. The Working Group decided to refer the matter to the Drafting Group.

54. A discussion took place as to whether interest should be due merely because of a delay in the execution of a payment order or whether only a delay in the completion

of the credit transfer should create a claim for interest in favour of the beneficiary. A delay in the execution of a payment order, it was stated, should give no claim to the beneficiary if the delay was made up at a later point in the credit chain and the credit transfer was completed by the payment date that had been stipulated. In reply it was said that a rule that relied on a delay in the completion of the credit transfer would be difficult to administer. Such a rule would mean that the intermediary bank would not know whether it was liable to pay interest until it had notice as to whether the credit transfer had been completed on time or not.

55. At the end of the discussion, the Working Group noted that it had adopted the following principles to be implemented by the Drafting Group in its redraft of paragraph (2): late completion of the credit transfer gives the beneficiary a claim for interest against the bank that caused the delay; a bank that does not properly execute a payment order is at fault and must pay interest; the intermediary bank that caused the delay is discharged from its liability if it passes interest to its receiving bank; the interest must be passed down the credit transfer chain by each receiving bank until it reaches the beneficiary. The Working Group noted that it had decided that the Model Law would not specify the rate of interest that would apply in such cases, but that it was proceeding on the assumption that it would be an interbank rate.

Proposed new paragraph

56. It was suggested that the Model Law should address the case where a bank that was obligated to pay interest to its sender (or, in accord with the decisions made at this session, to its receiving bank) and that in turn had a right of reimbursement of that interest, could not recover the reimbursement because that party had become insolvent. The suggestion was made that such a bank should be entitled to recover the reimbursement from any other bank further up or down the credit transfer chain, as the case may be, if that other bank would itself have been obligated to reimburse the insolvent bank.

57. In reply it was noted that such a rule would be of much greater significance in the context of the obligation to reimburse the principal sum under article 11(b). However, it was stated that, although such a rule appeared on first analysis to be a fair rule, a thorough economic analysis would show that it was incompatible with a bilateral or multilateral netting scheme; since the Working Group had decided that it should support the development of such netting schemes by including a rule on the time of payment of a receiving bank made through such a scheme, it would not at the same time be able to adopt the proposed rule. After discussion the Working Group decided not to adopt the proposal.

Article 13

58. In the light of the decisions taken by the Working Group regarding the rules on liability set forth in the Model Law, the view was expressed that, since liability existed only for interest, there was no need to maintain a

rule on exemption. After discussion, the Working Group decided to delete article 13.

Payment to receiving bank

59. The Working Group noted that there was no rule in the current text of the Model Law to indicate when the sender fulfilled its obligation to pay the receiving bank under article 4(4). It noted that payment to the receiving bank might be made either through correspondent banking relations or through a multilateral or bilateral netting arrangement.

60. The Working Group noted that the "Report of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries", which had been presided over by the Managing Director of the Bank for International Settlements, had been published during the month of November 1990. The Working Group noted that the report dealt with policy issues in regard to interbank netting schemes, including payment netting schemes, but that it did not attempt to draft any legal text to implement its policy determinations. The conclusions of the report set forth minimum standards for netting schemes. The first of those minimum standards was that "Netting schemes should have a well-founded legal basis under all relevant jurisdictions." The Working Group noted that for there to be a well-founded legal basis for the netting scheme, it would be necessary that the netting scheme would not only be valid under the civil or commercial law, but that it would also be effective under the law of insolvency. It was also noted that in Part C of the report of the committee on netting schemes it was indicated that the netting scheme would have to function as intended under the law of all relevant States, which included (a) the law of each of the parties to the netting scheme, (b) the law that governed the individual transactions subject to the netting scheme, and (c) the law that governed any contract or agreement necessary to effect the netting.

61. It was stated that the legal issues involved in assuring the existence of a well-founded legal basis for bilateral and multilateral netting schemes had not yet been completely examined. It was said that those issues would be further studied in the work of the committee on netting schemes. It was suggested that until those studies had been completed, it would be unwise for UNCITRAL to attempt to include any provision on the subject in the Model Law. It was said that it could be envisaged that at a later time such a provision might be included. There was general agreement that the report of this session should recommend to national legislators that domestic laws, especially laws dealing with bankruptcy and insolvency, should be reviewed with the objective of supporting interbank netting of payment obligations.

62. Before making a final decision on the question as to whether the Model Law should include any provision intended to give a legal basis to netting schemes, the Working Group decided to turn to the issue of the time when the sender pays the receiving bank. It noted that in A/CN.9/WG.IV/WP.49, comments 31 to 45 to article 4, that issue had been considered in respect of correspondent

banking before it was considered in respect of netting arrangements, since the issues were simpler in the context of correspondent banking. It was noted that an important reason for determining when the sender paid the receiving bank for the payment order was to be able to establish the amount in the account at any point of time in case of the insolvency of either the sender or the receiving bank or in case of attachment or other legal process against the account.

Sender has account with receiving bank

63. The discussion in the Working Group was based on the following proposal:

"Payment of the sender's obligation under article 4(4) 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, to the extent the debit is covered by a withdrawable credit balance in the account."

64. Under one view payment should be considered to be made at the time that the receiving bank had a right of setoff of the amount of the payment order against the account of the sender. The debiting of the account should be considered to be merely a bookkeeping entry with no independent legal significance.

65. Under another view it was appropriate for payment to be considered to have been made only when the account was debited. The act of debiting the account manifested the decision of the receiving bank that it was able and willing to receive payment in that manner. Even if the account was debited by a computer without human intervention, it had been programmed to do so only under certain conditions, thereby manifesting the decision of the receiving bank. Such a rule would not preclude the possibility that under the applicable law the receiving bank might have a right of setoff prior to the time of payment. It was noted that it was also possible for the receiving bank to debit the account prior to having a right of setoff. One example of such a possibility would be that the receiving bank might debit the account prior to executing the payment order received from the sender in order to be sure that it had been paid before it undertook its own obligation as sender to pay the receiving bank of its payment order.

66. Under one suggestion the words "to the extent of" should be replaced by "and". In support it was noted that it was not sufficient that there be "available credit" in the account, but that the credit should be withdrawable.

67. Under another suggestion the words "to the extent the debit is covered by a withdrawable credit balance in the account" should be deleted from the proposal. It was stated that it was not clear whether there was a withdrawable credit balance under either of two situations: when the account had a debit balance, or when the account had an insufficient credit balance to cover the amount of the payment order, but in either case there was a line of credit from the receiving bank to the sender

sufficient to cover the payment order. It was also questioned whether those words would permit a receiving bank to claim that its action in debiting the account did not constitute payment to it when the bank later discovered that there had been no withdrawable credit in the account or that credit had not been sufficient.

68. The Working Group noted that subparagraphs 5(2)(a) and 7(1)(a) both provided that the receiving or beneficiary's bank was deemed to accept a payment order by failing to give notice of rejection where the receiving or beneficiary's bank had been paid for the order. It was noted that it would be improper to allow the bank to avoid the effects of its failure to give notice of rejection by simply failing to debit the sender's account. It was, therefore, decided that the drafting of those subparagraphs should be modified to retain their current policy in the light of this discussion.

69. The Working Group, after discussion, decided to adopt the proposed text but to delete the words "to the extent the debit is covered by a withdrawable credit balance in the account".

Receiving bank has an account with sender or third bank

70. A proposal was made to add to the proposal set forth in paragraph 63 the following:

"(b) If the sender is a bank and the sender (i) credited an account of the receiving bank with the sender, or (ii) caused an account of the receiving bank in another bank to be credited, when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact."

71. The Working Group was in agreement with the proposal that payment should be considered as having been made to the receiving bank at the latest when the credit was withdrawn. It noted that in most cases the credit would not be withdrawn in specific terms, since the credit and any debit that might be considered to represent the withdrawal would be part of a continuous series of transactions through the account. The Working Group also noted that in some legal systems credits to an account are considered to have been withdrawn in the order in which they were made to the account.

72. The Working Group agreed with the principle that, in respect of a credit that had not been withdrawn, the receiving bank should have a certain period of time after learning of the credit to decide whether it wished to receive payment in that manner. It was noted that the receiving bank might not wish to receive payment by credit with the bank in question, even though it had an account with that bank, in order, for example, to manage its credit exposure to that bank. It was suggested that the problems were somewhat different when the credit was to an account with the sender and when the credit was to an account with a third bank. Consequently, it was said, the two situations should be treated independently in the Model Law.

73. It was stated that the receiving bank would often need additional time when the credit was in a foreign currency that it might need to convert to its own currency before it could use the credit effectively. In reply it was stated that international credit transfers to settle foreign exchange contracts were scheduled ahead of time and that the receiving bank would already have made commitments for the use of the funds. However, a large and unexpected credit in a foreign currency could cause such problems.

74. It was suggested that the time for payment should be extended to midnight of the day following the day on which the credit was withdrawable. While there was general agreement with the suggestion to the extent that it extended the time of payment to the next day, it was said that midnight had no relevance to banking operations in many countries. On the one hand the processing of transactions was completed earlier than midnight in many countries. To accommodate this point of view it was suggested that the proposed text should refer to the end of the banking day. On the other hand the movement to 24-hour banking, including the sending and receiving of international credit transfers, made any point of time arbitrary.

75. It was stated that the point of time when payment took place should be measured at the location of the receiving bank. Under another view it should be measured at the location of the sender. Under yet a third view it should be measured at the location where the account was located, which would be either the location of the sender or of the third bank.

76. A proposal was made to amend the text under consideration to provide "or, if not withdrawn, on the business day following the day on which . . .". It was noted that this proposal did not attempt to specify exactly when on that following day the receiving bank would be considered to have been paid by the sender.

77. Another proposal was to replace the words "the credit is withdrawable" by the words "the receiving bank is in a position to make effective the withdrawal". In opposition it was stated that the proposal would seem to leave the determination as to whether the receiving bank was in a position to withdraw the credit depend on the bank's subjective situation.

78. It was stated that the receiving bank should not be considered to have received payment unless the credit remained withdrawable throughout the entire period of time. It was stated that a credit would be considered to be withdrawable if the credit could be used within the country where the account was located even though it could not be transferred outside that country. If the currency and the account were otherwise appropriate but the receiving bank did not wish the credit, it should reject the credit (and perhaps the payment order if the payment order had not already been executed) prior to the deadline. It was said that in case of a rejection of the credit prior to the time of payment the right to the funds would automatically revert to the sender and the receiving bank would continue to have a right to be paid in an appropriate manner.

79. It was noted that the Model Rules on the Time of Payment of Monetary Obligations prepared by the Committee on International Monetary Law of the International Law Association provide in pertinent part:

"Rule 1: Basic rule on time of payment"

Payment is deemed to be made at the moment when the amount due is effectively put at the disposal of the creditor.

Rule 2: Payment by bank or giro transfer

Payment by bank or giro transfer, including electronic funds transfer (EFT), is deemed to be made at the moment when the amount due has been unconditionally credited to the creditor's account."

It was also noted that the Model Rules had been drafted to state the time of payment of an obligation that was to be satisfied by a bank transfer and were not necessarily applicable to the satisfaction of an obligation that arose as a part of the transfer.

80. The Working Group decided to adopt the proposal set out in paragraph 70 as modified by the proposal in paragraph 76.

Multilateral netting scheme and central bank credit

81. The Working Group decided to add to the proposal set forth in paragraph 63 a text in respect of the time of payment of a receiving bank that receives payment through a multilateral netting scheme or by central bank credit based on the following:

"(c) If the sender is a bank, when the receiving bank receives final settlement of the obligation with the central bank of the State where the receiving bank is located or through a funds transfer system. If the sender and receiving bank are members of a funds transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with [applicable law and] the rules of the system."

82. It was noted that when the receiving bank receives credit with its own central bank there was no reason for there to be any delay between the time of the credit and the time of payment. It was also noted that the settlement by the central bank had to be final for payment to have occurred. Therefore, if the central bank gave provisional settlement for certain types of transfers, the receiving bank would not be paid until the provisional settlement became final settlement. The Working Group decided not to discuss the question whether the central bank referred to in the provision should be limited by territorial or other connections.

83. The words "applicable law" were intended to indicate that the settlement would have to be final as a matter of law as well as in the manner indicated by the rules of the system. As a result the provision would not purport to validate a netting scheme that might otherwise not be valid under the applicable law. However, a question was raised as to the law of which State was indicated by the reference. Since the Working Group was not yet in a

position to answer that question, the words were placed in square brackets.

Bilateral netting

84. It was noted that in some areas of the world banks often engaged in bilateral netting of payment orders rather than posting the individual payment orders to accounts held by the banks with one another or through accounts in third banks. It was said that the Model Law should provide legal support for such bilateral netting schemes. It was pointed out that in the United States the provision on bilateral netting in article 4A-403(c) had been drafted in such a way as to overcome the common law rule that in order for there to be a setoff, there had to be mutuality of obligations and the parties had to be acting in the same capacity in respect of the claims that were to be setoff.

85. The Working Group agreed to adopt a provision that would provide that if two banks transmit payment orders to each other under an agreement that settlement of the obligations to each other under article 4(4) will be made at the end of the day or other period, each bank as receiving bank is paid when settlement of the net obligation becomes final. At this stage the Model Law would not provide a rule as to the status of the obligations of the two banks prior to the final settlement of the net obligation.

Article 10

Paragraphs (1) and (2)

Irrevocability of a payment order

86. The Working Group discussed whether, as a matter of principle, payment orders under the Model Law should be revocable or irrevocable. It was noted that, since either of those two principles would require a number of exceptions, the two principles would often result in similar practical solutions. However, it was also noted that, despite the similarity in practical solutions, a distinction between the general rule and the exceptions was of importance. It was stated that, under several legal systems, exceptions to a general rule are construed restrictively by the courts. It was also stated that the general rule might determine, in case of litigation, whether the sender of a revocation order or the receiving bank would bear the burden of proof as regards, for example, the time when the revocation order was received.

87. It was noted that the current draft of article 10 was based upon the principle that a payment order was revocable. It was stated that such a rule would not be compatible with the operation of high-speed electronic transfer systems that would, in most cases, execute payment orders within a few seconds after they had received them. In response, the example was given of a large electronic funds transfer system such as the Swiss Interbank Clearing (SIC) that functions even though it admits the revocability of payment orders sent through it. It was also stated that not all payment orders transmitted electronically were executed immediately, particularly in the case of batch processing. As regards the example of batch processing,

however, another view was that attention should be given to the high costs of removing an order from a batch. It was also stated that in many countries credit transfers were still largely paper-based. After discussion, the Working Group decided to base its discussion on a proposed draft of article 10 originally presented at the twentieth session of the Working Group (A/CN.9/329, para. 184) that read as follows:

"Article 10. Payment orders not revocable

(1) A payment order may not be revoked or amended by the sender once it has been received by the receiving bank.

(2) Notwithstanding paragraph (1) a sender may request the assistance of its receiving bank to amend or revoke a payment order and

(a) the receiving bank (other than the beneficiary's bank) may, if it wishes, cooperate with the request of its sender regardless of whether or not it has previously accepted the payment order, except that any request by the receiving bank to amend or revoke its own payment order is subject to this paragraph;

(b) the beneficiary's bank may, if it wishes, cooperate with the request of its sender, provided that it has not accepted the payment order."

88. It was stated that the proposal imposed no duty on the receiving bank to act on a revocation order; the bank had full discretion whether it would cooperate with the sender in trying to stop the execution of the payment order received or in trying to revoke the payment order the bank had issued to its receiving bank. At the same time, by enabling the receiving bank to act, the provision would release the receiving bank from the binding obligations it might have incurred by accepting or executing the payment order before it received the request to revoke. In opposition to the proposal it was said to state the principle of irrevocability of payment orders in too radical a manner. Nevertheless, the Working Group decided that it would state in the Model Law a general principle of irrevocability, which would be subject to limited exceptions.

89. Having adopted the principle of irrevocability, the Working Group considered the point of time when the principle of irrevocability would become applicable. The general view was that, in the case of a receiving bank other than the beneficiary's bank, a payment order should become irrevocable at the latest when it had been executed and, in the case of the beneficiary's bank, when it had been accepted.

90. Another concern was expressed that a bank might receive a revocation order shortly before the time when it executed the payment order or, in the case of the beneficiary's bank, before it accepted the payment order. It was, therefore, decided that the bank should have sufficient time to act pursuant to the revocation order before the payment order became irrevocable.

91. It was stated that execution of a payment order by a receiving bank other than the beneficiary's bank before the execution date (or by the beneficiary's bank before the payment date) should not discharge the bank from the

obligation it might have to act upon receipt of an otherwise timely revocation order.

92. After discussion, it was decided that a revocation order would be effective if it was received in sufficient time before the latest of the time when execution took place and the beginning of the execution date (or payment date, in the case of the beneficiary's bank).

Paragraph (3)

93. The Working Group decided to retain the current text of the paragraph.

Paragraph (4)

94. The Working Group considered whether a receiving bank should have any obligations in regard to a revocation order that was received after the payment order had become irrevocable. It noted that the current text of paragraph (4) provided that a receiving bank other than the beneficiary's bank was obligated to issue a revocation order in respect of its own payment order. After discussion, the Working Group decided that the bank that received a late revocation order could endeavour to revoke its own payment order but would be under no obligation to do so. The Working Group therefore deleted paragraph (4).

Authentication of a revocation order

95. The Working Group noted that the current text of paragraphs (1) and (2) provided that a revocation order was to be authenticated in the same manner as the payment order. It was stated that no reason existed why the parties should be prevented from agreeing that some other authentication procedure would apply, particularly when the revocation order was sent by a different means of communication than the payment order. The Working Group decided that a revocation order would have to be authenticated but not necessarily have to be authenticated in the same manner as the payment order.

Paragraphs (5) and (6)

96. There was general agreement with the principle expressed in paragraph (5) that the sender should not have to pay for the payment order if the revocation order arrived in time to be effective. Some doubt was expressed whether paragraphs (5)(a) and (6) were necessary since the sender would be refunded any payment it had already made to the receiving bank under article 11(b).

97. The Working Group also agreed that, where the revocation order was effective but, nevertheless, the receiving bank executed the payment order and the credit transfer was completed, the receiving bank should have the possibility of recovering the amount paid to the beneficiary to the extent such recovery would be possible under any otherwise applicable doctrine of law. The matter was referred to the Drafting Group.

Paragraphs (8) and (9)

98. The Working Group decided to retain the substance of the paragraphs subject to drafting changes.

Preparation of new text

99. The Working Group noted that a new text of article 10 would be necessary in the light of its decisions and referred the matter to the Drafting Group.

New proposal

100. The Working Group considered a proposal to include a new provision that would read as follows:

"For proper cause and in compliance with applicable law, a court may restrain:

(a) a person from issuing a payment order to initiate a funds transfer;

(b) an originator's bank from executing the payment order of the originator, or

(c) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing funds.

A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a credit transfer, but a bank has no obligation if it acts in accordance with the order of a court of competent jurisdiction."

101. In support of the proposal, it was stated that considerable disruption of the banking system might result from the execution of court orders that attempted to affect a credit transfer once the transfer process had been initiated. Therefore, it was considered important to restrict the possibility of executing a court order to the two ends of the credit transfer and to state that no action would be available against an intermediary bank. Although some support was given to the proposal, it was stated that it would be improper for the Model Law to include rules governing judicial procedure. It was also stated that there was no reason why the sender of an unsuccessful revocation order should be prevented from using any means that might be available under the applicable law to stop the execution of the credit transfer. After discussion, the Working Group did not adopt the proposal.

Article 11

102. The Working Group noted that the Drafting Group had under consideration a new draft of article 11 that would significantly change its presentation without changing the substance of the article. However, in order to consider the policy issues presented by the article, it decided to base its discussion on the current text.

103. It was pointed out that subparagraph (a) did not set forth all of the cases in which a receiving bank was obligated to assist the originator or its sender in carrying out a credit transfer. Where the receiving bank itself had failed in one of its obligations by, for example, misdirecting its own payment order, it would be obligated under article 6 to send a new payment order consistent with the order it had received. Subparagraph (a) on the other hand

was directed to the situation where another bank in the credit transfer chain had failed in its obligations and the originator or the sender to the receiving bank requested assistance in respect of that bank.

104. In one view the duty that the subparagraph sought to create was unclear in content and of uncertain utility since no remedy had yet been proposed by which breach of the duty might be appropriately redressed. In reply it was observed that in previous sessions the Working Group had indicated its intention to express a broad, general duty to assist which, even if not specifically enforceable by a clear sanction, would establish a norm for conduct and might, in egregious cases, be enforced by a court's application of general principles of law concerning the breach of a statutory duty.

Subparagraph (b)

105. The view was expressed that the general policy implemented in article 11(b) was inappropriate since it might adversely affect the banking system. It was stated that the duty of the originator's bank to refund to the originator the principal amount of a failed credit transfer was of particular importance in case of the insolvency of an intermediary bank from which the originator's bank had a right of reimbursement. The risk was a new one for banks in certain countries because previously it had been borne by the customers. It was said that the new risk would not be overly burdensome to large banks with foreign branches. Those banks would route most international credit transfers through their branches. It would be the small and middle-sized banks that had to route international credit transfers through correspondent banks in foreign countries that would run the risk. It was said that this would be of particular concern for banks in developing countries.

106. It was also stated that the increased risk for an originator's bank might give rise to new concerns by banking regulators who were increasingly aware of and interested in reducing systemic risk. Examples given raised the possibility of deposit insurance or reserve requirements being changed to address risks such as that which subparagraph (b) sought to create. It was also questioned whether banks might be required to provide capital support for that risk under the Basle Accord. In response, it was stated that at least one country that operated large value funds transfer systems had implemented a rule equivalent to article 11(b) without serious repercussions. The analysis carried out in that country by the bank supervisory authorities had led to the conclusion that the duty to refund to the originator did not raise issues under the Basle Accord, or serious risks of new contingent liabilities threatening the banks.

107. Another view was that the general effect of the Model Law would not be to increase the risks borne by banks. It was said that the effect of bilateral and multilateral net settlement agreements, which would be given a certain efficacy by the Model Law (see paragraphs 81 to 85), was estimated to reduce by 50 to 80 per cent the credit risk that otherwise would exist in respect of the transactions.

108. After discussion, the Working Group decided to maintain article 11(b). It requested the Secretariat to send a copy of the present report to the Bank for International Settlements (BIS) for its information. There was a request that delegations specifically prepare for a discussion of the regulatory impact of the new risk at the session of the Commission in June 1991 when the Model Law would be considered, although it was understood by the Working Group that the question of the regulatory impact of bank risk was not within the competence of the Commission.

109. A discussion took place as to whether the provisions of article 11(b) should be mandatory. Under one view the mechanism that guaranteed the sender that he would be refunded in case of an unsuccessful credit transfer was one of the main provisions of the Model Law and parties should not be given the opportunity to derogate from it. Under another view, derogation might be acceptable in special circumstances. For example, where the originator specified that the credit transfer was to be carried out through a particularly unreliable intermediary bank or a particularly unstable country, the originator's bank should have the possibility to conclude a special agreement shifting the responsibility of the transfer to the originator. However, the Model Law should not allow easy derogation, especially by means of a bank's standard terms of dealing. Under yet another view, since the refund mechanism set forth in article 11(b) could be compared to an insurance or guarantee that the credit transfer would be carried out successfully, it would create a cost for the bank for which the bank should be able to charge. An originator might wish to choose a less expensive method of transfer in which the risk that the credit transfer could not be completed and the principal amount of the transfer could not be recovered would be knowingly borne by the originator.

110. After discussion, the Working Group decided that the provisions of article 11(b) would be mandatory, but a receiving bank would not be responsible if refund could not be recovered from another bank (other than the beneficiary's bank) through which the receiving bank was directed to route the transfer. The Drafting Group was requested to prepare a provision to that effect.

111. The Working Group also made certain suggestions as to the content of the provision. It was stated that consideration should be given to the possibility that the funds would be refunded to the originator by a different route from the route used in the failed credit transfer. Another view was that the paragraph should address more clearly the situation where a payment order was issued to a beneficiary's bank in an amount greater than the amount in the payment order issued by the originator to the originator's bank.

Article 15

Paragraph (2)

112. The Working Group noted that, on the proposal of a drafting party, it had already adopted at the current session three paragraphs in place of paragraph (1) and decided that paragraph (2) would be renumbered paragraph (4) (see paragraph 140). A proposal was made to

delete renumbered paragraph (4) on the grounds that, in effect, it created a conflict of laws rule of general application between the originator and the beneficiary. After discussion, the Working Group decided to delete the paragraph. A proposal was made to link the deletion of article 15(4) with the deletion of article 14(2). No support was expressed in favour of that proposal.

Proposed additional paragraphs

113. In addition to the new formulation of paragraphs (1) to (3) as they had already been adopted by the Working Group on the proposal of a drafting party (paragraph 140), the Working Group considered a proposal to add the following paragraphs:

"() Where the rights and obligations referred to in paragraph (1) are embodied in a contract, the second sentence of that paragraph shall not affect the application of any rule of law

(a) for determining which law governs the formal validity of the contract; or

(b) applying the law of another State if it appears from the circumstances as a whole that the contract is more closely connected with that State.

() Paragraph (1) shall not apply to the extent that its application would be manifestly incompatible with the public policy of the forum.

() The application of the law of any State specified by this article means the application of the rules of law in force in that State other than its rules of private international law."

114. It was stated by its proponents that the proposed additional paragraphs were intended to make article 15 compatible with the provisions of the Rome Convention on the Law Applicable to Contractual Obligations. In opposition to the proposal it was said that the Model Law should not aim at accommodating the needs that particular States or groups of States would be facing under any other rule of law or international agreement. After discussion, the proposal was withdrawn by its proponents.

Definition of "execution"

115. The Working Group considered a proposal that "execution" should be defined as follows:

"'Execution' means, with respect to a receiving bank other than the beneficiary's bank, issuance of payment order intended to carry out the payment order received by the receiving bank."

116. It was pointed out that the term was used in many places throughout the Model Law and that it would be useful to have a definition. A discussion took place as to whether this definition of execution should be extended to cover the action taken by the beneficiary's bank. It was said that the beneficiary's bank did not "execute" the payment order but that it could only accept or reject the payment order it received. Once it accepts the payment order, the credit transfer is completed. The Working Group adopted the proposal, and noted that a careful review of

the entire text of the Model Law would be necessary to ensure that all references to "execution" were correct and that all references to "acceptance", "execution date" or "payment date" (with reference to the beneficiary's bank) that might be incompatible with the new definition of "execution" were brought to the attention of the Commission.

Article 9

117. *Execution date.* A suggestion was made that the requirement to execute the payment order on the day it was received might put an excessive burden on the banks. It was also stated that there might exist good reasons why payment orders would not be executed on the day when they had been received, particularly in the case of paper-based payment orders. No support was given to that suggestion.

118. *Paragraph (2).* The Working Group adopted a proposal to amend article 9(2) so as to replace the words "the day the payment order is received" by the words "the date when a payment order is required to be executed under paragraph (1)". In support of that proposal, it was stated that the receiving bank should have no obligation to examine or process payment orders any earlier than they were obliged to in order to give timely notice under the Model Law.

119. *Derogation by contract.* A suggestion was made that the provisions of article 9(1) should be mandatory. It was stated that contractual derogation to those provisions would make it impossible for the originator's banks to predict how long international credit transfers would take when they had to go through several intermediary banks. Although some support was expressed in support of that view, the Working Group decided that the general recognition of the freedom of contract under the Model Law should prevail. Another suggestion was that derogation from the provisions of article 9(1) should be possible only between the originator and the originator's bank. Under yet another view the extent to which the Model Law will place constraints on derogation by parties' contract should be determined in a review of the Model Law as a whole to ensure that it achieves the correct balance between freedom of contract and a reliable core of content in order to be effective legislation.

Article 8

120. A proposal was made to delete article 8(2) and the references to it. In support of that proposal, it was stated that the case might arise where an originator had made a mistake in the indication of the beneficiary's identity that could not be detected by the beneficiary's bank. As an example, it was stated that a payment order might well contain a reference to an account number as the only indication of the beneficiary's identity. It was stated that, in such a situation, the banking system should bear no liability to the originator. It was also noted that as a technical matter, the definition of "beneficiary's bank" made it impossible for a payment order received by it to

be misdirected. After discussion, the Working Group deleted the paragraph.

Article 4

121. At the twenty-first session of the Working Group the Secretariat was requested to propose a provision governing the use by a receiving bank of an error detection procedure. The proposal of the Secretariat was considered by a small group and a revised proposal for a new paragraph (3 *bis*) was submitted to the Working Group. The proposal read as follows:

"A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, if the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates or errors in a payment order, the sender is not bound by the payment order if [the sender complied with the procedure and] use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate or the error. If the error which the bank would have detected was that the sender instructed payment of an amount greater than the amount intended by the sender, the sender shall be bound only to the extent of the amount that was intended."

122. It was recalled that some procedures used in respect of the identification of the sender depended upon the use of an algorithm that incorporated the contents of the payment order. In those cases, any error in the content of the payment order would cause the authentication to fail. In other cases a payment order might have an authentication procedure that did not depend on the content of the payment order. In those cases a separate procedure for the detection of errors might be employed. The proposed provision was designed for those situations.

123. It was also recalled that, at its twentieth session, the Working Group had not accepted a suggestion to define "authentication" to cover both identification of source of a message and detection of errors in the message (A/CN.9/329, paras. 77 to 79).

124. A view was expressed that explicitly requiring compliance by the sender with any agreed upon procedure was necessary to protect the rights of a receiving bank in the event of an erroneous payment order. After discussion the Working Group decided that the procedure envisaged in the proposal should not depend on whether the sender complied with any aspect of an agreed upon procedure. If it had not and that made it impossible for the receiving bank to exercise the error detection procedure agreed upon, the sender would bear the risk that an error would not be found.

125. A concern was expressed as to the general policy that a sender should be bound by the payment order as it was received. It was stated that the Model Law did not clearly state the moment when a payment order was received. The example was given of a payment order that would be transmitted through an automatic teller machine controlled by the receiver and corrupted at a later stage during its transmission to the receiving bank's central

computer. It was stated that, in such a situation, the sender should not have to bear the consequences of the error. It was therefore proposed to add the following words at the end of the first sentence of the proposal:

"unless a sender proves that the terms of the payment order issued by the sender are different from the terms of the payment order received by the receiving bank and that the change of the terms occurred during the transmission process of the payment order under the control of the receiving bank and without any fault of the sender."

126. The Working Group did not reconsider its policy decision that the sender would be bound by the terms of the payment order as received by the receiving bank. After discussion, the Working Group adopted the proposal stated in paragraph 121, deleting the words in square brackets.

II. DRAFTING CHANGES IN THE MODEL LAW

127. The Working Group considered the other drafting proposals made by the drafting party. It was noted that these proposals carried no implication as to the substance of the Model Law.

128. The Working Group noted that, at its twenty-first session, it had made a number of policy decisions and requested the Secretariat to propose new draft provisions to implement those decisions. Those drafting proposals were set out in A/CN.9/WG.IV/WP.49. At its current session, the Working Group requested a small drafting party to review those provisions and make appropriate changes. After discussion on the report of the drafting party, the Working Group adopted the provisions set forth in paragraphs 129 to 141.

Article 1

129. The footnote was redrafted as follows:

"*This law does not deal with issues related to the protection of consumers."

Article 2(b)

130. Subparagraph (iii) was replaced by the following:

"the instruction does not provide that payment is to be made at the request of the beneficiary."

131. A concern was expressed that the wording may not be sufficiently clear as to exclude point-of-sale payment transactions.

132. The following additional words to the definition of "payment order" were accepted in principle with an expectation that they would be reformulated by the Drafting Group:

"Where an instruction is not a payment order because it is issued subject to a condition, and the condition is

subsequently satisfied, the instruction shall be treated as if it had been unconditional when it was issued; but this shall not affect the rights or obligations of any person in respect of the instruction during the period before the condition was satisfied."

Article 2(f)

133. As requested, the Secretariat suggested a word to be used in place of "bank". The term suggested was "credit transfer institution". The Working Group decided that the term "bank" would continue to be used.

134. It was decided that the following new sentence would be added at the end of the definition:

"An entity is not to be taken as executing payment orders merely because it transmits them."

Definition of "branch"

135. In place of the proposal to define the word "branch" of a bank as used in articles 1(2), 6(7), 9(5) and 10(9), the Working Group decided that the words "and separate offices" would be added following the word "branch" in those provisions.

Article 4(2)

136. The Working Group added the following sentence:

"The parties may not agree that this paragraph shall apply if the method of authentication is not commercially reasonable."

Article 12(4)

137. The Working Group decided that subparagraph (a) should read as follows:

"The beneficiary's bank is liable

(a) 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 its obligations under article 8(1) and (6), and"

Article 14

138. The Working Group decided that the title of chapter IV and of article 14 would be changed to

"Completion of credit transfer and discharge of obligation"

139. The Working Group further decided that paragraph (2 *bis*) would be renumbered paragraph (1) and that a new paragraph (3) would read as follows:

"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."

Article 15

140. The Working Group adopted the following three paragraphs in place of paragraph (1) and decided that paragraph (2) would be renumbered paragraph (4):

"(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 shall be considered to be separate banks."

Article 16

141. The Working Group decided that the article would be moved to article 3 (which currently was deleted) and that it would be given the title "Variation by agreement".

III. DRAFTING GROUP AND ADOPTION OF DRAFT MODEL LAW

142. A Drafting Group was created and was charged with the review of the entire text of the draft Model Law to assure proper style, to eliminate inconsistencies and to assure the concordance of the six language versions. The text of the draft Model Law was adopted by the Working Group on the recommendation of the Drafting Group and is presented to the Commission for its consideration. The text of the draft Model Law as adopted by the Working Group is reproduced in the annex to this report.

ANNEX

*Draft UNCITRAL Model Law on International Credit Transfers**

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

(1) This law applies to credit transfers where a sending bank and its receiving bank are in different States.

*This law does not deal with issues related to the protection of consumers.

*Text of the draft Model Law as adopted by the Working Group on International Payments at its twenty-second session, on 7 December 1990.

(2) For the purpose of determining the sphere of application of this law, branches and separate offices of a bank in different States are separate banks.

Article 2. *Definitions*

For the purposes of this law:

(a) "Credit transfer" means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order. [The term does not include a transfer effected through a point-of-sale payment system.]

(b) "Payment order" means an unconditional instruction by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money if:

(i) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(ii) the instruction does not provide that payment is to be made at the request of the beneficiary.

When an instruction is not a payment order because it is issued subject to a condition but the condition is subsequently satisfied and thereafter a bank that has received the instruction executes it, the instruction shall be treated as if it had been unconditional when it was issued.

(c) "Originator" means the issuer of the first payment order in a credit transfer.

(d) "Beneficiary" means the person designated in the originator's payment order to receive funds as a result of the credit transfer.

(e) "Sender" means the person who issues a payment order, including the originator and any sending bank.

(f) "Bank" means an entity which, as an ordinary part of its business, engages in executing payment orders. An entity is not to be taken as executing payment orders merely because it transmits them.

(g) A "receiving bank" is a bank that receives a payment order.

(h) "Intermediary bank" means any receiving bank other than the originator's bank and the beneficiary's bank.

(i) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(j) "Authentication" means a procedure established by agreement to determine whether all or part of a payment order or a revocation of a payment order was issued by the purported sender.

(k) "Execution date" means the date when the receiving bank should execute the payment order in accordance with article 10.

(l) "Execution" means, with respect to a receiving bank other than the beneficiary's bank, the issue of a payment order intended to carry out the payment order received by the receiving bank.

(m) "Payment date" means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary.

Article 3. *Variation by agreement*

Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party.

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

(1) A purported sender is bound by a payment order or a revocation of a payment order if it was issued by him or by another person who had the authority to bind the purported sender.

(2) When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless bound if:

(a) the authentication provided is a commercially reasonable method of security against unauthorized payment orders, and

(b) the receiving bank complied with the authentication.

(3) The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable.

(4) A purported sender is, however, not bound under paragraph (2) if it proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

(5) A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, if the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates or errors in a payment order, the sender is not bound by the payment order if use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate or the error. If the error that the bank would have detected was that the sender instructed payment of an amount greater than the amount intended by the sender, the sender shall be bound only to the extent of the amount that was intended.

(6) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the [execution date], unless otherwise agreed.

Article 5. *Payment to receiving bank*

Payment of the sender's obligation under article 4(6) to pay the receiving bank occurs:

(a) if the receiving bank debits an account of the sender with the receiving bank, when the debit is made; or

(b) if the sender is a bank and subparagraph (a) does not apply,

(i) when a credit that the sender causes to be entered to an account of the receiving bank with the sender is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact, or

(ii) when a credit that the sender causes to be entered to an account of the receiving bank in another bank is used or, if not used, on the business day following

the day on which the credit is available for use and the receiving bank learns of that fact, or

(iii) when final settlement is made in favour of the receiving bank at the central bank of the State where the receiving bank is located, or

(iv) when final settlement is made in favour of the receiving bank

a. through a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally and the settlement is made in accordance with applicable law and the rules of the system, or

b. in accordance with a bilateral netting agreement with the sender; or

(c) if neither subparagraph (a) nor (b) applies, as otherwise provided by law.

Article 6. *Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank*

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank accepts the sender's payment order at the earliest of the following times:

(a) when the time for execution under article 10 has elapsed without notice of rejection having been given, provided that: (i) where payment is to be made by debiting an account of the sender with the receiving bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the amount of the payment order; or (ii) where payment is to be made by other means, acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 5(b) or (c),

(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it gives notice to the sender of acceptance, or

(d) when it issues a payment order intended to carry out the payment order received.

(3) A receiving bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (2)(a), is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Article 7. *Obligations of receiving bank that is not the beneficiary's bank*

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

(3) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the receiving bank shall give notice to the sender of the misdirection, within the time required by article 10.

(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 10.

(5) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the receiving bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 10 if, in the time required by that article, it enquires of the sender as to the further actions it should take in light of the circumstances.

(7) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

Article 8. *Acceptance or rejection by beneficiary's bank*

(1) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the time for [execution] under article 10 has elapsed without notice of rejection having been given, provided that: (i) where payment is to be made by debiting an account of the sender with the beneficiary's bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the amount of the payment order; or (ii) where payment is to be made by other means, acceptance shall not occur until the beneficiary's bank has received payment from the sender in accordance with article 5(b) or (c),

(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will [execute] payment orders from the sender upon receipt,

(c) when it notifies the sender of acceptance,

(d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary,

(e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit,

(f) when the bank otherwise applies the credit as instructed in the payment order,

(g) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

(2) A beneficiary's bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (1)(a), is required to give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the [execution date].

Article 9. *Obligations of beneficiary's bank*

(1) The beneficiary's bank is, upon acceptance of a payment order received, obligated to place the funds at the disposal of the

beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary.

(2) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be [executed] because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 10.

(3) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the beneficiary's bank shall, within the time required by article 10, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(4) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank shall give notice, within the time required by article 10, to its sender and to the originator's bank, if they can be identified.

(5) The beneficiary's bank shall on the [execution date] give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, if the bank has sufficient information to give such notice.

Article 10. *Time for receiving bank to [execute] payment order and give notices*

(1) A receiving bank is required to [execute] the payment order on the day it is received, unless

(a) a later date is specified in the order, in which case the order shall be [executed] on that date, or

(b) the order specifies a payment date and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the payment date.

(2) A notice required to be given under article 7(3), (4) or (5) shall be given on or before the day the payment order is required to be executed.

(3) A notice required to be given under article 9(2), (3) or (4) shall be given on or before the [payment date].

(4) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank [executes] that type of payment order.

(5) If a receiving bank is required to take an action on a day when it is not open for the [execution] of payment orders of the type in question, it must take the required action on the following day it [executes] that type of payment order.

(6) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

Article 11. *Revocation*

(1) A payment order may not be revoked by the sender unless the revocation order is received by a receiving bank other than the beneficiary's bank at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act before the later of the actual time of execution and the beginning of the execution date.

(2) A payment order may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner sufficient to afford the bank a reasonable opportunity to act before the later of the time it accepts the payment order or the beginning of the payment date.

(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received by an earlier point of time than provided in paragraphs (1) and (2).

(4) A revocation order must be authenticated.

(5) A receiving bank other than the beneficiary's bank that executes or a beneficiary's bank that accepts a payment order that has been revoked is not entitled to payment for that payment order and, if the credit transfer is completed in accordance with article 17(1), shall refund any payment received by it.

(6) If the recipient of a refund under paragraph (5) is not the originator of the transfer, it shall pass on the refund to the previous sender.

(7) If the credit transfer is completed in accordance with article 17(1) but a receiving bank [executed] a revoked payment order, the receiving bank has such rights to recover from the beneficiary the amount of the credit transfer as are otherwise provided by law.

(8) The death, bankruptcy, or incapacity of either the sender or the originator does not of itself, operate to revoke a payment order or terminate the authority of the sender. The word "bankruptcy" includes all forms of personal, corporate and other insolvency.

(9) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS

Article 12. *Duty to assist*

If the credit transfer is not completed in accordance with article 17(1), each receiving bank is obligated to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the credit transfer.

Article 13. *Duty to refund*

(1) If the credit transfer is not completed in accordance with article 17(1), the originator's bank is obligated to refund to the originator any payment received from it, with interest from the day of payment to the day of refund. The originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund.

(2) The provisions of paragraph (1) may not be varied by agreement. However, a receiving bank shall not be required to make a refund under paragraph (1) if it is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund. The sender that first specified the use of that intermediary bank shall have the right to obtain the refund from the intermediary bank.

Article 14. *Correction of underpayment*

If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted, it is obligated to issue a payment order for the difference between the amounts of the payment orders.

Article 15. *Restitution of overpayment*

If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order executed by a receiving bank is greater than the amount of the payment order it accepted, it has such rights to recover from the beneficiary the difference between the amounts of the payment orders as are otherwise provided by law.

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.

F. Working paper submitted to the Working Group on International Payments at its twenty-second session: international credit transfers: comments on the draft Model Law on International Credit Transfers: report of the Secretary-General (A/CN.9/WG.IV/WP.49) [Original: English]

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INTRODUCTION

1. The Commission, in conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers (A/CN.9/SER.B/1) as a product of the work of the Secretariat, decided to begin the preparation of model rules on electronic funds transfers and to entrust the task to the Working Group on International Payments (A/41/17, para. 230).

2. The Working Group undertook the task at its sixteenth session held at Vienna from 2 to 13 November 1987 at which it considered a number of legal issues set forth in a report prepared by the Secretariat (A/CN.9/WG.IV/WP.35). At the conclusion of the session the Working Group requested the Secretariat to prepare draft provisions based on the discussions during that session for its consideration at its next meeting (A/CN.9/297, para. 98).

3. At its seventeenth session held in New York from 5 to 15 July 1988 the Working Group considered a text of the draft provisions prepared by the Secretariat (A/CN.9/WG.IV/WP.37). At the close of the session the Working Group requested the Secretariat to prepare a revised draft of the provisions (A/CN.9/317, para. 10).

4. At its eighteenth session held at Vienna from 5 to 16 December 1988 the Working Group began its consideration of the redraft of the Model Rules prepared by the Secretariat in A/CN.9/WG.IV/WP.39. It renamed the draft Model Rules as the draft Model Law on International Credit Transfers (A/CN.9/318). The Working Group continued its consideration of the draft provisions at its nineteenth session held in New York from 10 to 21 July 1989. During the session a drafting group prepared a restructured text of the draft Model Law (A/CN.9/328, annex I). The restructured text was discussed at the twentieth session of the Working Group held at Vienna from 27 November to 6 December 1989. A drafting group revised articles 1 to 9 of the draft Model Law but left articles 10 to 15 unchanged (A/CN.9/329, annex). The Working Group continued its discussion of the draft Model Law at its twenty-first session held in New York from 9 to 20 July 1990 where a certain number of changes in the text were adopted. In a number of other cases the Working Group decided that the draft Model Law should be changed to reflect a certain policy decision, but did not adopt a

specific text to reflect that decision. All such policy decisions, as well as a few made at prior sessions of the Working Group, were reflected in footnotes to the draft Model Law as it appeared in the annex to the report of the twenty-first session (A/CN.9/341, annex).

5. This report contains a commentary on the draft articles of the text as it emerged from the twenty-first session of the Working Group (A/CN.9/341, annex), indicating their history and their relationship to other provisions. Where the commentary is historical, where the text of an article was not considered at the twenty-first session, or the text of an article was considered but not changed, the commentary is often identical to that in A/CN.9/WG.IV/WP.46. The report also contains suggested texts to implement the policy decisions that have been made by the Working Group.

6. A new feature of this report is that it provides references to the relevant provisions in Article 4A of the Uniform Commercial Code of the United States for comparison. Article 4A governs the same kinds of credit transfers as does the draft Model Law, except that Article 4A is not limited either to domestic or to international credit transfers. Its preparation began in the United States somewhat before the beginning of the preparation of the Model Law.

7. The principal interest in Article 4A arises out of the fact that it is the only legislative text in existence that provides a basic legal structure for credit transfers. In all other States, including those States where credit transfers have been the principal means of interbank payments, the law of credit transfers is derived from a multitude of sources. As a result, the draft of Article 4A that was current at the time of a meeting of the Working Group has often been a source of ideas for the consideration of the Working Group.

8. The final text of Article 4A was adopted by its sponsoring organizations in August 1989 and soon thereafter was presented to the individual states within the United States for adoption. It has been adopted by a number of those states, including the state of New York, where the Clearing House Interbank Payments System (CHIPS) is located. It will also govern the operations of the Federal Reserve System wire transfer network (FEDWIRE) once the proposed Regulation J is adopted.

9. Summary comparisons between the Model Law and Article 4A are often difficult because of the differences in the structure and in the drafting style of the two texts. Article 4A often goes beyond the enunciation of a general rule, as does the draft Model Law, by providing for a number of detailed implementing sub-rules and by providing for many of the more important exceptions to the general rule. These implementing sub-rules and exceptions are often important. Furthermore, the complexity of the text, often brought about by the level of detail contained in it, has led to extensive explicit and implicit cross-referencing. Since the full context of the Article 4A rules cannot be set out in the summary comparisons stated in this report, the interested reader should turn to the full text of Article 4A itself.

COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

Title of the Model Law

Prior discussion

A/CN.9/318, paras. 10 to 19

A/CN.9/329, paras. 11 to 15

Comments

1. The current title was adopted by the Working Group at its eighteenth session. The Working Group decided that the words "Model Law" should be used in the title to reflect the fact that the text was for use by national legislators and that the text should not for the time being be in the form of a convention (A/CN.9/318, paras. 12 and 13).

2. The use of the words "Credit Transfers" reflected the decision that only credit transfers and not debit transfers should be included (A/CN.9/318, para. 14). The decision is set forth as a rule in article 1(1). Credit transfers are defined in article 2(a).

3. The word "electronic" is not used in the title as a result of the decision that the Model Law would be applicable to paper-based credit transfers as well as to those made by electronic means (A/CN.9/318, paras. 15 to 17). At the twenty-first session, while no suggestion was made that the Model Law should not apply to paper-based credit transfers, there was general agreement that the Model Law should be drafted so as to meet the operating needs of high speed electronic credit transfers (A/CN.9/341, para. 28; see also paras. 24 to 27 and 56).

4. The Working Group at the eighteenth session decided that the Model Law should be restricted to international credit transfers and that that decision should be reflected in the title (A/CN.9/318, para. 18). At its twentieth session the Working Group reaffirmed its decision to restrict the sphere of application of the Model Law to international credit transfers (A/CN.9/329, paras. 12 to 15). It noted that the preparation of a model law applicable to domestic as well as international credit transfers was within its mandate. However, it also noted that there were differences between the two types of transfers that justified different

treatment of some of the legal issues that arose. Furthermore, appropriate solutions might not be the same in all States for domestic credit transfers. As a result it was believed to be preferable not to confront the difficult political problems that might be created by providing in the Model Law that it applied to all credit transfers. Nevertheless, some States might wish to apply the Model Law to both domestic and international credit transfers.

5. The criteria for determining whether a credit transfer is international are to be found in article 1.

Comparison with Article 4A

6. The title of Article 4A, "Funds transfers", and the definition of that term in Article 4A-104, are an indication that in the greatest respect the substantive spheres of application are almost identical. Although Article 4A was prepared because of the recent development of high-speed high-value credit transfers in the United States, it would apply to transfers made by any technology. For example, Article 4A-302(a)(2) anticipates the execution of a payment order "by first class mail" under certain circumstances. However, since there has never been an interbank paper-based credit transfer system in the United States, and since the credit transfer system based on the bulk exchange of payment orders, especially by the physical exchange of magnetic tapes and similar devices, is of comparatively minor importance, the substantive rules are oriented towards the exchange of individual high-speed high-value payment orders.

CHAPTER I. GENERAL PROVISIONS

*Article 1. Sphere of application**

(1) This Law applies to a credit transfer where a sending bank and its receiving bank are in different States.

(2) For the purpose of determining the sphere of application of this Law, branches of a bank in different States are considered to be separate banks.

*This law is subject to any national legislation dealing with the rights and obligations of consumers.

Prior discussion

A/CN.9/297, paras. 12 to 23 and 29 to 31

A/CN.9/317, paras. 16 to 24, 30 and 95 to 97

A/CN.9/318, paras. 20 to 34, 53 and 54

A/CN.9/329, paras. 12 to 25 and 194

A/CN.9/341, paras. 57 to 65

Error in A/CN.9/341, annex

The footnote to article 1 as set out in A/CN.9/341, annex refers to "this Model Law".

Comments

1. The general scope of article 1 was adopted by the Working Group at its eighteenth session (A/CN.9/318). It

was reconsidered at the twentieth and twenty-first sessions, where several amendments were adopted (A/CN.9/329 and A/CN.9/341).

Internationality of a transfer

2. As indicated by the title, the Model Law will apply only to credit transfers that are international. However, at the twentieth session the Working Group noted that some States might wish to apply the Model Law to both domestic and international transfers (A/CN.9/329, para. 14).

3. The test of internationality in paragraph (1) as it was adopted at the eighteenth session was that the originator's bank and the beneficiary's bank were in different countries. The Working Group decided at its twentieth session to eliminate the result pointed out in A/CN.9/WG.IV/WP.44, article 1, comments 4 to 6 that, since a bank that originated a credit transfer for its own account was an originator and not an originator's bank, a transfer by such a bank to a second bank through a mutual correspondent bank would not fall within the sphere of application of the Model Law even if all three banks were in different States. In order to carry out its decision, the Working Group decided to add the words "or, if the originator is a bank, that bank and its receiving bank are in different countries" (A/CN.9/329, paras. 16 to 23). The formulation was changed by the drafting group, a result that the Working Group disavowed during the adoption of the report of the twentieth session but did not correct for lack of time (A/CN.9/329, para. 194). At the twenty-first session the Working Group began by returning to the original formula (A/CN.9/341, para. 58). After discussion it adopted the current text of paragraph (1) (A/CN.9/341, para. 64).

4. The current formula requires that any one sending bank and its receiving bank in the chain of sending and receiving banks that carry out the credit transfer must be in different States. If any such pair of sending and receiving banks is located in two States, the credit transfer is international and the Model Law applies to every segment in the chain. This is so even though a particular segment is between a sender (originator or sending bank) and a receiving bank in the same State. Except for the originator's bank, the first receiving bank in every State involved in a particular credit transfer necessarily receives a payment order from a sending bank in another State. However, the originator, the originator's bank as well as the next several receiving banks in the credit transfer chain may be in the same State. All of the payment orders between these parties are subject to the Model Law even though they are prior to the sending of a payment order from a sending bank in that State to a receiving bank in another State.

5. Since paragraph (1) refers only to the location of a sending bank and a receiving bank, the location of a non-bank sender is irrelevant for determining whether the credit transfer is international. Therefore, when a non-bank originator resident in State A issues a payment order to the originator's bank in State B instructing a transfer to the account of the beneficiary at the same or a different bank in State B, the credit transfer would not be international. However, if the originator resident in State A was

a bank, its payment order to its bank in State B would be between banks in different States and the credit transfer would be international.

6. In some cases in which a transfer is made from a customer's account in a financial institution in State A to an account in a financial institution in State B, the sending financial institution may not be considered to be a bank under the definition of a bank in article 2(f). Such a situation might arise where the sending financial institution was a broker which would, on instructions of a customer, transfer a credit balance in a customer's brokerage account, but which did not engage in executing payment orders as an ordinary part of its business. See comment 30 to article 2. In that case the sending financial institution would not be a bank. A similar situation arises when the receiving financial institution in State B is not a bank and the payment order issued to it is the only payment order to go from one State to another. In either of those situations the Model Law would not apply. At the twenty-first session of the Working Group the definition of a "bank" in article 2(f) was modified so as to increase the likelihood that an entity that held accounts of its customers that were subject to payment orders would be considered to be a bank. See comment 33 to article 2.

7. A transfer may be international even though the originator's bank and the beneficiary's bank are in the same State. That situation can occur when a transfer between an originator's bank and a beneficiary's bank, both of which are in State A, is denominated in the currency of State B. In such a case the originator's bank would often send a payment order to its correspondent bank in State B instructing it to credit the account of the beneficiary's bank, or instructing it to send a payment order to the correspondent bank of the beneficiary's bank in State B. When the transfer is carried out in that manner, there is a sending bank and a receiving bank in two different States and the credit transfer is subject to the Model Law.

8. There is one situation where the transfer between two banks in State A denominated in the currency of State B would not be international and a second where it is not clear whether it would be international. The transfer would not be international if there was a clearing in State A in the currency of State B and the transfer was executed through that clearing, since no payment order would be sent between State A and State B.

9. It is not clear whether the transfer is international where the originator's bank in State A sends its payment order directly to the beneficiary's bank in State A and pays the beneficiary's bank the amount of that payment order by sending a second payment order to its correspondent bank in State B with instructions to credit, or to cause to be credited, the account of the beneficiary's bank at the correspondent bank. It has been said that in such a case the instruction from the originator's bank to the third (reimbursing) bank to credit the account of the beneficiary's bank is a separate credit transfer from the credit transfer between the originator's bank and the beneficiary's bank. Under that interpretation, the transfer between the originator's bank and the beneficiary's bank in the currency of State B is not an international credit

transfer under paragraph (1). However, the credit transfer by which the originator's bank instructs its correspondent bank in State B to reimburse the beneficiary's bank by crediting its account would be an international credit transfer and subject to the Model Law. That interpretation was given at the twenty-first session, but it does not figure in the report of the session. However, that interpretation was specifically rejected at the twentieth session of the Working Group when the concern was whether a reimbursing bank was an "intermediary bank" (A/CN.9/329, paras. 70 and 71; see comment 44 to article 2).

10. Opposition to the results described in comments 7 to 9 were expressed at the twenty-first session, as well as at the eighteenth session when a similar proposal was before the Working Group, because of the possibility that the same instruction from the originator might be subject to the Model Law or not depending on the particular means of settlement chosen. It was said that even the originator's bank might not know the routing the credit transfer would take or the settlement procedures to be used where the originator's bank sent its payment order to another bank in the same State that handled international and foreign currency transfers (A/CN.9/318, paras. 25 to 26 and A/CN.9/341, para. 62). At the eighteenth session it was said that that result was not appropriate since the transfer would otherwise be identical from an economic point of view. At the twenty-first session the results described in comments 7 to 9 were accepted since it would always be possible for the originator to specify to its bank the routing of the credit transfer.

11. Since the application of the Model Law depends on the existence of two banks in different countries, normally it would not apply where the originator and the beneficiary had their accounts in the same bank. However, according to paragraph (2), for the purposes of the sphere of application of the Model Law, branches of a bank in different States are considered to be separate banks. Therefore, a transfer is within the application of the Model Law even though only one bank is involved when the originator's account and the beneficiary's account are in branches of that bank in different States.

12. Restricting application of the Model Law to international credit transfers means that a State that adopts the Model Law will potentially have two different bodies of law governing credit transfers, one applicable to domestic credit transfers and the Model Law applicable to international credit transfers. In some countries there are no domestic credit transfers or the domestic elements of international transfers are segregated from purely domestic transfers. In other countries domestic credit transfers and the domestic elements of international transfers are processed through the same banking channels. In those countries it would be desirable for the two sets of legal rules to be reconciled to the greatest extent possible or for the Model Law to be adopted for both domestic and international credit transfers.

Territorial scope of application

13. Since the Model Law is being prepared for international credit transfers, questions of conflict of laws

naturally arise. The relevant provisions are contained in article 15. Article 15(1) has the effect of limiting the territorial application of the Model Law.

Consumer transfers

14. The Working Group decided at its eighteenth session that the Model Law should apply to all international credit transfers, including transfers made for consumer purposes. Not only would that preserve the basic unity of the law, it would avoid the difficult task of determining what would be a credit transfer for consumer purposes. That was also thought to be of importance since special consumer protection legislation affecting credit transfers currently exists, and could be envisaged in the future, in only some of the countries that might consider adopting the Model Law.

15. At the same time, it was recognized that the special consumer protection legislation that exists in some countries, and that may be adopted in others, could be expected to affect some international credit transfers as well as domestic credit transfers. To accommodate that possibility, the footnote to article 1 was adopted to indicate that the Model Law would be subject to any national legislation dealing with the rights and obligations of consumers, whether the provisions of that legislation supplemented or contradicted the provisions of the Model Law (A/CN.9/318, paras. 30 to 33). The footnote was reconsidered at the twentieth session where no change was made (A/CN.9/329, para. 24).

16. At the twenty-first session the Working Group decided that the footnote should be reworded to state that the Model Law was not intended to deal with issues related to the protection of consumers (A/CN.9/341, para. 65). It may be noted that consumers who are originators or beneficiaries of credit transfers have the same rights, obligations and protections under the Model Law as do all other originators and beneficiaries. No text was adopted to implement the Working Group's decision. The Working Group may wish to consider the following text:

"This Law does not deal with issues related to the protection of consumers as a special class of [bank customers] [originators and beneficiaries]."

Comparison with Article 4A

17. Article 4A applies to both domestic and international credit transfers that fall within its scope of application based upon the conflict of laws rules in Article 4A-507. For a discussion, see comments 1 to 10 to article 15.

18. Article 4A-108 excludes from the coverage of Article 4A any transfer that is governed by the Electronic Fund Transfer Act of 1978. While that exclusion covers almost all transfers by or for the benefit of consumers, it does not exclude the relatively rare transfers made for consumer purposes that use the facilities of CHIPS, FEDWIRE or of the Society for Worldwide Interbank Financial Telecommunication (SWIFT).

Article 2. Definitions

For the purposes of this Law:

(a) "Credit transfer" means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a designated person. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order.

(b) "Payment order" means an unconditional instruction by a sender to a receiving bank to place at the disposal of a designated person a fixed or determinable amount of money if:

(i) Deleted

(ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(iii) the instruction is to be transmitted either directly to the receiving bank, or to an intermediary, a funds transfer system, or a communication system for transmittal to the receiving bank.

(iv) Deleted

(c) "Originator" means the issuer of the first payment order in a credit transfer.

(d) "Beneficiary" means the person designated in the originator's payment order to receive funds as a result of the credit transfer.

(e) "Sender" means the person who issues a payment order, including the originator and any sending bank.

(f) "Bank" means an entity which, as an ordinary part of its business, engages in executing payment orders.

(g) A "receiving bank" is a bank that receives a payment order.

(h) "Intermediary bank" means any receiving bank other than the originator's bank and the beneficiary's bank.

(i) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this Law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(j) "Authentication" means a procedure established by agreement to determine whether all or part of a payment order [or a revocation of a payment order] was issued by the purported sender.

(k) "Execution date" means the date when the receiving bank is to execute the payment order in accordance with article 9.

(l) "Payment date" means the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary.

Prior discussion

A/CN.9/297, paras. 24 to 28

A/CN.9/317, paras. 26 to 47

A/CN.9/318, paras. 35 to 59, 75, 76, 94 and 106

A/CN.9/328, paras. 79 and 88

A/CN.9/329, paras. 26 and 82

A/CN.9/341, paras. 66 to 84

Comments

1. The Working Group at its sixteenth session expressed the view that, in order to harmonize to the greatest extent possible the terms as used by bankers and as used in legal rules governing credit transfers, an effort should be made to use the terminology adopted by the Committee on Banking and Related Financial Services of the International Organization for Standardization in ISO 7982-1 (A/CN.9/297, paras. 25 to 28). However, in view of the fact that the ISO terminology had not been adopted with legal considerations in mind, some deviation from both the terminology and the definitions had to be envisaged. Various definitions have been considered at the seventeenth, eighteenth, nineteenth, twentieth and twenty-first sessions.

2. The comments below indicate the extent to which the terms used and their definitions differ from those in ISO 7982-1.

Chapeau

3. At the twentieth session the Working Group decided to introduce article 2 with the words "For the purposes of this Law", especially since some of the terms such as "bank" may be defined in other ways in the statutory law of a State that adopts the Model Law (A/CN.9/329, para. 26).

"Credit transfer"

4. The definition as adopted by the Working Group at its eighteenth session was based upon the definition of "funds transfer" in ISO 7982-1. However, certain amendments were made to the ISO definition in order to clarify its meaning. (See A/CN.9/318, paras. 36 to 38 and A/CN.9/WG.IV/WP.44, article 2, comments 4 to 6.)

5. At the twentieth session the Working Group adopted the current definition. When doing so it recognized that the definition of "credit transfer" and the associated definition of "payment order" were of particular importance since article 1 on the sphere of application provided that the law applied to credit transfers (A/CN.9/329, paras. 27 to 33). Therefore, the definition of the term serves in part to determine the sphere of application of the Model Law.

6. A credit transfer is defined in terms of the actions taken in regard to payment orders, and not in terms of the movement of funds as in an earlier definition. The types of transfers to be covered by the Model Law are also affected by the definition of "payment order".

7. The definition of "credit transfer" as adopted at the twentieth session included in square brackets a third sentence that provided when the credit transfer is completed (A/CN.9/329, para. 33). At the twenty-first session the sentence was deleted in view of the adoption of a provision on completion of a credit transfer in article 14(2 *bis*) (A/CN.9/341, para. 72).

8. *Comparison with Article 4A.* The definition of "credit transfer" is almost identical to the definition of "funds transfer" in Article 4A-104.

"Payment order"

9. In accordance with a suggestion made at the seventeenth session of the Working Group, the minimum data elements necessary to constitute a payment order were included in the definition of the term submitted to the eighteenth and nineteenth sessions (A/CN.9/317, para. 54). At the nineteenth session the drafting group separated the definition into two elements, a definition in article 2 and the requirements as to the minimum data elements in a payment order in article 3 (A/CN.9/328, para. 145 and annex).

10. At the twentieth session of the Working Group the minimum data elements in a payment order as set out in article 3 were deleted from the draft Model Law (A/CN.9/329, paras. 89 to 93). Nevertheless, the existence of an incomplete payment order has consequences in regard to the credit transfer. Those consequences are considered in articles 5 to 8.

11. The basic elements of the current definition of "payment order" were adopted at the twentieth session to accord with the new definition of "credit transfer" adopted at that session (A/CN.9/329, paras. 34 to 58).

12. It was decided not to make any reference to the form in which the payment order might exist, i.e. written, oral or magnetic, or to the form in which it might be transmitted from the sender to the receiving bank. On the one hand, any listing might exclude new technological advances. On the other hand, in some countries restrictions on the use of particular forms for the existence or transmission of a payment order might be of a regulatory nature. In the absence of any provision on this point in the Model Law, it would be settled under other applicable provisions of national law.

13. At the twentieth session the Working Group agreed that the Model Law should not govern conditional payment orders that were to be sent from one bank to another, and decided that such orders would not be considered to be "payment orders" (A/CN.9/329, paras. 40 to 42 and 50 to 53). However, a conditional payment order issued by the originator was a "payment order" according to subparagraph (i) if the condition was to be satisfied on or before the issue of a payment order by the originator's bank. Consequential provisions were included to assure that the condition would not affect subsequent receiving banks or the beneficiary. In addition, subparagraph (iv) provided that an instruction to open a letter of credit was not a payment order, a provision that was thought to be

necessary in view of the conditional nature of such an instruction.

14. Nevertheless, opposition was expressed at the twentieth session to even such a restricted recognition of conditional payment orders as falling within the sphere of application of the Model Law. It was noted that article 5(1) did not give the originator's bank any extra time within which to consider whether it wished to be bound by a conditional payment order before the bank was deemed to have accepted the order (A/CN.9/329, para. 52).

15. At the twenty-first session the Working Group decided that a conditional payment order should not be considered to be a payment order under the Model Law (A/CN.9/341, para. 73). That result was achieved by inserting the word "unconditional" in the *chapeau* of the definition and by deleting subparagraph (i). In addition, subparagraph (iv) was deleted as being unnecessary (A/CN.9/341, para. 79).

16. The Working Group recognized that, by saying that a conditional payment order was not a payment order under the Model Law, the sender of that order was not an originator and, consequently, had no rights or obligations under the Model Law. Therefore, if the credit transfer was not carried out properly for reasons unconnected with the original condition, any rights the customer might have would arise from rules of law outside the Model Law. Consequently, the Working Group decided that a provision should be included in the Model Law giving the sender of a conditional payment order the rights of an originator of a credit transfer where the execution of the conditional payment order eventually resulted in an unconditional credit transfer (A/CN.9/341, paras. 74 and 75). In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested the following addition to the definition of "originator" in article 2(c) in implementation of that decision:

"or, where the first payment instruction is not a payment order because it is subject to a condition which subsequently is satisfied, the issuer of that instruction".

17. The delegation of the United Kingdom pointed out, however, that the conditional instruction would still not be a "payment order", which could give rise to difficulties in the interpretation of expressions such as "originator's payment order". As a consequence, while it stated its reluctance to include any reference to conditional instructions, it suggested that an approach preferable to the one decided by the Working Group would be to add the following at the end of the definition of "payment order":

"Where an instruction is not a payment order because it is issued subject to a condition, and the condition is subsequently satisfied, the instruction shall be treated as if it had been unconditional when it was issued; but this shall not affect the rights or obligations of any person in respect of the instruction during the period before the condition was satisfied."

18. At the twenty-first session deletion of subparagraph (ii) was suggested on the grounds that the question

of reimbursement of the receiving bank should be left for the originator and its bank to agree upon on a contractual basis. However, the subparagraph was retained on the grounds that it was necessary in order to exclude debit transfers from the scope of the Model Law (A/CN.9/341, para. 76).

19. Subparagraph (iii) is also intended to draw a distinction between debit transfers and credit transfers. A proposal at the twenty-first session to delete the subparagraph received no support. Various drafting proposals were made both before the twenty-first session (A/CN.9/WG.IV/WP.46, comment 16 to article 2) and during the session (A/CN.9/341, paras. 77 and 78) intended to make sure that the subparagraph could in fact apply only to a credit transfer.

20. It would seem that the distinction between a payment order that forms part of a credit transfer and an instruction that forms part of a debit transfer is that in the former case the instruction is transmitted by the sender to the receiving bank while in the latter case it is transmitted by the sender to the beneficiary, who in turn transmits it to the receiving bank. In both credit and debit transfers the transmission to the receiving bank may be made directly or the services of an intermediary may be used. However, it would seem that the meaning should be sufficiently clear if subparagraph (iii) were to provide

"the instruction is to be transmitted by the sender to the receiving bank"

or, in order specifically to exclude debit transfers,

"the instruction is to be transmitted by the sender to the receiving bank by any intermediary other than the beneficiary".

21. *Comparison with Article 4A.* Article 4A-103 defines "payment order" in substantially similar terms.

"Originator"

22. The definition differs from the wording of the definition in ISO 7982-1, but not from its meaning. It was approved by the Working Group at its seventeenth, eighteenth and twentieth sessions (A/CN.9/317, para. 32; A/CN.9/318, para. 41; A/CN.9/329, para. 59). Under the definition a bank that issues a payment order for its own account is an originator.

23. In comment 16 it is suggested that the following words be added to the definition in implementation of the decision that the sender of a conditional payment order that results in an unconditional credit transfer should be considered to be the originator of the transfer:

"or, where the first payment instruction is not a payment order because it is subject to a condition which subsequently is satisfied, the issuer of that instruction".

24. *Comparison with Article 4A.* Article 4A-104(c) defines "originator" in almost identical terms to the current text. "Originator's bank" (which is not defined in the Model Law) is defined in Article 4A-104(d) to include

"the originator if the originator is a bank". That is inconsistent with the Model Law, though the inconsistency probably does not have any substantive consequences in light of the current sphere of application in article 1 of the Model Law.

"Beneficiary"

25. The definition differs from the wording of ISO 7982-1 in that the beneficiary is the person named as beneficiary in the originator's payment order and a person whose account is credited in error is not a beneficiary (A/CN.9/318, para. 42; A/CN.9/329, para. 69). For the situation where the identity of the beneficiary is expressed both by words and by account number and there is a discrepancy between them, see article 8(5). Similarly to the rule in regard to an originator, a bank may be the beneficiary of a transfer.

26. *Comparison with Article 4A.* Article 4A-103(a)(2) defines "beneficiary", while "beneficiary's bank" (not defined in the Model Law) is defined in 4A-103(a)(3). The definitions seem to be generally consistent with the usage in the Model Law.

"Sender"

27. The Working Group decided at its seventeenth and eighteenth sessions that the term should include the originator as well as any sending bank (A/CN.9/317, para. 46; A/CN.9/318, para. 44; see also A/CN.9/329, para. 61). ISO 7982-1 defines "sending bank" as the "bank that inputs a message to a service" but it has no term that includes the originator as a sender. Such a term is not necessary in the context of ISO 7982-1.

28. *Comparison with Article 4A.* Article 4A-103(a)(5) defines "sender" consistently with the Model Law.

"Bank"

29. The Working Group at its eighteenth session agreed to use the word "bank" since it was short, well-known and covered the core concept of what was intended (A/CN.9/318, para. 46; but see comments 27 and 38). The definition in the Model Law will necessarily differ from that used in national legislation since there are different definitions in various countries and in some countries there are two or more definitions for different purposes.

30. The definition in ISO 7982-1 is that a bank is "a depository financial institution". The Working Group at its eighteenth session was of the view that the test as to whether a financial institution should have the rights and obligations of a bank under the Model Law should depend on whether "as an ordinary part of its business it engaged in credit transfers for others", rather than whether it engaged in the totally unrelated activity of taking deposits (A/CN.9/318, para. 50). As a result, some individual financial institutions that would not normally be considered to be banks, such as dealers in securities that engage in credit transfers for their customers as an ordinary part of their business, would have been considered to be banks for

the purposes of the Model Law under the definition adopted at the eighteenth session.

31. The Working Group at its twentieth session made three changes in the definition (A/CN.9/329, paras. 62 to 68). First, it replaced the words "financial institution" by the word "entity". It was said that the Model Law was intended to govern a service and not particular systems. The change in the definition was specifically intended to bring under the Model Law those post offices that provide a service for the execution of payment orders, even though they may otherwise be governed by different rules because of their administrative status. That position was reaffirmed at the twenty-first session, despite some continuing opposition (A/CN.9/341, para. 66).

32. A second change made at the twentieth session was that the definition focuses on the execution of payment orders rather than, as it had previously, on whether the entity engages in credit transfers. At the twenty-first session the Working Group decided that the definition of a bank should not be extended to cover entities that only occasionally executed payment orders (A/CN.9/341, para. 69).

33. A third change made at the twentieth session was that the words "and moving funds to other persons" were added, but those words were placed in square brackets by the drafting group. At the twenty-first session it was said that the words should be retained so as to exclude message systems from the definition of a "bank". However, it was decided to delete the words in square brackets and to add a second sentence to state specifically that entities that merely transmitted payment orders were not banks (A/CN.9/341, para. 68).

34. It is clear that the Working Group's decision was intended to exclude the postal authorities from the definition of "bank" when they were exercising their function of operating a public message system such as telex, but not when they were exercising their function of operating a credit transfer system. It is also clear that the policy decision was to extend to all similar message systems, which presumably included clearing-houses. However, it is not clear that the decision can be adequately implemented by a new second sentence that says "Entities that merely transmit payment orders are not banks."

35. A message system such as telex "merely" transmits messages, but a message system such as SWIFT gives value-added services. Even more services are given by a clearing-house, such as CHAPS or CHIPS. In some clearing-houses, such as the Swiss Interbank Clearing (SIC), an account is opened each morning for each participating bank by transfer from the bank's reserve account with the Swiss National Bank. Payment orders sent by the bank through SIC are debited to the account while payment orders received by SIC for the account of the bank are credited to the account. The rules governing SIC do not permit a debit balance in an account at any time, thereby excluding any financial risk to other participating banks if one of the banks should be closed during the day because of its insolvency. It would seem that the suggested new sentence would not exclude any of those

entities, other than the telex service, from the definition of "bank". Moreover, there is the danger that the sentence would suggest that a message system that did more in respect of a payment order was a bank. That might be particularly so for SIC and any other clearing-house that established accounts for the debiting and crediting of payment orders sent and received by participating banks. (See comment 44 to article 4.) The Secretariat is unable to suggest any other wording that would accomplish the desired purpose without creating other possibilities of misunderstanding. Therefore, it suggests that the current text without a second sentence is the most likely to be properly interpreted.

36. *Comparison with Article 4A.* Article 4A-105(a)(2) defines a "bank" as "a person engaged in the business of banking" and goes on to list several types of institutions that are included.

Proposed new term for "bank"

37. At the twenty-first session the Working Group requested the Secretariat to reconsider the possibility of using a word other than "bank" and to report to the twenty-second session (A/CN.9/341, para. 70). The Working Group recognized that any word chosen would need to serve in such compound terms as "receiving bank".

38. It would seem that if an alternative term were chosen that had an existing well understood meaning, the problems that are seen in connection with the use of the word "bank" would arise in connection with the alternative term. That is particularly so since the term would be used in six official languages and may be translated into a number of other languages when the Model Law is used as the basis for national legislation. It is suggested that a new term associated with the subject matter of the Model Law might be created. The term the Secretariat would suggest would be "credit transfer institution". The term has the disadvantage of being long, especially when compared with the word "bank". However, it has the advantage of combining well with the modifiers used in the Model Law, i.e., sending, receiving, originator's, intermediary, and beneficiary's.

Proposed definition of "branch"

39. An earlier version of the definition of "bank" provided that "for the purposes of these Rules a branch of a bank is considered to be a separate institution." At the eighteenth session of the Working Group the sentence was deleted and it was decided that consideration would be given in each of the substantive articles whether branches should be treated as banks (A/CN.9/318, para. 54). Paragraphs indicating that branches of a bank are considered as separate banks have been added to articles 1(2), 6(7), 9(5) and 10(9) (A/CN.9/318, paras. 53 and 54; A/CN.9/328, paras. 82 and 110; A/CN.9/329, para. 141).

40. At the twenty-first session it was suggested that the Model Law should contain a definition of a "branch" of a bank (A/CN.9/341, para. 71). It was said that under

some national laws "branches" were defined in a restrictive way that would not cover certain offices or agencies of a bank that might be intended to be treated as separate banks under the Model Law. It was proposed that the significant feature of a "branch" under the Model Law should be that it sent and received payment orders. That proposal was objected to on the ground that the sending and receiving of payment orders were acts that could be carried out by simple message carriers. The delegation that had raised the question was invited, if it so wished, to prepare a draft definition and submit it to the twenty-second session. In the absence of any draft definition that might be submitted by the delegation, the Working Group might consider that the desired result would be achieved if articles 1(2), 6(7), 9(5) and 10(9) were to read "branches or separate offices of a bank are considered to be separate banks", as appropriately modified for the context.

41. *Comparison with Article 4A.* Article 4A-105(a)(2) provides that "A branch or separate office of a bank is a separate bank for purposes of this Article."

"Receiving bank"

42. Although the Working Group at its eighteenth session modified the wording of the definition from that found in ISO 7982-1, the meaning remained the same (A/CN.9/318, paras. 55 to 57). A bank that receives a payment order is a receiving bank even if the payment order was not addressed to it. Such a bank must react to the fact of having received the order. (The problem of misdirected payment orders is addressed in articles 6(3) and 8(2).) A bank to which a payment order is addressed but which does not receive it is not a receiving bank. It would not be appropriate to place upon it the obligation of a receiving bank in regard to a payment order that it did not know about.

43. *Comparison with Article 4A.* Article 4A-103(a)(4) defines a "receiving bank" as "the bank to which the sender's instruction is addressed", and not the bank that in fact receives the instruction. It is not clear whether that distinction is of significance in Article 4A. In most contexts the term "receiving bank" seems to include the beneficiary's bank, but in other contexts a distinction seems to be drawn between the two (e.g., Article 4A-301(a)).

"Intermediary bank"

44. The definition was proposed by the Working Group at its seventeenth session and modified at its twentieth session by the drafting group (A/CN.9/317, para. 41; A/CN.9/329, para. 72). It differs from the definition in ISO 7982-1 in three substantial respects: first, it includes all receiving banks other than the originator's bank and the beneficiary's bank, whereas ISO 7982-1 includes only those banks between the given receiving bank and the beneficiary's bank; secondly, ISO 7982-1 includes only those banks between the receiving bank and the beneficiary's bank "through which the transfer must pass if specified by the sending bank"; and thirdly, reimbursing banks are included in this definition, even though the

transfer may be considered not to pass through them and they are not in the chain of payment orders from the originator to the beneficiary's bank (A/CN.9/329, paras. 70 and 71). See also comment 9 to article 1.

45. *Comparison with Article 4A.* Article 4A-104(b) defines "intermediary bank" in almost identical terms to that in the Model Law.

"Funds" or "money"

46. The definition is modelled on the definition of "money" or "currency" contained in article 5(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/318, para. 59). However, it specifies that the term includes credit in an account, as is proper in the context of the Model Law. The definition was modified by the drafting group at the nineteenth session in accordance with the suggestion contained in A/CN.9/WG.IV/WP.41, article 2, comment 16. At the twentieth session it was noted that the definition included the ECU (A/CN.9/329, para. 73).

"Authentication"

47. The purpose of an authentication procedure is to permit the receiving bank to determine whether the payment order was issued by the purported sender. Even if the payment order was not authorized, the purported sender will be bound if the requirements of article 4(2) are met, including the requirement that "the authentication provided is a commercially reasonable method of security against unauthorized payment orders".

48. The definition makes it clear that an authentication of a payment order does not refer to formal authentication by notarial seal or the equivalent, as it might be understood in some legal systems.

49. The definition differs from the definition of "message authentication" in ISO 7982-1 in that authentication as here defined does not include the aspect of validating "part or all of the text" of a payment order, even though most authentication techniques that rely upon the use of computers do both. That position was confirmed by the Working Group at its twentieth session because the problems of authentication of a payment order as to its source and verification of the accuracy of its contents were two different legal concepts. In respect of the source of a message, the basic rule in article 4(1) is that the purported sender is not bound by a payment order unless the order had in fact been issued or authorized by the purported sender. The concept of authentication and its use in article 4(2) served to describe situations in which the purported sender might be bound by a payment order in spite of the fact that the order had not been issued or authorized by that person. In respect of errors, the Working Group noted that the general rule was that the sender was bound by what was received by the receiving bank (A/CN.9/329, paras. 77 to 79) (although that conclusion is not specifically stated in the current draft of article 4(1) or of any other provision of the Model Law). The Working Group went on to say that if it was intended that the Model Law

should relieve the sender of that responsibility because of the availability of a procedure agreed between the sender and the receiving bank that would detect errors in a payment order or corruption of the contents of a payment order, that intention should be set out separately in the Model Law. At the twenty-first session the Working Group decided that, in its discussion of article 4, it would consider issues having to do with verification that the contents of a payment order as received were the same as the contents of the payment order as sent (A/CN.9/341, para. 81). See comments 20 to 25 to article 4.

50. The Working Group was in agreement at its twentieth session that, if article 10 was retained, the definition of authentication should apply to the revocation of payment orders. However, since there was opposition to the basic scheme of article 10, the words "or a revocation of a payment order" were placed in square brackets (A/CN.9/329, paras. 76 and 184 to 186).

51. The definition as adopted by the Working Group at its eighteenth session and modified at its twentieth session includes the provision that the authentication procedure is established by agreement; a procedure applied unilaterally by the receiving bank does not qualify as an authentication (A/CN.9/318, paras. 75, 76 and 94; A/CN.9/329, paras. 74 and 76). That agreement may be embodied in the rules of a clearing-house or message system or it may be in the form of a bilateral agreement between the sender and the receiving bank. Under article 4(2) the authentication procedure must be "commercially reasonable" in order for a purported sender to be bound by an unauthorized payment order; a sender cannot agree to be bound by a commercially unreasonable procedure (see article 4, comments 7 to 9).

52. *Comparison with Article 4A.* Article 4A-201 defines "security procedure" in terms that are similar to the definition of "authentication", except that it applies as well to a procedure for the purpose of "detecting error in the transmission or the content of the payment order or communication". The provision goes on to give several examples of what the security procedure may require, and specifically states that comparison of a signature is not by itself a security procedure.

"Execution date"

53. There is no equivalent term in ISO 7982-1, except to the extent that the term "value date", i.e., "the date on which the funds are to be at the disposal of the receiving bank", is intended to be used in a payment order to indicate the date when the receiving bank is to execute the order (see A/CN.9/341, para. 82).

54. The execution date is the date when a given payment order is to be executed by the receiving bank and not the date the receiving bank did execute it, if those dates are not the same. See comments 27 and 28 to article 4. Since a credit transfer may require several payment orders, each of those payment orders may have an execution date, and the execution dates may be different.

55. The Working Group at its eighteenth and nineteenth sessions engaged in an extensive effort to define properly the term "execution date", especially in connection with its use in article 9 (A/CN.9/318, paras. 104 to 106; A/CN.9/328, paras. 76 to 91; see also A/CN.9/WG.II/WP.44, article 2, comments 27 to 31 where the earlier discussion is summarized). The current definition was adopted by the Working Group at its twentieth session (A/CN.9/329, paras. 81 and 182). As to the date when article 9 requires the receiving bank to execute the payment order, see article 9, comments 5 and 12.

56. The current draft of the Model Law does not define what constitutes execution of the payment order by the receiving bank. A proposal at the twenty-first session to add such a definition did not receive sufficient support (A/CN.9/341, para. 80). When the bank is not the beneficiary's bank, an order can be assumed to be executed when the receiving bank issues a payment order intended to carry out the order received (compare article 5(2)(d) with article 6(2)). When the receiving bank is the beneficiary's bank, execution is probably best understood as acceptance of the order in any of the ways specified in article 7(1). If the sender wishes to specify when the funds are to be placed at the disposal of the beneficiary, a "payment date" should be specified. The term "execute" in one of its various forms is used throughout the draft Model Law in connection with payment orders. In addition, in article 12(2) reference is made to execution of the credit transfer, and a definition is there given of that concept.

57. *Comparison with Article 4A.* Article 4A-301(b) defines "execution date" substantively the same as in the current text. Article 4A-301(a) defines "execution" in respect of a bank that is not the beneficiary's bank. In contrast to the usage in the Model Law, Article 4A-301(a) goes on to say that "A payment order received by the beneficiary's bank can be accepted but cannot be executed." That difference in the formal statement seems to lead to no differences in substance between Article 4A and the Model Law.

"Payment date"

58. At the twenty-first session the question was raised whether the Model Law should contain any rules covering the use of a payment date and, consequently, whether there was any need for a definition (A/CN.9/341, paras. 82 and 83). It was noted that the payment messages used by SWIFT did not contain a field for such a date and, it was stated, ISO would delete any reference to a pay (or payment) date in its next revision of its standards. It was said that the date commonly used on payment orders between banks was the value date, i.e., the date on which the funds were to be available to the receiving bank. The suggestion that the term "execution date" could be made to serve the intended function of payment date was not adopted on the grounds that, even though payment orders used in inter-bank practice might not provide for the designation of a payment date, the original payment order sent by the originator to its bank might stipulate that the funds were to be paid to the beneficiary on a particular date.

59. At the twenty-first session the Working Group changed the term "pay date", that it had previously been using to indicate when the funds were to be placed at the disposal of the beneficiary, to "payment date" (A/CN.9/341, para. 83). With that change the terminology used in the Model Law is now in conformity with Article 4A but out of harmony with ISO 7982-1, since the term "pay date" is used by ISO 7982-1 to indicate the date when the funds are to be available to the beneficiary. ISO 7982-1 uses the term "payment date" to indicate the date when a payment was executed. The term "payment date" was included in the text prior to the seventeenth session of the Working Group with the same meaning as in ISO 7982-1 but, since it was not used further, it was deleted in the revision by the Secretariat submitted to the eighteenth session.

60. The definition of "payment date" differs from pay date in ISO 7982-1 in that in the latter the pay date is the "date on which the funds are to be available to the beneficiary for withdrawal in cash". In the Model Law definition the payment date is the date "when the funds are to be placed at the disposal of the beneficiary". (See A/CN.9/317, para. 43 and A/CN.9/341, para. 83) The definition leaves open the question when and under what circumstances funds are placed at the disposal of the beneficiary, but they may be at the disposal of the beneficiary even though they are not available for withdrawal in cash. The most obvious example is when the transfer is in a unit of account that may be at the disposal of the beneficiary for further transfer in that form but not available in cash either as a unit of account or, perhaps, even in the local currency.

61. At the twenty-first session the definition was modified to make it clear that the payment date binding on the receiving bank is the date specified in the payment order received by it. See A/CN.9/WG.IV/WP.46, comment 37 to article 2 and A/CN.9/341, para. 83. If a payment date specified in a payment order received by an intermediary bank or the beneficiary's bank is not in conformity with the payment date specified by the originator, the bank where the change in dates occurred would be responsible for the error. For the significance of a payment date in a payment order prior to the one received by the beneficiary's bank, see article 9, comment 17.

62. At the twenty-first session the Working Group was in agreement that the question should be reconsidered together with articles 9 and 12 and, therefore, it adopted the current text as an interim draft (A/CN.9/341, para. 84). See comment 18 to article 9.

63. *Comparison with Article 4A.* Article 4A-401 has a broader definition of "payment date" in that it is "the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank". Presumably the day is the day specified in the payment order received and not the day specified in the originator's payment order. The official comments indicate that the payment date may be expressed in various ways, presumably including the use of a type of credit transfer system that has a fixed time schedule of a certain number of days to process payment orders.

Article 3. *Contents of payment order*

(Deleted)

Prior discussion

A/CN.9/297, paras. 37 and 38

A/CN.9/317, paras. 49 to 68

A/CN.9/329, paras. 87 to 93

A/CN.9/341, para. 85

Comments

1. Article 3 of the draft Model Rules prepared by the Secretariat and submitted to the seventeenth session of the Working Group was entitled "form and content of payment order". In the light of the discussion at that session (A/CN.9/317, paras. 49 to 68), the substance of paragraphs (1) and (2) of article 3 were included in the definition of "payment order" in the redraft prepared for the eighteenth session of the Working Group. In particular, in accordance with a suggestion made in the seventeenth session of the Working Group, the minimum data elements necessary to constitute a payment order were included in the definition of the term (A/CN.9/317, para. 54). Inclusion of the minimum required data elements in the Model Law was expected to have an educational function.

2. At the nineteenth session the drafting group decided to delete the minimum required data elements from the definition of a payment order, since a message might be considered not to be a payment order if any one of the listed data elements was omitted (A/CN.9/328, para. 145; see A/CN.9/WG.IV/WP.41, article 2, comment 18), and to set out the required minimum data elements in article 3.

3. At the twentieth session the Working Group considered whether additional data elements should be made mandatory, and particularly information on cover and the identification of the originator and the originator's bank (A/CN.9/329, paras. 87 and 88). At the end of the discussion the Working Group decided to delete article 3 entirely (A/CN.9/329, para. 93). Problems of incomplete instruments are now considered in articles 6(4) and 8(3).

4. The Working Group also decided to address in some other provision the need for payment orders to disclose to receiving banks that the payment order formed part of an international credit transfer (A/CN.9/329, para. 93 and A/CN.9/341, para. 85).

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

(1) A purported sender is bound by a payment order [or a revocation of a payment order] if it was issued by him or by another person who had the authority to bind the purported sender.

(2) When a payment order is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless bound if:

(a) the authentication provided is a commercially reasonable method of security against unauthorized payment orders, and

(b) Deleted

(c) the receiving bank complied with the authentication.

(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

(4) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the execution date, unless otherwise agreed.

Prior discussion

A/CN.9/297, paras. 39 to 45 and 69
A/CN.9/317, paras. 57, 69 to 79 and 84
A/CN.9/318, paras. 70 to 109
A/CN.9/329, paras. 94 to 111
A/CN.9/341, paras. 86 to 103

Comments

1. Paragraphs (1) to (3) set forth the situations in which a purported sender of a payment order is bound by the order. Paragraph (4) sets forth the only obligation of the sender in regard to a payment order on which it is bound, i.e. to pay the receiving bank for it.

Paragraph (1)

2. Paragraph (1) states the basic rule that a purported sender is bound by a properly authorized payment order. The question whether the actual sender was authorized to bind the purported sender will be determined in accordance with the applicable law and will not be determined by the Model Law. Moreover, at the twenty-first session it was decided that the question as to the law of which jurisdiction would be applicable would not be determined by article 15 (A/CN.9/341, paras. 46 and 47; see also comment 10 to article 15).

3. Pursuant to the words "or revocation of a payment order" the purported sender is also bound by a properly authorized revocation of a payment order. Those words have been placed within square brackets subject to a determination whether article 10 will be retained (A/CN.9/329, para. 96).

4. *Comparison with Article 4A.* Article 4A-202 provides an essentially identical rule to that in paragraph (1).

Paragraph (2)

5. Paragraph (2) has been drafted as an exception to paragraph (1), but from the viewpoint of banking

operations it provides the basic rule. In almost all cases a payment order must be authenticated. Proper authentication indicates proper authorization and the receiving bank will act on the payment order. Even if the payment order was not properly authorized under paragraph (1), the purported sender is bound by the order if the requirements of paragraph (2) are met (see A/CN.9/341, para. 86).

6. The Working Group may wish to consider deleting the words "When a payment order is subject to authentication" in the *chapeau* of paragraph (2). Those words were part of a technical amendment made at the twenty-first session to overcome the possible interpretation of paragraph (2), contained in the draft then before the Working Group, that even if the payment order had been authorized under paragraph (1), the sender was bound only if the requirements of paragraph (2) were also met (A/CN.9/341, para. 86; see A/CN.9/WG.IV/WP.46, comment 9 to article 4). The opening words do not seem to be necessary to achieve the result desired at the twenty-first session. However, they leave open the question as to when a payment order is subject to authentication, a question that does not need to be raised.

7. The first requirement, set out in subparagraph (a), is that the authentication provided is commercially reasonable. The discussion in the eighteenth session of the Working Group proceeded on the basis that it was the receiving bank that determined the type of authentication it was prepared to receive from the sender (A/CN.9/318, para. 75). Therefore, it was the receiving bank's responsibility to assure that the authentication procedure was at least commercially reasonable. If the receiving bank was willing to accept a payment order even though there was no commercially reasonable authentication, it should accept the risk that the payment order had not been authorized in accordance with paragraph (1) (A/CN.9/341, para. 94).

8. At the eighteenth session the Working Group was in agreement that the sender and the receiving bank could not provide for a lower standard by agreement (A/CN.9/318, para. 75). At the twenty-first session the Working Group noted that at that session it had adopted a new article 16 that stated a general principle of freedom of contract unless otherwise provided in the Model Law, and that it had decided to review each of the substantive articles to determine whether the previous statements as to the effect of an agreement should be retained (A/CN.9/341, para. 93). Consequently it decided to include in paragraph (2) a provision to the effect that parties would not be allowed to agree on the use of an authentication procedure that was not commercially reasonable (A/CN.9/341, para. 96). That decision might be implemented by the addition of a new sentence that would read as follows:

"The provisions of this paragraph may not be varied by agreement."

9. No attempt has been made to set a standard as to what constitutes a commercially reasonable authentication procedure. The standard would be objective, since it would be one from which the parties were not free to vary by agreement. However, since the commercial reasonableness of an authentication procedure would depend on

factors related to the individual payment order, including such factors as whether the payment order was paper-based, oral, telex or data transfer, the amount of the payment order and the identity of the purported sender, the statement of the parties in their agreement that they chose to use a procedure that was less protective than others available, especially if they explained the reasons why they had made that decision, could be expected to influence a court as to whether the standard chosen was commercially reasonable. It could be expected to be of particular importance that the receiving bank offered the sender at a reasonable price another authentication procedure that clearly was commercially reasonable, but the sender chose to use the less secure procedure for reasons of its own. The standard as to what was commercially reasonable could be expected to change over time with the evolution of technology. At the twentieth session of the Working Group it was suggested that, in view of the imprecision of the term "commercially reasonable" and the unfamiliarity of many legal systems with the concept, any commentary that might be written to accompany the Model Law when it is adopted by the Commission might give a suggestion as to factors to be taken into account (A/CN.9/329, para. 98).

10. A previous requirement, that had been set out in subparagraph (b), was that the amount of the payment order was covered by a withdrawable credit balance or authorized overdraft in an appropriate account of the sender with the receiving bank. That rule was said to afford a protection for originators in some countries. By limiting the amount that could be debited to an account, a customer could limit the amount of potential loss. Such a limitation also furnished to a limited degree an indication that an excessively large payment order might have been in error or fraudulent (A/CN.9/318, paras. 82 and 85 to 87; A/CN.9/329, paras. 100 and 101).

11. At the twentieth session a proposal to delete subparagraph (b) was rejected (A/CN.9/329, paras. 100 and 101). At the twenty-first session it was again proposed to delete the subparagraph (A/CN.9/341, paras. 87 to 91). The principal argument against the provision was that it was impractical from an operational point of view since banks could not monitor the accounts of senders on a real-time basis unless all the debits and credits that were chargeable to the account were entered on a real-time basis. It was said that in even the most highly automated banks some types of payment orders were processed in batch with the resulting debits and credits entered to the accounts periodically, and often at the end of the working day. In reply it was said that the rule in subparagraph (b) was a risk allocation rule and not an operational rule. The first decision made by the Working Group at the twenty-first session was to limit the application of subparagraph (b) to non-bank senders. Subsequently, in connection with its discussion of paragraph (3), it decided to delete subparagraph (b) (see comments 16 and 17).

12. What was the third, but is now the second, requirement is that the receiving bank complied with the authentication. If the bank complied with the authentication but the sender had not, the bank would know that the payment order had not been authenticated by the sender and should

reject it. However, even if the bank did not comply with the authentication but the payment order was in fact authorized, the purported sender would be bound under paragraph (1). The one occasion when subparagraph (c) would be truly dispositive would be in the case envisaged by paragraph (3), i.e., where an unauthorized payment order was properly authenticated by the actual sender but the receiving bank did not comply with the authentication procedure. In that case the sender would not be bound under paragraph (2) and there would be no occasion to turn to paragraph (3).

13. *Comparison with Article 4A.* Article 4A-202(b) provides essentially an identical rule with additional detail. Subparagraph (c) of Article 4A-202 gives an indication as to what would be "commercially reasonable".

Paragraph (3)

14. The paragraph was prepared in two versions at the eighteenth session of the Working Group (A/CN.9/318, paras. 88 to 90). In general, those who were in favour of placing on the receiving bank the major risk that an authentication had been falsified by a known or unknown third person favoured variant A. Placing the major risk on the receiving bank was said to be appropriate because it was the receiving bank that usually designed the authentication procedure (see comment 7). In general, those who were in favour of placing the major risk on the sender favoured variant B. Placing the major risk on the sender was said to be appropriate because it was the sender who chose the means of transmission of the particular payment order. Moreover, variant B would act as an incentive to senders to protect the authentication or encryption key in their possession.

15. The paragraph was discussed again at the twentieth session where several new proposals were made (A/CN.9/329, paras. 103 to 108). However, because of the failure to reach agreement, the Working Group left the text unchanged.

16. The current text was adopted at the twenty-first session (A/CN.9/341, paras. 97 to 101). Paragraph (3) deals with the relatively rare case when there has been an unauthorized payment order that was authenticated in accordance with paragraph (2) but was not authorized in accordance with paragraph (1). In such a case paragraph (3) provides that the purported sender must show that the payment order resulted from the actions of a person other than a present or former employee of the purported sender in order not to bear the loss. In order to meet that burden it would not be necessary to show who had sent the payment order; the fact that it could not have resulted from the actions of a present or former employee might be proved by other means. Once that burden has been met by the purported sender, the receiving bank must show that the authentication was procured by the fault of the purported sender in order to place the loss back on the purported sender.

17. With adoption of the new version of paragraph (3), the Working Group decided to delete paragraph (2)(b) (see comment 11).

18. After an extensive discussion at the twenty-first session the Working Group decided that it would leave the parties free to vary the provisions of paragraph (3) by agreement, as provided in article 16. A suggestion was made that it should not be possible to vary the provisions to the detriment of non-bank senders. Another suggestion was that there should be no limitation on the extent to which paragraph (3) could be modified by agreement, but that the agreement could not be in the general conditions of the receiving bank; the agreement would have to be in an individual contract between the purported sender and the receiving bank. The delegations that expressed strong reservations to the decision leaving the parties free to vary the provisions of paragraph (3) by agreement were concerned that the likelihood that the Model Law would be found acceptable by national legislatures would be seriously reduced.

19. *Comparison with Article 4A* Article 4A-203 is essentially the same as paragraph (3), but slightly more to the advantage of the receiving bank.

Errors in payment order or corruption of its contents

20. In the working paper submitted to the twentieth session of the Working Group suggestions were made as to how the authentication defined in article 2 and used in article 4 in respect of identification of the sender might also be used in respect of errors in a payment order or corruption of the contents of a payment order during its transmission (A/CN.9/WG.IV/WP.44, article 2, comment 23 and article 4, comment 10). The Working Group did not accept the suggestion that an authentication as defined should be used for both purposes. It said that, if it was intended that the Model Law should relieve the sender of the responsibility for the content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that would detect the error or corruption, that intention should be set out separately in the Model Law (A/CN.9/329, para. 79). At the twenty-first session the Working Group requested the Secretariat to propose a text that would implement this idea for consideration at its twenty-second session.

21. If it would be the desire of the Working Group to include such a rule, it would seem appropriate that it be in article 4 following current paragraph (3). The Working Group may wish to consider the following proposal:

"A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, if the sender and the receiving bank have agreed upon a procedure for the detection of errors in a payment order, the sender is not bound by the payment order to the extent that use of the procedure by the receiving bank revealed or would have revealed the error."

22. The first sentence makes it clear that the sender bears the risk that the contents of the payment order as received by the receiving bank are not those intended to be sent, or those actually sent, by the sender. The discrepancy may have occurred as a result of an error by the

sender or because the contents of the payment order changed after being sent. The second sentence sets out the occasions when the sender would not be bound to the terms of the payment order as received. A prerequisite is that the sender and the receiving bank had agreed on the use of a procedure that would reveal some or all of the errors in the payment order. In contrast to the authentication procedure, there would be no requirement that the procedure was commercially reasonable, or that it was designed to reveal all errors. There is also no requirement that the procedure must require the sender to act; the only question is whether use of the procedure by the receiving bank in respect of the particular payment order received revealed the error or, if the receiving bank did not use the procedure, whether its use would have revealed the error. It is understood that the word "error" includes all discrepancies between the payment order as it was intended and the payment order as it was received, whatever be the source of the discrepancy. To some degree the proposed paragraph implements the same policy as do articles 6(3), (4) and (5) and 8(2), (3), (4) and (5) when the error in the payment order is in relation to the subject matter covered by those provisions. However, the proposed paragraph might most often be applicable to an error in the amount of money to be transferred when the amount was expressed only in figures.

23. Another wording has been suggested by the delegation of the United Kingdom as follows:

"Where the sender has agreed with a receiving bank that a payment order will be subject to a procedure to detect errors, and the sender complies with the procedure, the sender shall not be bound by the payment order if the bank, had it also complied with the procedure, would have detected that

(a) the payment order instructed payment to a beneficiary not intended by the sender, or

(b) was an erroneous duplicate of a payment order already sent by the sender.

If the error the bank would have detected was that the sender instructed payment of an amount greater than that intended by the sender, the sender shall be bound only to the extent of the amount that was intended."

24. The delegation of the United Kingdom pointed out that the proposed new paragraph does not deal with erroneously misdirected payment orders, which are dealt with in articles 6(3) and 8(2), and suggested an amendment to its prior proposal in this regard. See comments 8 to 11 to article 6, comment 6 to article 8 and comments 10 and 11 to article 9.

25. *Comparison with Article 4A* Article 4A-205 gives results in respect of a "payment order . . . transmitted pursuant to a security procedure for the detection of error" that are similar to the results in article 4(2) in respect of an unauthorized but authenticated payment order. If the transfer was made to an incorrect beneficiary or was a duplicate transfer, "the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution", while if the transfer was for too great an

amount, the receiving bank could recover from the beneficiary "the excess amount received". To some degree the restitution provision in Article 4A-205 already exists in article 11(b), though article 11(b) permits each sender to recover from its receiving bank and not from the beneficiary. This difference in approach is explained in part by the fact that in principle the Model Law does not regulate the rights and obligations of the beneficiary.

Paragraph (4)

26. The distinction between creation of the obligation of the sender to pay the receiving bank when the receiving bank accepts the payment order and the maturing of the obligation to pay on the execution date is relevant when the execution date is in the future. The provision raises two separate problems: the obligation of the sender when the receiving bank fails to execute on the execution date and the obligation of the sender when the receiving bank accepts the payment order prior to the execution date.

27. At the eighteenth and twentieth sessions the use of the execution date as the date when the sender should be obligated to make the funds available to the receiving bank was questioned on the grounds that the execution date was defined in article 2(k) as the date the receiving bank was obligated to act and not the date the receiving bank had performed its obligation (A/CN.9/318, para. 104; A/CN.9/329, para. 109). At the twentieth session it was stated in reply that, while the sender should be obligated to pay on the execution date, the sender should receive interest under article 12 for the period of any delay by the receiving bank in executing the order. The latter suggestion appears to have been thought to have been the natural consequence of the text of the Model Law as currently drafted.

28. It can be doubted whether receiving banks will often accept payment orders for future execution prior to the execution date, unless the sender has already paid for the order. However, if the receiving bank executes the payment order prior to the execution date, it accepts the order at the time of its execution. While the sender can no longer revoke the order (article 10(1) and (2)), and becomes obligated to pay for it, the receiving bank may not debit the sender's account or otherwise require payment for the order until the execution date.

29. At the twentieth session it was stated that the sender's obligation to pay should extend only to the amount of the payment order and not to any costs or charges. That issue, however, was not resolved. Reference was made to the treatment of the issue in article 14(3) (A/CN.9/329, para. 110). Compare the discussion in regard to article 14(3) in comments 15 and 16 to article 14.

30. *Comparison with Article 4A.* Article 4A-402(b) and (c) are essentially the same as the Model Law. Exceptions are stated to the duty of the sender to pay in case of erroneous payment orders of various types.

Concept of payment and netting

31. The current text of the Model Law does not contain any provision that indicates how and when a sender would

pay for the payment order as it is required to do by paragraph (4). This lack of an indication as to how and when the sender pays for the payment order may cause problems in the implementation of articles 5(2)(a) and 7(1)(a) under which the receiving bank accepts a payment order by failing to give notice of rejection if, and only if, the receiving bank has received payment from the sender. The only relevant discussion has been in respect of netting.

32. At the nineteenth session the Working Group engaged in a preliminary discussion of the desirability of introducing a provision on netting into the Model Law. The Working Group noted that important studies on this issue were taking place elsewhere, and particularly in a committee of the central banks of the Group of Ten, presided by the General Manager of the Bank for International Settlements (BIS). Therefore, the Secretariat was requested to follow those developments and to report to the Working Group on the conclusions that had been reached, including the submission of a draft text for possible inclusion in the Model Law if that seemed appropriate (A/CN.9/328, paras. 61 to 65; see A/CN.9/WG.IV/WP.42, paras. 47 to 57). At the twenty-first session the Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not available soon (A/CN.9/341, para. 53). Although it was expected that participants in the work of BIS on netting who were also participants in the Working Group would submit a text to the Secretariat for incorporation in this report, that has not been possible. Nevertheless, a few comments may be made on the concept of payment and on netting as it would affect the current text of the Model Law.

33. The normal means by which a sending bank pays the receiving bank for a high-value high-speed credit transfer is that the amounts being transferred are debited and credited to accounts held by the banks with one another or to accounts held with a third bank. That can give rise to any one of four situations:

(a) The sender has an account with the receiving bank. The receiving bank is paid by debiting that account. Since the receiving bank will debit the account only if the account has a credit balance, or if the receiving bank is willing to extend credit to the sender, it would seem reasonable for the receiving bank to be considered to be paid by the sender when the receiving bank debits the account.

(b) The receiving bank has an account with the sender. In such a case the sender would pay the receiving bank by crediting the receiving bank's account with the sender. Normally, the receiving bank should be considered to be paid when the account was credited, which could be prior to the sending of the payment order. However, the amount of the payment order by itself, or in conjunction with other payment orders sent by the sending bank, may be so large that it would create a credit balance larger than that which the receiving bank is willing to have with the sender. Therefore, it may be desirable to have a rule that payment is made in such a situation only when the receiving bank withdraws the credit (perhaps measured on a first-in first-out basis) or when a specified time has passed

after the account was credited or after the receiving bank knew of the credit.

(c) The receiving bank receives credit in its account with a third bank. The situation would be essentially the same as when the receiving bank received credit with the sender and the same rules might apply.

(d) The third bank in which the receiving bank receives credit is the central bank or its equivalent. In such a case payment may be considered to have been made when the credit was entered to the receiving bank's account.

34. Netting is used when it is not possible or desirable for one reason or another to make payment by debiting and crediting the individual transactions to an account as described above. Netting is an arrangement by which a set of two or more transactions creating financial rights and obligations between two or more parties during a defined period of time or coming due at a defined point of time are settled by calculation and payment of the net amount due by the participant or participants who on balance have remaining obligations. Netting may be used as a technique to reduce the number of transaction messages between the participants without changing the legal nature of the individual obligations. This is often referred to as "position netting". Until final settlement is made between the participants by the transfer of a single net amount by the participant with the debit balance between them, each one owes to the other the gross amounts due on each individual transaction.

35. Netting may also be structured in such a way as to merge the individual legal obligations into a single legal obligation for the net amount. Such a transformation of the legal obligations usually depends upon the use of the concept of novation, though the concept of set-off may also be used in some legal systems. It is not clear in some legal systems whether, in case of the insolvency of one of the participants in the netting arrangement prior to settlement of the net amounts, the legal representative of the insolvent person (or of the creditors of the insolvent person) would be bound to recognize the netting arrangement or whether a claim could be made for the gross amounts due to the insolvent while the gross amounts due by the insolvent to the other participant or participants were recoverable only in the liquidation proceedings.

36. So-called "netting by close-out", where the future obligations between two banks are to be reduced to a single net obligation in case of the occurrence of a defined event of default, such as the appointment of a receiver or liquidator of one of the banks, is relevant to forward exchange contracts but not to the payment system as such and need not be considered here.

37. In some types of financial transactions, such as the purchase and sale of currencies for future delivery, bilateral netting may take place. For example, when both of the two parties during the period in question buys and sells to the other party pounds against dollars, on the delivery date one of them will be obligated to deliver more pounds than that person has a right to receive and the other will be obligated to deliver more dollars than that person has

a right to receive. The two parties may then agree to deliver only the net amounts of pounds in the one direction and the net amount of dollars in the other rather than for each to deliver to the other the gross amounts of both pounds and of dollars that they have sold.

38. Although high-value high-speed credit transfers are not normally settled by bilateral netting, bilateral netting is more often used when two banks interchange payment orders in bulk by the manual transmission of magnetic tapes or the like. While the legal consequences of debiting and crediting incoming and outgoing payment orders to an account are in many respects similar to those intended to be achieved by netting by novation, the mechanics and the legal concepts involved are different. Therefore, it may be desirable to have a provision on bilateral netting in the Model Law.

39. *Comparison with Article 4A.* The provision on bilateral netting in the final version of Article 4A-403(c) is contained in the first two sentences of draft paragraph (3) as set out in A/CN.9/WG.IV/WP.42, para. 54.

40. Multilateral netting is a common feature in clearing-houses with delayed settlement, such as CHAPS and CHIPS. In such a clearing-house the value of payment orders sent and received during the day by the participants are recorded by the clearing-house. At the end of the day the net amounts due by each participant are calculated. The net calculation may be made first in respect of each bilateral relationship in the clearing-house with the individual nets then being netted into a net-net amount. Alternatively, the net-net amounts may be calculated directly. The settlement would be effected by those banks that on the net-net basis had a debit balance transferring sufficient funds to a settlement account to cover their debit balance while those banks that had a net-net credit balance would receive that amount from the settlement account. The settlement account might be with the clearing-house itself, but it is typically with the central bank.

41. The legal issues arising out of multilateral netting are of two types. First, payment of the sender to the receiving bank could be considered to have occurred when the payment order went through the clearing-house, since the sending bank would at that time be debited in respect of the settlement to be made at the end of the day and the receiving bank would be credited. Payment to the sender could also be considered to have taken place only when the settlement at the end of the day is completed. The decision as to when payment is considered to have been made would be heavily dependent on the second issue, namely what happens if one of the banks with a net-net debit balance is unable to transfer to the settlement account sufficient funds to cover the outstanding debit balance. If the transfers that have been made through the clearing-house must be reversed in whole or in part in order to permit the settlement to be completed in respect of the remaining transfers, it is logical to draw the conclusion that no sender has paid the receiving bank of any particular payment order until the settlement is complete. If no transfer is to be reversed upon the failure of a bank to meet its obligations in the settlement, either because the central bank or other adequate entity guarantees the

settlement or because a loss-sharing arrangement between all participating banks is in place, it is logical to conclude that the receiving bank receives payment from the sender when it receives the payment order through the clearing-house.

42. A provision in the Model Law in respect of multi-lateral netting might settle one or more of three separate issues:

(a) Whether, as a matter of law, the debits and credits arising out of the sending of payment orders through the clearing-house are to be netted, and if they are, whether the netting is to take place on a bilateral basis between each pair of banks or whether it is to take place on a multilateral basis.

(b) Whether some or all of the payment orders that have been sent through the clearing-house are to be reversed in case one of the participating banks is unable to meet its obligations in the settlement.

(c) The time when payment is considered to have been made by the sender to the receiving bank.

43. *Comparison with Article 4A.* Article 4A-403(b), containing the provisions on multilateral netting, is set out in A/CN.9/WG.IV/WP.42, para. 54. Only minor editorial changes were made to that text in the finally adopted form. In addition, Article 4A-405(d) provides that a funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. For the rule to apply, it would not be necessary that the beneficiary's bank was the receiving bank of the order made through the funds-transfer system. Such a system rule would be most likely to be found in conjunction with a multilateral netting arrangement.

44. It should be noted that a payments clearing arrangement can be structured in such a manner that netting in the form discussed here is not necessary. An example is the Swiss Interbank Clearing (SIC), also discussed in comment 35 to article 2 in the context of the definition of a "bank". In SIC an account is opened each morning for each participating bank by transfer from the bank's reserve account with the Swiss National Bank. Payment orders sent by the bank through SIC are debited to the account while payment orders received by SIC for the account of the bank are credited to the account. The rules governing SIC do not permit a debit balance in an account at any time, thereby excluding any financial risk to other participating banks if one of the banks should be closed during the day because of its insolvency. In effect, from both an operational and, it would seem, a legal point of view SIC is in this limited context the equivalent of a correspondent bank of the sending and receiving banks. Therefore, the time of payment by the sending bank to the receiving bank would be governed as suggested in comment 33.

45. *Comparison with Article 4A.* Article 4A-403 provides when a sender pays a receiving bank under the circumstances described above. It contains a detailed provision on netting that is designed to accommodate the

new CHIPS rule that reduces the risk that the failure of one bank to settle will cause other banks to be unable to meet their settlement obligations.

Article 5. *Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank*

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank accepts the sender's payment order at the earliest of the following times:

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given, provided that acceptance shall not occur until the receiving bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it gives notice to the sender of acceptance, or

(d) when it issues a payment order intended to carry out the payment order received.

(3) A receiving bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (2)(a), is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Prior discussion

A/CN.9/297, paras. 46 to 51
A/CN.9/317, paras. 80 to 84
A/CN.9/318, paras. 110 to 120 and 126 to 134
A/CN.9/WG.IV/WP.42, paras. 7 to 16
A/CN.9/328, paras. 12 to 16
A/CN.9/329, paras. 112 to 127
A/CN.9/341, para. 53

Comments

1. The drafting group at the nineteenth session substantially restructured the portion of the draft Model Law dealing with acceptance of a payment order by a receiving bank and the statement of the obligations of a receiving bank. Under the new structure articles 5 and 6 deal with a receiving bank that is not the beneficiary's bank while articles 7 and 8 deal with the beneficiary's bank. Since a "receiving bank" is defined in article 2(g) in such a way as to include a "beneficiary's bank", it was necessary to include paragraph (1) in this article to make it clear that article 5 does not apply to a beneficiary's bank.

Concept of acceptance

2. In the draft prepared by the Secretariat for the eighteenth session of the Working Group a number of

the substantive rules depended on the acceptance of a payment order by the receiving bank. Discussion at that session showed that the Working Group was strongly divided on the desirability of using such a concept. Its use was advocated as a convenient means to describe in a single word a number of different actions of different receiving banks that should have the same legal consequences, making it possible to use the word in various substantive provisions. In response, it was said that use of the term "acceptance" was not necessary and that it would cause difficulties in many legal systems because it seemed to suggest that a contract was created as a result of the receiving bank's actions.

3. In order to help resolve the controversy, the Secretariat prepared a report for the nineteenth session of the Working Group that described the criteria for determining when a receiving bank had accepted a payment order and the consequences of acceptance (A/CN.9/WG.IV/WP.42, paras. 2 to 42). The matter was discussed at length by the Working Group at its nineteenth session, at the conclusion of which the Working Group decided to retain the use of the concept (A/CN.9/328, para. 52).

4. A proposal was made at the twentieth session to define the term "acceptance". The proposal received no support (A/CN.9/329, paras. 112 and 113).

Paragraph (2)

5. At the twenty-first session, when it made its decision that the credit transfer was completed when the beneficiary's bank accepted the payment order addressed to it, with the legal consequences that followed, "the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in articles 5 and 7 . . ." (A/CN.9/341, para. 17).

Subparagraph (a)

6. The current text of subparagraph (a) was adopted at the twentieth session (A/CN.9/329, paras. 123 and 175). It is fundamentally a combination of paragraphs (1) and (2)(a) of the text as it emerged from the nineteenth session (A/CN.9/328, annex). Paragraph (1) of that text was in turn composed of elements that had been in articles 5(1) and 7(1) of the text that had emerged from the eighteenth session (A/CN.9/318, annex). Throughout these various forms of presentation the basic policy, first established at the eighteenth session, has remained unchanged.

7. Except for certain obligations of notification of error set out in articles 6 and 8, the receiving bank is normally not required to act upon a payment order it receives unless it accepts the order. Nevertheless, the expectation is that a receiving bank will execute a payment order it has received. Therefore, if the receiving bank does not accept the order, paragraph (3) provides that it is required to notify the sender of the rejection. (See comments 16 to 20.) If the required notice of rejection is not given, paragraph (2)(a) provides that the payment order is accepted.

8. One of the most difficult issues has been whether the receiving bank should have an obligation to give a notice

of rejection when the reason that it has not executed the payment order is that it has not as yet received payment for it from the sender. In favour of such an obligation is that a notice of rejection informs a good faith sender that there is a problem that needs to be rectified, a problem that otherwise may be unknown. Failure to rectify the problem may have adverse consequences for the sender, for the originator, if the sender is not the originator, and for the beneficiary. Opposed to such an obligation of notification is the fact that in most cases the failure to receive payment is in fact only a technical delay that is automatically rectified. A notification of rejection, or even of non-receipt of payment without specifying that rejection will follow, will merely add to the message flow between banks and will itself lead to additional confusion. In any case, a sender is expected to know whether it has made adequate provision for paying the receiving bank, whether by debit of an account of the sender with the receiving bank or by credit of an account of the receiving bank with the sender or with a third bank.

9. The Working Group decided at the eighteenth session that the receiving bank should have no obligation to give the notice of rejection (the notice now called for by paragraph (3)) if one of its reasons for rejecting the payment order was insufficient funds (A/CN.9/318, para. 119). This led to discussions at the nineteenth and twentieth sessions as to what constituted insufficient funds, and whether any distinctions should be made between the different reasons why the funds were insufficient (A/CN.9/328, para. 15 and A/CN.9/329, paras. 119 to 122). The result was that the reference to insufficient funds was deleted from what is now paragraph (3) (A/CN.9/329, paras. 123 and 175). Paragraph (2)(a) was amended to provide that even if a required notice of rejection was not given, the payment order is not accepted "until the receiving bank has received payment from the sender in accordance with article 4(4)." See comments 17 to 19 as to when a notice of rejection is required and comments 31 to 45 to article 14 as to when payment has been received.

10. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested the deletion of the words "in accordance with article 4(4)". It noted that those words gave rise to a circular problem since article 4(4) provides that the sender is obligated to pay the receiving bank only when the receiving bank accepts the payment order. The sender is always permitted to pay the receiving bank prior to acceptance, which is the situation envisaged in article 5(2)(a). See also the suggestion in respect of paragraph (3) in comment 19.

Subparagraph (b)

11. Paragraph 2(b) was originally in prior article 6(2)(a) and was applicable only to the beneficiary's bank. At the eighteenth session of the Working Group it was decided that the provision should be modified by adding to it a requirement that the beneficiary's bank had exhibited a volitional element before the beneficiary's bank was deemed to have accepted the payment order (A/CN.9/318, para. 137). However, the required volitional element was not added to the text at that session. At the nineteenth

session of the Working Group the original provision was discussed at length in the context of the beneficiary's bank (A/CN.9/328, paras. 45 to 49). In favour of retaining the original text without any volitional element it was stated that contracts between banks that the receiving bank would execute payment orders when received even if funds were not yet available existed both in regard to multilateral net settlement systems and bilateral banking relations. They were entered into to increase the security of the operation of the funds transfer system. The legal security provided by those contractual obligations would be increased if the receiving bank was considered to have accepted the payment order as soon as it was received.

12. At the conclusion of the discussion at the nineteenth session it was decided to retain the original text as it applied to the beneficiary's bank and to extend the rule to receiving banks that were not the beneficiary's bank (A/CN.9/328, paras. 32 and 49; see also A/CN.9/329, para. 126 where a technical amendment was made).

Subparagraph (c)

13. Paragraph 2(c) providing that a receiving bank might expressly accept a payment order was added by the Working Group at its nineteenth session (A/CN.9/328, paras. 29 to 31). In the discussion doubts were raised as to the likelihood that a receiving bank would expressly accept a payment order for future implementation, but it was suggested that in the case of a large transfer a bank might be asked whether it would be prepared to handle the transaction. Its agreement would function as an express acceptance of the order.

Subparagraph (d)

14. Paragraph 2(d) provides for the normal way in which a receiving bank that is not the beneficiary's bank would accept a payment order it had received, i.e., by sending its own payment order intended to carry out the payment order received. If the payment order sent is consistent with the payment order received, the undertaking of obligations by the receiving bank and the execution of the most important of those obligations under article 6(2) are simultaneous. However, a receiving bank accepts a payment order even when it sends its own order for the wrong amount, to an inappropriate bank or for credit to the account of the wrong beneficiary, so long as the payment order sent was intended to carry out the payment order received. If such an inconsistent payment order is sent, the undertaking of obligations and the failure to carry out those obligations are also simultaneous.

15. *Comparison with Article 4A.* Article 4A-209(a) provides that "a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order". Such a receiving bank executes the order, according to Article 4A-301(a), "when it issues a payment order intended to carry out the payment order received by the bank". That is the only way in which such a receiving bank can accept a payment order. If a notice of rejection is not given "despite the existence on the execution date of a withdrawable credit balance in an authorized account

of the sender sufficient to cover the order", Article 4A-210(b) provides that the bank is obliged to pay interest to the sender on the amount of the order, but that failure to give notice of rejection does not constitute acceptance of the order. Article 4A-211(d) provides that "An unaccepted payment order is cancelled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order". If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, Article 4A-212 provides that it is liable for breach of the agreement.

Paragraph (3)

16. The text of article 7(4) following the eighteenth session of the Working Group provided that "a notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order" (A/CN.9/318, annex). The drafting group at the nineteenth session moved the rule as to when the notice must be given by a receiving bank that is not the beneficiary's bank to article 5(1). In conformity with a decision of the Working Group it deleted the requirement that the notice must be given on the day the decision is made (A/CN.9/328, para. 86). At the twentieth session the requirement that a notice of rejection must be given was moved by the drafting group to article 5(3).

17. Paragraph (3) now provides that, if the receiving bank does not accept the payment order under paragraph (2)(b), (c) or (d), it must give a notice of rejection and that notice of rejection must be given by the execution date. If no required notice of rejection is given, paragraph (2)(a) provides that the receiving bank accepts the payment order. The provision should be understood to require the notice to be given by an expeditious means, which would normally mean by telecommunications.

18. The need to give notice of rejection exists even if the sender has no account relationship with the receiving bank or has even had no prior dealings with it of any kind (A/CN.9/318, paras. 114 to 116; A/CN.9/329, para. 118). There is no requirement that the notification give any reason for the rejection of the payment order (A/CN.9/297, para. 51).

19. No notice of rejection need be given if there is insufficient information to identify the sender (A/CN.9/329, para. 117). Furthermore, paragraph (3) appears to provide, by referring to paragraph (2)(a), that a receiving bank that had not yet received payment for the payment order need not give a notice of rejection. That would be contrary to what was decided at the twentieth session (A/CN.9/329, para. 123). In order to avoid that difficulty, in a communication to the Secretariat subsequent to the twenty-first session, the delegation of the United Kingdom has suggested the deletion of the words "otherwise than by virtue of subparagraph (2)(a)" and the addition of the following sentence:

"Where a receiving bank has failed to give notice of rejection within the time required by this paragraph, but under subparagraph (2)(a) the payment order is not

accepted because the receiving bank has not received funds from the sender, the receiving bank is not required to give notice of such non-acceptance, but remains liable for its original failure."

20. The text of article 5(1) following the eighteenth session of the Working Group stated that the obligation of the receiving bank to notify the sender of its decision that it would not comply with the sender's payment order was subject to the contrary agreement of the sender and receiving bank. Although the drafting group deleted those words from the current text, the deletion did not indicate a change in policy on the part of the Working Group. At the twentieth session the Working Group took note of the above statement, which had originally been made in A/CN.9/WG.IV/WP.44, comment 9 to article 5 (A/CN.9/329, para. 124). At the twenty-first session the Working Group adopted article 16, which gives the parties the power to vary any provision of the Model Law, unless specifically provided otherwise in the provision itself.

21. *Comparison with Article 4A.* As indicated in comment 15, although Article 4A does not require a notice of rejection, Article 4A-210(b) requires the receiving bank to pay interest to the sender if the bank fails to execute the order or give notice of rejection "despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order". While the provision applies whether the sender is a bank or not, it seems to be intended to apply primarily when the sender is a non-bank originator. No rule is given when the receiving bank has received payment in some other way but fails either to execute the order or to give notice of rejection.

Article 6. *Obligations of receiving bank that is not the beneficiary's bank*

(1) The provisions of this article apply to a receiving bank that is not the beneficiary's bank.

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 9, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

(3) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the receiving bank shall give notice to the sender of the misdirection, within the time required by article 9.

(4) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(5) If there is an inconsistency in a payment order between the words and figures that describe the amount

of money, the receiving bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 9 if, in the time required by that article, it enquires of the sender as to the further actions it should take in light of the circumstances.

(7) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 88

A/CN.9/318, paras. 60 to 69, 121, 122 and 144 to 154

A/CN.9/328, paras. 17 to 20 and 75

A/CN.9/329, paras. 128 to 141

Comments

Paragraph (2)

1. Paragraph (2) is prior paragraph (4), drafted in essentially the current form as article 5(3)(a) at the eighteenth session (A/CN.9/318, paras. 152 and 154) and redrafted by the drafting group at the nineteenth session. The paragraph states the basic obligation of a receiving bank other than the beneficiary's bank that has accepted a payment order, i.e., to send its own proper order to an appropriate bank within an appropriate period of time. On most occasions when a receiving bank is held liable to its sender it will be for failure to comply with the requirements of this paragraph. When the receiving bank sends its own payment order to its receiving bank, it becomes a sender and undertakes the obligations of a sender under article 4.

2. *Comparison with Article 4A.* Article 4A-302(a)(1) is essentially the same in substance.

Paragraph (3)

3. Paragraph (3) is based on paragraph (2) as it emerged from the nineteenth session (A/CN.9/328, annex), which in turn was based on the first sentence of article 5(1 *bis*) as it was adopted at the eighteenth session (A/CN.9/318, annex).

4. The Working Group decided at its eighteenth session that a receiving bank should be required to notify the sender when the payment order received indicated that it had been misdirected. The imposition of such a duty will help assure that the funds transfer system will function as intended (A/CN.9/318, para. 122). The duty applies

whether or not the sender and the receiving bank have had any prior relationship, whether or not the receiving bank accepted the order and whether or not the bank recognized that the payment order had been misdirected (see A/CN.9/328, para. 18).

5. As the result of a concern expressed at the nineteenth session that the bank might not be able to fulfil its obligation even if it wished to, paragraph (3) was modified to provide that the receiving bank is required to notify the sender only if the payment order "contains sufficient information to identify and trace the sender" (A/CN.9/328, para. 20). The words "and trace" were deleted at the twentieth session (A/CN.9/329, annex).

6. Paragraph (3) was retained at the twentieth session in spite of the argument that an excessive burden was being placed on the receiving bank, especially when the error was that of the sender (A/CN.9/329, paras. 129 to 131). In particular, it was said that when modern means of transmitting payment orders were used, the addressing of the payment order was done primarily by bank identification number and not by name.

7. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that the present wording did not seem to implement the policy expressed at the twentieth session that the Model Law should not set forth a duty to detect the misdirection but that it was appropriate to require notification once the misdirection had been detected (A/CN.9/329, para. 130). It suggested the following wording to implement the policy there stated:

"(3) A receiving bank that detects that a payment order contains information which indicates that it has been misdirected shall give notice to the sender, if the payment order contains sufficient information to identify the sender, within the time required by article 9."

8. In accord with its suggested provision submitted to the Secretariat subsequent to the twenty-first session in respect to the existence of a procedure designed to detect errors, the delegation of the United Kingdom suggested the addition of the following sentence to its previous proposal:

"If the receiving bank has agreed with the sender that the payment order will be subject to a procedure to determine whether it has been misdirected and the sender complies with the procedure, the bank shall be taken to have detected any such misdirection if it would have done so had it also complied with the procedure."

9. The United Kingdom delegation further noted that, if a payment order was received with an execution date some time in the future, the fact that it had been misdirected might not be discovered on the date of receipt. It suggested an amendment to article 9(2) (see article 9, comment 10) that would read as follows:

"A notice required to be given under article 6(3) shall be given by the close of business on the day following the day of detection."

10. The United Kingdom delegation further suggested that it should be possible to contract out of the duties imposed by paragraph (3). It noted that agreements between banks often provide that a bank can rely on certain elements of a payment order; they agree that notification is not required even where a discrepancy that is discovered indicates that the payment order might have been misdirected. Effectively the sender is agreeing to bear the risk. The following wording was suggested to be added to the paragraph:

"This paragraph does not apply if the sender and the receiving bank have agreed that the bank would rely on only certain elements of the payment order."

11. It may be noted that the proposed text would not give as broad a freedom of contract as does article 16, a provision that did not yet exist when the suggestion of the United Kingdom was sent to the Secretariat.

12. *Comparison with Article 4A.* Article 4A-208(b)(4) provides that "if the receiving bank knows that the name and number identify different persons", (person here means intermediary or beneficiary's bank) reliance on either one is a breach of the bank's obligations. That provision is more positive than is the Model Law in authorizing a receiving bank to rely on identification of another bank by number alone.

Paragraph (4)

13. Paragraph (4) was added at the twentieth session (A/CN.9/329, para. 132) to cover a situation that did not fall within the scope of the already existing provisions requiring notice when a message is received that purports to be a payment order but that cannot be executed as such.

14. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that the provision as drafted presented two difficulties. First, the Model Law applies only if there is a payment order. Therefore, logically it could not apply to a message that did not meet the definition of a payment order. Secondly, and of greater importance, it was suggested that the provision was too widely drawn because it covered an instruction regardless of whether the receiving bank appreciated that the provision applied. The following wording was suggested:

"(4) When an instruction is received that appears to be intended to be a payment order but that does not contain sufficient data to be a payment order or, being a payment order, cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 9."

15. *Comparison with Article 4A.* There is no equivalent provision in Article 4A, but the same result might be reached in some instances through Article 4A-208(b).

Paragraph (5)

16. Paragraph (5) as adopted at the twentieth session (A/CN.9/329, annex) is essentially the same as paragraph (3)

as adopted at the nineteenth session (A/CN.9/328, annex), which in turn was identical to article 3(1) as it was adopted at the eighteenth session (A/CN.9/318, paras. 60 to 69). If the amount is expressed in both words and figures and there is a discrepancy, the receiving bank is required to notify the sender. The obligation to notify exists whether or not the receiving bank has accepted the payment order. If the receiving bank does not give the required notice and it acts upon the incorrect amount, it is responsible for the consequences, even if it had no knowledge of the discrepancy.

17. At the twentieth session arguments were presented in favour of the rule that, in case of discrepancy, the traditional banking rule should be applied that words controlled over numbers (A/CN.9/329, paras. 133 to 135). Other arguments were presented in favour of the opposite rule that, in regard to modern electronic means of transmitting payment orders where the orders were processed by number, the numbers should control the words. Both arguments were rejected on the grounds that the current rule was a compromise and if a bank did process payment orders by number only, it could contract with its customers to that effect.

18. The rule is expressed in general terms to apply to payment orders between any sender and receiving bank. However, it was the expectation in the Working Group that paragraph (5) would apply in fact only between the originator and the originator's bank, since interbank payment orders in electronic form transmit the amount of the transfer in figures only (A/CN.9/318, paras. 61 and 63).

19. The view was expressed in the twentieth session that the paragraph was too restricted in that the amount might be represented in clear text by numbers but might also be part of a code, as a result of which the conflict might be between two sets of numbers (A/CN.9/329, para. 134). The suggestion was made that the reference should be only to a discrepancy in amount without saying how that discrepancy might appear. That suggestion was not implemented by the drafting group at the twentieth session.

20. *Comparison with Article 4A.* There is no equivalent provision in Article 4A. In some cases Article 4A-205 governing the security procedure for the detection of error would be applicable.

Paragraph (6)

21. Although a receiving bank is normally bound to follow any instruction in the payment order specifying an intermediary bank, funds transfer system or means of transmission, it can happen that it is not feasible to follow the instruction or that doing so would cause excessive costs or delay in completing the transfer (A/CN.9/328, para. 75). This paragraph gives the receiving bank an opportunity to make such a determination, so long as it does so in good faith (see other suggestions at A/CN.9/329, para. 139).

22. As an alternative, the receiving bank can enquire of the sender as to the actions it should take, but it must do so within the time required by article 9. In a communication

to the Secretariat subsequent to the twentieth session of the Working Group the delegation of the United Kingdom suggested that the second sentence did not clearly state that a receiving bank would not be in breach of article 9 if it enquired of the sender in the time specified in article 9. It suggested that the second sentence might read:

"A receiving bank that is required to take action by a time specified in article 9 shall be taken to have done so if, within that time, it enquires of the sender as to the further actions it should take in the light of the circumstances."

23. *Comparison with Article 4A.* Article 4A-302(b) contains essentially the same rule as does paragraph (6), except that a receiving bank may not choose an intermediary bank other than the one specified in the payment order received.

Article 7. Acceptance or rejection by beneficiary's bank

(1) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the time within which a required notice of rejection should have been given has elapsed without notice having been given, provided that acceptance shall not occur until the beneficiary's bank has received payment from the sender in accordance with article 4(4),

(b) when the bank receives the payment order, provided that the sender and the bank agreed that the bank will execute payment orders from the sender upon receipt,

(c) when it notifies the sender of acceptance,

(d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary,

(e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit,

(f) when the bank otherwise applies the credit as instructed in the payment order,

(g) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

(2) A beneficiary's bank that does not accept a sender's payment order, otherwise than by virtue of subparagraph (1)(a), is required to give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date.

Prior discussion

A/CN.9/297, paras. 46 to 51

A/CN.9/317, paras. 80 to 84

A/CN.9/318, paras. 110 to 120 and 135 to 143

A/CN.9/WG.IV/WP.42, paras. 32 to 42 and 59 to 65

A/CN.9/328, 44 to 51, 59 and 60

A/CN.9/329, paras. 142 to 147

A/CN.9/341, para. 53

Error in text in A/CN.9/341, annex

In subparagraph (1)(a) as it appears in A/CN.9/341, annex the words "receiving bank" have been used rather than "beneficiary's bank", as is here used.

Comments

1. As a result of the restructuring of the draft Model Law by the drafting group at the nineteenth session of the Working Group, the provisions on the acceptance or rejection of a payment order by the beneficiary's bank were placed in an article separate from that containing similar provisions in respect of a receiving bank that is not the beneficiary's bank. The changes made to article 5 at the twentieth session were also introduced into article 7. Consequently, the majority of the provisions are identical, with the exception of the way in which the bank is referred to, and the comments to article 5 relative to use of the concept of acceptance and to paragraphs (2)(a), (b), (c) and (3) are applicable to article 7(1)(a), (b), (c) and (2).

2. Paragraph 1(c), (d), (e), (f) and (g) represents various forms of volitional act by the beneficiary's bank to accept the payment order received by it. Subparagraphs (d) to (g) were carried over from article 6(2) as adopted at the eighteenth session (A/CN.9/318, annex). At the twentieth session a suggestion was made, but was not acted upon, that subparagraphs (d) to (g) could be replaced by words to the effect "when the beneficiary's bank placed the funds at the disposal of the beneficiary" (A/CN.9/329, paras. 143 and 147).

3. At the nineteenth session the Working Group deleted from what is currently paragraph (1)(d) the words that had been in square brackets "[without reserving a right to reverse the credit if cover is not furnished]" (A/CN.9/328, para. 49). Those words recognized a practice in some countries to allow a receiving bank, including a beneficiary's bank, to give the credit party provisional credit awaiting the receipt of cover from the sending bank. (Compare last sentence of comment 7.)

4. The discussion at the nineteenth session recognized that the granting of provisional credit to the credit party had the advantage of making the processing of credit transfers more efficient in the vast majority of cases in which cover arrived at an appropriate time. Since the receiving bank was never required to grant provisional credit as a matter of law, it would do so only where it made the credit judgment that it was highly likely to receive the cover or that, if it did not, it could recover the provisional credit from the credit party. Such a credit judgment might be reflected in an agreement with a credit party to grant such provisional credit. Such an agreement would always authorize the receiving bank to reevaluate its decision to grant provisional credit, although the bank might be required to give advance notice of its decision that it would no longer do so.

5. The discussion at the nineteenth session also noted that the possibility that provisional credit might be reversed introduced elements of insecurity into the funds transfer system that affected not only the credit party, but in extreme cases might endanger the functioning of the entire system. Therefore, the Working Group decided that it was undesirable for a receiving bank, including the beneficiary's bank, to be allowed to reverse a credit (A/CN.9/328, paras. 59 to 60).

6. In an associated discussion at the nineteenth session the Working Group engaged in a preliminary discussion of the desirability of introducing a provision on netting into the Model Law (A/CN.9/328, paras. 61 to 65). A discussion of netting as it might affect the Model Law is to be found in comments 34 to 44 of article 4.

Comparison with Article 4A

7. Article 4A-209 makes a larger distinction than does the Model Law between the events leading to acceptance of a payment order by the beneficiary's bank and the events leading to acceptance of an order by any other receiving bank. Article 4A-209(b)(1) is substantially equivalent to subparagraphs (c) through (g) of this article. Article 4A-209(b)(2) and (3) base the acceptance of a payment order on when the beneficiary's bank is paid for the order, i.e., when it receives credit in its account at the Federal Reserve Bank, receives final settlement through a funds transfer system (e.g., CHIPS) or "the opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless . . ." The "unless" clause introduces the possibility of rejection of a payment order by the beneficiary's bank. Rejection of a payment order by the beneficiary's bank is not possible when the bank receives the order through FEDWIRE. In the case of CHIPS, and as far as Article 4A is concerned, the beneficiary's bank can reject a payment order until it has accepted the order in one of the ways indicated above. Under Article 4A-405(d) and (e) it is possible for a beneficiary's bank to reverse its acceptance of a payment order if a net settlement system is unable to complete the settlement.

Article 8. Obligations of beneficiary's bank

(1) The beneficiary's bank is, upon acceptance of a payment order received, obligated to place the funds at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary.

(2) When a payment order is received that contains information which indicates that it has been misdirected and which contains sufficient information to identify the sender, the beneficiary's bank shall give notice to the sender of the misdirection, within the time required by article 9.

(3) When an instruction does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but

the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 9.

(4) If there is an inconsistency in a payment order between the words and figures that describe the amount of money, the beneficiary's bank shall, within the time required by article 9, give notice to the sender of the inconsistency, if the sender can be identified. This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be.

(5) Where the beneficiary is described by both words and figures, and the intended beneficiary is not identifiable with reasonable certainty, the beneficiary's bank shall give notice, within the time required by article 9, to its sender and to the originator's bank, if they can be identified.

(6) The beneficiary's bank shall on the execution date give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, if the bank has sufficient information to give such notice.

Prior discussion

A/CN.9/317, paras. 62 to 67 and 89 to 92

A/CN.9/318, paras. 64, 66 and 156 to 159

A/CN.9/328, paras. 17 to 20

A/CN.9/329, paras. 148 to 167

Comments

Paragraph (1)

1. The Working Group discussed at its nineteenth and twentieth sessions the issue of the extent to which the Model Law should be concerned with the relationship between the beneficiary and the beneficiary's bank (A/CN.9/328, paras. 37 to 43; A/CN.9/329, paras. 151 to 159; see A/CN.9/WG.IV/WP.42, paras. 58 to 68). The majority of the discussion at the nineteenth session related to the extent to which the Model Law should have rules in respect to the civil consequences of the credit transfer as in current article 14, but the discussion was generally relevant to the question as to whether the Model Law should include rules on the obligation of the beneficiary's bank to the beneficiary in respect of the credit transfer. At the conclusion of the discussion at the nineteenth session the Working Group decided to defer any decision on the question until it had discussed the time when acceptance took place. It returned to the question at the twentieth session at which time the current text was adopted.

2. Paragraph (1) provides only that the funds must be placed at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary. The paragraph serves primarily as a reminder that the ultimate purpose of a credit transfer is to make funds available to the beneficiary

3. A proposal to include a more detailed statement of the obligations of the beneficiary's bank to the beneficiary

was rejected at the twentieth session (A/CN.9/329, paras. 151 to 153). The limited approach taken in paragraph (1) conformed to the general policy that the Model Law should set forth the rights and obligations of the parties up to the moment when the beneficiary's bank accepted the payment order. However, the Model Law should not enter into the account relationship between the beneficiary and the beneficiary's bank, including in respect of issues that are closely related to the credit transfer, such as whether the bank must give the beneficiary notice of receipt of the credit (A/CN.9/329, paras. 165 and 166; see comments 15 and 16 for the notice requirement when there is no account relationship).

4. Notice by the beneficiary's bank to the beneficiary that it has the right to withdraw the funds or use the credit (or any of the other actions set out in article 7(1)(c) to (g)) would constitute acceptance of the payment order, if the payment order had not already been accepted in some other manner. To that extent the Model Law gives legal significance to the notice, in addition to any legal significance it may have under other applicable rules of law. However, the Model Law leaves it to those other applicable rules of law to determine the circumstances when notice might be required.

5. *Comparison with Article 4A.* Article 4A-404 specifies the obligation of the beneficiary's bank to pay to the beneficiary the amount of an order it has accepted. If the United States were to adopt the Model Law, Article 4A-404 would be the applicable law referred to in article 8(1).

Paragraphs (2), (3) and (4)

6. The restructuring of the text by the drafting group at the nineteenth and twentieth sessions of the Working Group led to the duplication in article 8(2), (3) and (4) of the text of article 6(3), (4) and (5) with appropriate changes in the references to the relevant banks. Therefore, the comments to those paragraphs, including the references to Article 4A, are relevant to the corresponding paragraphs of article 8.

Paragraph (5)

7. Paragraph (5) applies only to a payment order received by the beneficiary's bank containing a discrepancy between the identification of the beneficiary in words and its identification in figures. No bank prior to the beneficiary's bank can be expected to have the information to be able to determine that such a discrepancy exists.

8. Any solution to the case envisaged presents substantial difficulties. While a discrepancy in the identification of the beneficiary may be the result of error, it may also be an indication of fraud. Rather than take the chance that the incorrect account would be credited, the Working Group decided that the transfer should be suspended and the beneficiary's bank should notify its sender and also the originator's bank, if they are identified on the payment order, of the discrepancy (A/CN.9/318, para. 64).

9. In order to reduce to a minimum the time during which the transfer is suspended, the notification to both

the sender and the originator's bank must be done within the time specified in article 9(2), i.e., on the day the payment order is received, subject to article 9(3) and (4). It is anticipated that within a reasonable time the beneficiary's bank would receive further instructions as to the proper identification of the beneficiary, or an indication that the transfer was fraudulent.

10. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that banks be permitted to contract out of the notice obligation in paragraph (5) by adding the following words:

"This paragraph does not apply if the sender and the bank have agreed that the bank would rely either upon the words or figures."

11. The proposed text would not give as broad a freedom of contract as does article 16, a provision that did not yet exist when the suggestion of the United Kingdom was sent to the Secretariat.

12. The delegation of the United Kingdom also noted that paragraph (5) was the only notice provision to require that notice be given directly to the originator's bank. It suggested that if the reason for such a requirement was that a discrepancy in the manner of identifying the beneficiary was particularly indicative of fraud, such a requirement might be included in other notice provisions and particularly article 8(4). Furthermore, it suggested that in any event it seemed sensible to notify the originator's bank when the sender could not be identified.

13. The delegation of the United Kingdom also suggested that there seemed to be an overlap between paragraphs (3) and (5) and that they might be rationalized.

14. *Comparison with Article 4A.* Article 4A-207 governs the problems covered in article 8(5). The provision is too complex to be summarized adequately here, but in general the beneficiary's bank is permitted to rely upon the number alone.

Paragraph (6)

15. Any duty to notify a beneficiary who had an account with the beneficiary's bank could be left to their agreement or to the law applicable to the account relationship. Although the sender may have an interest that the beneficiary's bank notify the beneficiary of the credit, that interest is not recognized in the Model Law (A/CN.9/329, para. 165).

16. However, there is unlikely to be a rule in the law applicable to the account relationship as to the obligation of the beneficiary's bank to notify a beneficiary who had no account relationship with the bank that the funds were available. Such a duty is set out in paragraph (6), but it applies only if the beneficiary's bank has accepted the payment order and if the bank has sufficient information to give such notice (A/CN.9/329, paras. 165 and 166). Contrary to the rule in article 9(2) in respect of the time when other required notices must be given, the notice specified in this paragraph must be given on the execution

date (A/CN.9/329, para. 172; compare the notice requirement in articles 5(3) and 7(2), i.e., "not later than on the execution date").

17. *Comparison with Article 4A.* Article 4A-404(b) provides that notice of receipt of a payment order instructing payment to an account of the beneficiary must be given by midnight of the next day but that "If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order". In both cases the obligation to give notice can be varied by agreement of the beneficiary or by a rule of a funds transfer system that is used in the transfer.

Beneficiary's right to reject credit transfer

18. At the twentieth session the Working Group decided that in principle the Model Law should provide that the beneficiary would have a right to reject the credit transfer (A/CN.9/329, para. 164). One of the participants was requested to prepare a text, which would deal with the time within which the beneficiary would be permitted to act and the costs of any credit transfer returning the funds. Although the participant did not submit a proposal, the following provision suggested for the consideration of the Working Group is inspired by an informal draft supplied by him:

"The beneficiary has the right to reject a credit transfer [even though the beneficiary's bank has accepted the payment order and even though the transfer was made to an appropriate account of the beneficiary] by notice to the beneficiary's bank before the close of the banking day following the day when the bank accepted the payment order, if

(a) the beneficiary's bank has not applied the credit in conformity with paragraphs (1)(f) or (g),

(b) the beneficiary's bank has not applied the credit to an obligation owed by the beneficiary to the bank,

(c) when the beneficiary rejects the transfer, there is a credit balance in the account of an amount at least as much as the amount of the transfer, and

(d) the beneficiary's bank is not precluded by reason of insolvency or otherwise from repaying the amount of the transfer to its sender."

19. The rejection by the beneficiary should be as soon as is feasible so as to reduce the risk to the originator. The beginning of the period during which the beneficiary might be permitted to reject the transfer could be when the beneficiary's bank accepts the payment order, when the beneficiary's bank credits the beneficiary's account or otherwise applies the credit, or when the beneficiary receives notice of the transfer. Although the most logical time from the point of view of the beneficiary would be when he receives notice of the transfer, the Model Law does not require that notice be given and banking law and practice vary greatly as to when notice might be given, or even whether notice of a transfer is given. The proposal suggests that the rejection should have to be given by the end of the banking day following the day the beneficiary

bank accepts the payment order. That is a very long period of time for high-speed, high-value credit transfers, but it is difficult to decide what might be an appropriate shorter time.

20. The proposal places several limitations on the beneficiary's right to reject the payment order. The credit must not already have been specifically applied. The credit must still be available in the sense that there is a sufficient credit balance in the account. There might be a sufficient credit balance in the account when the payment order is rejected even though there had earlier not been a sufficient balance because in the meantime other credits have been made to the account. Unless the credit has been specifically applied, the proposal does not attempt to trace the credit on a first-in, first-out or other such basis. The credit must still be available in the sense that the beneficiary's bank is in a position to repay the amount of the transfer to the sender. The beneficiary should not be able to place on the originator the risk that the beneficiary's bank has become insolvent after it has accepted a payment order for the beneficiary's benefit or that the outbreak of war or similar event reduces the value of the credit to the beneficiary's account.

21. Under article 11(b) the beneficiary's bank, like all receiving banks in the chain of the failed credit transfer, will have to refund to its sender the funds received from its sender.

22. *Comparison with Article 4A.* Article 4A has no provision allowing the beneficiary to reject a payment order by notifying the beneficiary's bank. Compare Article 4A-406(b) on the right of the beneficiary to refuse payment from the originator when the payment was made by a means prohibited by the contract of the beneficiary with respect to the obligation.

Obligation to make funds available on pay date

23. At the twentieth session the Working Group considered, but did not decide, the issue of whether the beneficiary's bank should have a duty either to its sender or to the originator to make funds available on a payment date specified on the payment order (A/CN.9/329, para. 167).

Article 9. Time for receiving bank to execute payment order and give notices

(1) A receiving bank is required to execute the payment order on the day it is received, unless

(a) a later date is specified in the order, in which case the order shall be executed on that date, or

(b) the order specifies a pay date and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the pay date.

(2) A notice required to be given under article 6(3), (4) or (5) or article 8(2), (3), (4) or (5) shall be given on the day the payment order is received.

(3) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank executes that type of payment order.

(4) If a receiving bank is required to take an action on a day when it is not open for the execution of payment orders of the type in question, it must take the required action on the following day it executes that type of payment order.

(5) For the purposes of this article, branches of a bank, even if located in the same State, are separate banks.

Prior discussion

A/CN.9/297, paras. 65 to 68

A/CN.9/317, paras. 94 to 107

A/CN.9/328, paras. 76 to 91

A/CN.9/329, paras. 168 to 183

Comments

1. Following the discussion at the nineteenth session of the Working Group of the draft of prior article 7, which had been prepared by the Secretariat for the eighteenth session, a new draft was prepared by a small group (A/CN.9/328, para. 88). Following discussion of the draft late in the nineteenth session, the small group further revised the draft article for discussion at the twentieth session, taking into account the restructuring of the draft Model Law being undertaken by the drafting group (A/CN.9/328, paras. 89 to 91). Article 9 was further revised at the twentieth session.

Purpose of paragraph (1)

2. The purpose of paragraph (1) is to state the time within which a receiving bank must execute a payment order; it is not intended to state an obligation to execute the order.

Same day execution

3. The general rule stated in the *chapeau* to paragraph (1) is that a payment order is to be executed on the day the payment order is received.

4. The Working Group has at all times accepted the appropriateness of the general rule. Such a rule might not have been appropriate when credit transfers, including international credit transfers, were paper based. However, the vast majority of international credit transfers are currently transmitted by electronic means, and especially by on-line data transfer. In such an environment rapid execution by the receiving bank should normally be expected (A/CN.9/329, paras. 176 and 177).

5. Nevertheless, the rule is strict and it is necessary that it be mitigated by several supplementary provisions. The first, found in paragraph (1) itself, is that the payment order may indicate that later execution is intended, either by specifying a later execution date or by specifying a

payment date that indicates that later execution is appropriate.

6. The second is the general rule that a receiving bank is not required to execute any payment order it receives simply by virtue of its reception (article 5, comment 6). Therefore, the obligation to execute the payment order by a certain time arises only if the receiving bank has accepted the order pursuant to article 5(2) or 7(1). A particularly important application of this rule is that, since a bank does not accept a payment order for failure to give notice of rejection under article 5(2)(a) or 7(1)(a) "until the . . . bank has received payment from the sender in accordance with article 4(4)", a receiving bank that receives sufficient funds on a day later than the day the order is received and executes the payment order on that day is not in breach of its obligations under article 9(1). It would be in breach of those obligations if it had agreed with the sender that it would execute payment orders from the sender upon receipt, since in such situations the receiving bank would have accepted the payment order when the order was received (articles 5(2)(b) and 7(1)(b)).

7. The third mitigating rule, which is found in paragraph (3), recognizes that banks establish cut-off times for the processing of payment orders for same day execution. There may be different cut-off times for different types of payment orders, and a bank might establish its cut-off time for certain types of payment orders by adhering to the rules of a funds transfer system. Any order received after the cut-off time is treated as having been received the following day the bank executes that type of payment order. There is no limit on the discretion of a bank (or funds transfer system) in establishing a cut-off time, and it is not unusual for cut-off times to be as early as noon (A/CN.9/329, para. 178).

8. The fourth mitigating rule, which is found in paragraph (5), is that a branch of a bank, even if in the same State, is treated as being a separate bank for these purposes. Where the branches of a bank process payment orders on a decentralized basis, a payment order that is sent from one branch to a second branch requires the same amount of time to be executed at the branch as if the order was to be sent to a different bank (A/CN.9/328, para. 82).

Notices

9. According to paragraph (2), notices must be given on the day the payment order is received, except for the notices required by articles 5(3), 7(2) and 8(6). The notice by the beneficiary's bank to a beneficiary who does not maintain an account at the bank that it is holding funds for his benefit, required by article 8(6), must be given on the execution date.

10. In a communication to the Secretariat subsequent to the twentieth session in which the delegation of the United Kingdom suggested several changes to the notice provision in article 6(3) (see article 6, comments 8 to 11), it suggested that the time within which the notice that a payment order received had been misdirected, as required by article 6(3), might be too short. If a payment order was

received with an execution date considerably later than the date of receipt, the fact that it had been misdirected might not be discovered on the day of receipt. It suggested that article 9(2) should be amended as follows:

"A notice required to be given under article 6(3) shall be given by the close of business on the day following the date of detection."

11. The delegation of the United Kingdom made a similar suggestion in regard to article 8(2) that it had made in regard to article 6(3). However, since the delegation was of the belief that the beneficiary's bank would generally verify whether it was the correct bank, a somewhat different wording was suggested as follows:

"A notice required to be given under article 8(2) shall be given by the close of business on the day following the date on which it was, or ought reasonably to have been, detected that the payment order contained information indicating that it had been misdirected."

Execution date

12. According to article 2(k), the execution date is the date when the receiving bank is to execute the payment order in accordance with article 9. The execution date may be any of three different dates. Normally the execution date is the day the payment order is received. If a later execution date is specified on the order, the execution date is that date. If a payment date is specified on the payment order, the execution date for a receiving bank other than the beneficiary's bank is the day that is appropriate in order for the beneficiary's bank to accept a payment order and place the funds at the disposal of the beneficiary on the payment date.

13. At the twentieth session the Working Group deferred to a future session the question whether any special time period would have to be given to an originator's bank that received a conditional payment order or whether the proper result would be achieved by an interpretation of paragraph (1) (A/CN.9/329, paras. 173 and 174). However, consideration of that question is no longer necessary following the decision of the Working Group at the twenty-first session that conditional payment order should not be considered to be payment orders under the Model Law (A/CN.9/341, para. 73).

14. If the receiving bank executes the order prior to the execution date, the payment order is accepted (articles 5(2)(d) and 7(2)(d)) and the sender would no longer have the possibility to revoke the order (article 10(1)(b) and (2)(b)). At the nineteenth session it was stated that the sender should not lose its power to revoke its payment order prior to the execution date even if the order had been prematurely executed by the receiving bank (A/CN.9/328, para. 78). However, no provision to that effect was introduced into the draft Model Law by the drafting group. The question was again raised at the twentieth session, where it was said that such a rule would have its most important effects in cases of insolvency. The Working Group decided to keep the issue in mind in its consideration of articles 10 and 12 (A/CN.9/329, paras. 168 and 169). In this regard it should be noted that the sender is

not required to pay the receiving bank until the execution date (article 4(4)).

15. If a provision were introduced into the Model Law permitting a sender to revoke its payment order until the execution date, the sender would presumably be entitled to recover any funds it had already paid the receiving bank and the right of the sender to recover funds from the beneficiary would be assigned to the bank (compare article 10(6) and (7)).

16. The receiving bank's failure to execute a payment order on the execution date would lead to liability under article 12. The receiving bank might execute the payment order late because the order was received late. Under the text of article 7(2) as it was adopted at the eighteenth session (A/CN.9/318, annex) the bank that received the order late complied with its obligations if it executed the order on the day received "regardless of any execution, value or pay date specified in the order". Although no objection was expressed to that paragraph at the nineteenth session (A/CN.9/328, paras. 81 and 82), the paragraph was not included in the article as it was restructured by the drafting group. At the twentieth session the Working Group decided that the substance of prior article 7(2) was currently covered in the *chapeau* of article 9 where it was stated that a receiving bank was required to execute the payment order on the day it was received (A/CN.9/329, para. 170).

Payment date

17. According to article 2(1) the payment date is "the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary". (See comments 58 to 62 to article 2.) The payment date is of immediate importance in the payment order issued to the beneficiary's bank, since it is that bank that must place the funds at the disposal of the beneficiary. A payment date in a payment order sent to the beneficiary's bank functions as though it was the execution date.

18. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that the expression "pay date" could be replaced by "date when the funds are to be placed at the disposal of the beneficiary". Unless the Working Group decided that the expression "payment date" was needed in article 12(4), the definition in article 2(1) could also be deleted.

Derogation by contract

19. In response to a suggestion made at the twentieth session that the sender and the receiving bank should be able to derogate from the provisions of paragraph (1) by agreement, it was stated that such a possibility would make it impossible for originator's banks to predict how long international credit transfers would take when they had to go through several intermediary banks (A/CN.9/329, para. 180). However, with the adoption of article 16 at the twenty-first session, the parties are free to derogate from any provision of article 9. If the Working Group should wish to reaffirm the policy stated at the twentieth

session for some or all of article 9, it would have to do so specifically

Comparison with Article 4A

20. Articles 4A-301(b) and 4A-302(a) in combination are substantially the same as paragraph (1). Since there are no notice requirements that are the equivalent of the ones referred to in paragraph (2), there are no time limits equivalent to paragraph (2). Article 4A-106 is the same as paragraphs (3) and (4). Article 4A-209(d) provides that a payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank.

Article 10. Revocation

(1) A revocation order issued to a receiving bank other than the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before the execution of the payment order to enable the receiving bank, if it acts as promptly as possible under the circumstances, to cancel the execution of the payment order, and

(c) it was authenticated in the same manner as the payment order.

(2) A revocation order issued to the beneficiary's bank is effective if:

(a) it was issued by the sender of the payment order,

(b) it was received in sufficient time before acceptance of the payment order to enable the beneficiary's bank, if it acts as promptly as possible under the circumstances, to refrain from accepting the payment order, and

(c) it was authenticated in the same manner as the payment order.

(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received by an earlier point of time than provided in paragraphs (1) and (2).

(4) If a revocation order is received by the receiving bank too late to be effective under paragraph (1), the receiving bank shall, as promptly as possible under the circumstances, revoke the payment order it has issued to its receiving bank, unless that payment order is irrevocable under an agreement referred to in paragraph (3).

(5) A sender who has issued an order for the revocation of a payment order that is not irrevocable under an agreement referred to in paragraph (3) is not obligated to pay the receiving bank for the payment order:

(a) if, as a result of the revocation, the credit transfer is not completed, or

(b) if, in spite of the revocation, the credit transfer has been completed due to a failure of the receiving bank or a subsequent receiving bank to comply with its obligations under paragraphs (1), (2) or (4).

(6) If a sender who, under paragraph (5), is not obligated to pay the receiving bank has already paid the receiving bank for the revoked payment order, the sender is entitled to recover the funds paid.

(7) If the originator is not obligated to pay for the payment order under paragraph (5)(b) or has received a refund under paragraphs (5)(b) or (6), any right of the originator to recover funds from the beneficiary is assigned to the bank that failed to comply with its obligations under paragraphs (1), (2) or (4).

(8) The death, bankruptcy, or incapacity of either the sender or the originator does not affect the continuing legal validity of a payment order that was issued before that event.

(9) A branch of a bank, even if located in the same country, is a separate bank for the purposes of this article.

Prior discussion

A/CN.9/297, paras. 79 and 92 to 95
A/CN.9/317, paras. 68 and 120 to 133
A/CN.9/328, paras. 92 to 116
A/CN.9/329, paras. 184 to 186

Comments

1. Article 10 provides a framework for the revocation of payment orders after they have been received by the receiving bank. At the nineteenth session of the Working Group it was suggested that, since international credit transfers are almost always sent by on-line telecommunications and are processed by computer, there would be little opportunity for the sender to revoke the payment order before the order was executed by the receiving bank and that it was, therefore, unnecessary to have any provision on the subject. The reply was given that a revocation that did not arrive in time because of the use of high-speed electronic systems would not be effective. That was not, however, considered to be sufficient reason to preclude the originator or other sender from having the opportunity to attempt to revoke the order (A/CN.9/328, paras. 93 and 94).

2. The text presented to the nineteenth session of the Working Group had one set of rules that covered both the revocation and the amendment of payment orders. At the nineteenth session it was noted that the amendment of payment orders might raise additional policy issues to those raised by the revocation of orders (A/CN.9/328, para. 100). As a result article 10 refers only to the revocation of payment orders and no provision is made in the current draft for their amendment.

3. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that the policy not to permit an amendment

of a payment order was not sufficiently clear in the text and that the following wording might be added to paragraph (2):

"A revocation order is not effective if it is expressed to cover part only of a payment order."

4. At the twentieth session the Working Group took note of a proposal that would terminate the right to revoke or amend a payment order once it had been received by the receiving bank, but which would also permit a receiving bank that was not the beneficiary's bank to cooperate with the request of the sender, regardless of whether or not the payment order had been accepted, or a beneficiary's bank to so cooperate if it had not already accepted the payment order (A/CN.9/329, paras. 184 to 186). However, no action was taken since it had been agreed that the discussion of article 10 at that session was to be only exploratory.

5. Also at the twentieth session the words "or a revocation of a payment order" were placed in square brackets in articles 2(j) and 4(1) because of opposition in the Working Group to the basic scheme of article 10 (A/CN.9/329, paras. 76 and 96).

Paragraphs (1) and (2)

6. Paragraphs (1) and (2) provide essentially the same rules for the revocation of a payment order sent to a receiving bank that is not a beneficiary's bank and to a receiving bank that is a beneficiary's bank. In both cases the revocation can be sent only by the sender of the payment order; neither the originator nor an earlier bank in the credit transfer chain can revoke the order even though it may be the party interested in having the order revoked. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested the addition of the words "or other person who had the authority to bind the sender" to both paragraphs (1)(a) and (2)(a).

7. In both cases the payment order can be revoked only if the revocation is received by the receiving bank in time. In the case of a receiving bank that is not the beneficiary's bank, the event that marks the termination of the right to revoke is the execution of the order by the receiving bank. Although the current draft of the Model Law does not define what constitutes execution of the order by the receiving bank, it can be assumed to be the sending of its own payment order intended to carry out the order received (compare article 5(2)(d) with article 6(2)). While sending its own order would also constitute acceptance of the order received, other forms of acceptance under article 5(2) would not constitute execution of the order received. In the case of the beneficiary's bank, the event that marks the termination of the right to revoke is the acceptance of the order by the bank in any of the ways described in article 7(1).

8. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that paragraph (1)(b) should read as follows:

"(b) it was received in sufficient time to enable the receiving bank, if it acts as promptly as is reasonable

in all the circumstances, to refrain from executing the payment order, and"

while paragraph (2)(b) should read as follows:

"(b) it was received in sufficient time to enable the beneficiary's bank, if it acts as promptly as is reasonable in all the circumstances, to refrain from accepting the payment order, and".

9. The receiving bank is given a certain period of time to act upon the revocation received. This period must be "sufficient" to enable the bank "if it acts as promptly as possible under the circumstances," to cancel the execution of its own order or to refrain from accepting the order received, as the case may be. The length of the period as so defined is by its nature indefinite, since it depends on the ability of the receiving bank to act (A/CN.9/328, paras. 96 and 116). The time required will vary from one bank to another, indeed from one branch of a bank to another, and depend on the nature of the payment order and the means of communication of the revocation.

10. The revocation must be authenticated in the same manner as the payment order. This implies that the revocation must be sent by the same means of communication as was the payment order. When this wording was questioned at the nineteenth session of the Working Group, citing the case of a paper-based payment order that was revoked by a telex, the reply was given that an attempt had been made to draft a requirement that the authentication had to be as good as or better than the authentication of the payment order being revoked, but that it had not proven possible to do so (A/CN.9/328, para. 114).

11. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that it would be desirable to add to the end of subparagraphs (1)(c) and (2)(c) the words "or as otherwise agreed by the sender and receiving bank".

12. At the nineteenth and twentieth sessions of the Working Group it was stated that the sender should not lose its power to revoke its payment order prior to the execution date even if the order had been prematurely executed by the receiving bank (A/CN.9/328, para. 78; A/CN.9/329, paras. 168 and 169; see article 9, comment 14).

13. *Comparison with Article 4A.* Article 4A-211 permits cancellation of a payment order, as well as its amendment, until the order has been accepted. A receiving bank that is not the beneficiary's bank can agree to cancel or amend an order it has received even after it has accepted the order, or can be bound to do so by a funds transfer system rule, but the bank must be able to cancel any order it has issued in execution of the order it received. A beneficiary's bank can agree, or be required by a funds transfer system rule, to cancel or amend an order that was issued in execution of an unauthorized payment order or was issued as a result of one of several types of error by the sender. Those provisions in Article 4A cover essentially the problems covered in paragraphs (1) to (4) of article 10.

Paragraph (3)

14. Paragraph (3) was introduced into the draft Model Law at the nineteenth session of the Working Group (A/CN.9/328, para. 98). Agreements restricting the right of a sender to revoke a payment order are common in multi-lateral payment arrangements, especially where there is delayed net settlement, and in batch processing systems where it may be difficult, if not impossible, to extract a single payment order from the batch. Paragraph (3) probably does not apply to a restriction in a telecommunications message system that prohibits the withdrawal of a message once sent. Even a telex cannot be withdrawn as a message from the public telecommunications system once it has been sent; however, the order contained in the message can be revoked under paragraph (1) or (2).

15. When paragraph (3) was introduced at the nineteenth session of the Working Group, concern was expressed over its effect since the originator might not know that there were agreements between particular banks through which the credit transfer might pass that made a payment order between those banks irrevocable (A/CN.9/328, para. 115). An agreement of a clearing-house, for example, through which the originator's bank sent the payment order to an intermediary bank that restricted the right to revoke the order would preclude the originator from revoking the credit transfer even though the beneficiary's bank had not yet accepted an order to carry out the transfer. That result is explicitly provided in paragraph (4).

16. At the twenty-first session the Working Group adopted article 16, which provides for a general freedom of contract "except as otherwise provided in this law". If the right to revoke a payment order as provided in article 10 is retained, the Working Group may wish to reconsider paragraph (3) in the light of article 16. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that, if the paragraph is retained, it should begin "For the avoidance of doubt" instead of "Notwithstanding the provisions of paragraphs (1) and (2)", so as not to prejudice the generality of article 16.

Paragraph (4)

17. If a receiving bank has already issued its own payment order intended to carry out the payment order received, paragraph (4) provides that it shall revoke its own order to its receiving bank. The obligation is automatic and is not dependent upon the request of the sender, but it is dependent on there not being an agreement restricting the right of the receiving bank as a sender to revoke its own order as described in paragraph (3). The effectiveness of the revocation is tested under paragraph (1) or (2). The series of messages can go from bank to bank until a payment order is revoked or the beneficiary's bank is reached. The credit transfer can no longer be interrupted by revocation of a payment order once the beneficiary's bank has accepted an order implementing the transfer.

18. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom has suggested a redraft of paragraph (4) in which the

most important change would be that the revocation would have to be issued "as promptly as is reasonable in all the circumstances".

Paragraphs (5) and (6)

19. These two paragraphs specify that a sender who has sent a revocation that was or should have been effective is not obligated to pay for the payment order, as he would otherwise be under article 4(4), and is entitled to recover any funds paid. At the nineteenth session it was suggested that the sender should be entitled to receive back the original amount of the transfer less costs. This was said to be a question that arose in respect of the reimbursement of the funds in case of an unsuccessful credit transfer as well and that it would need to be addressed at a later stage (A/CN.9/328, para. 115). It may be thought that a sender who has a right to a refund under paragraph (6) should also have a right to interest on the funds for the period of time the sender was deprived of the use of those funds. Compare article 12, comments 25 to 35.

20. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested that paragraphs (5)(a) and (b) should be redrafted as follows:

"(a) if, as a result of the revocation, the payment order has not been accepted by the beneficiary's bank, or

(b) if, in spite of the revocation, the payment order has been accepted due to a failure of the receiving bank or a subsequent receiving bank to comply with its obligations consequent upon the operation of paragraphs (1) and (2) or under paragraph (4)."

21. The delegation of the United Kingdom also suggested the addition of the words "from the receiving bank" to the end of paragraph (6).

22. *Comparison with Article 4A.* Paragraphs (5) and (6) would seem to be covered by Article 4A-402(c) and (d), which in this respect are the equivalent of article 11(b).

Paragraph (7)

23. If a bank has executed a payment order in spite of receipt of an effective revocation, there is a likelihood that the funds will eventually be credited to the account of the beneficiary. Paragraph (7) gives the bank that made the error and was required to reimburse its sender the means to recover the funds by being assigned any right the originator may have had to recover the funds from the beneficiary.

24. Under some circumstances paragraph (7) will not give the bank the full protection that was anticipated and the originator may have an unjustified profit. Although the sender has a complete right to recover the funds from the bank that made the error under paragraph (6), the originator may not have a right to recover the funds from the beneficiary because it owed that amount to the beneficiary. The right assigned to the bank that made the error could be no greater than the right of the originator.

25. To some degree paragraph (7) is a replacement for article 8(7) as it was adopted at the eighteenth session (A/CN.9/318, annex), that was deleted by the Working Group at its nineteenth session (A/CN.9/328, para. 106). That provision would have given the beneficiary's bank a right to reverse a credit entered to the beneficiary's account that met certain objective criteria of being the result of an error or fraud. For the origin of prior article 8 see A/CN.9/297, para. 79 and A/CN.9/317, para. 68. The current text of paragraph (7) is severely restricted in its field of application compared to the earlier provision.

26. In order to avoid the problems mentioned in comment 24 and because the reference in paragraph (7) to paragraph (6) was said to be incorrect, since paragraph (6) refers to paragraph (5), and paragraph (7) cannot apply if subparagraph (5)(a) applies, the delegation of the United Kingdom in a communication to the Secretariat subsequent to the twentieth session suggested the following redraft:

"(7) If the originator has received a refund under paragraph (5)(b), the bank whose failure to comply with its obligations under paragraphs (1), (2) or (4) resulted in the completion of the credit transfer shall have such rights to recover from the beneficiary as the originator would have had if he had not received a refund. If the originator has not paid for his payment order and under paragraph (5)(b) is not obliged to do so, that bank shall have the same rights under this paragraph as if the originator had paid for the payment order and had received a refund."

27. *Comparison with Article 4A.* There is no directly equivalent provision in Article 4A. See, however, Article 4A-211(c)(2).

Paragraph (8)

28. In order to make the provision clearer and to assure that the word "bankruptcy" is not understood in a restricted sense (as in English law where it is restricted to personal insolvency), the delegation of the United Kingdom in a communication to the Secretariat subsequent to the twentieth session suggested the following revision:

"(8) The death, bankruptcy, or incapacity of either the sender or the originator does not, of itself, operate to revoke a payment order or terminate the authority of the sender. The word 'bankruptcy' includes all forms of personal and corporate insolvency."

29. It may be noted that article 52(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes treats a similar problem as follows:

"1. A necessary or optional presentment for acceptance is dispensed with if:

(a) The drawee is dead, or no longer has the power freely to deal with his assets by reason of his insolvency, or is a fictitious person, or is a person not having capacity to incur liability on the instrument as an acceptor; or

(b) The drawee is a corporation, partnership, association or other legal entity which has ceased to exist."

30. *Comparison with Article 4A.* Article 4A-211(g) provides that

"A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order."

Paragraph (9)

31. This paragraph should be revised in line with the similar wording in the earlier articles.

New proposal

32. Former article 8(8) provided that a bank has no obligation to release the funds received if ordered by a competent court not to do so. When it deleted that paragraph at its nineteenth session the Working Group decided that it would consider a proposal that was to be presented authorizing courts to restrain a bank from acting on a payment order if proper cause was shown (A/CN.9/328, para. 109).

33. A proposal presented to the nineteenth session but not yet considered by the Working Group provided:

"For proper cause and in compliance with applicable law, a court may restrain:

(a) a person from issuing a payment order to initiate a funds transfer;

(b) an originator's bank from executing the payment order of the originator, or

(c) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing funds.

A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a credit transfer, but a bank has no obligation if it acts in accordance with the order of a court of competent jurisdiction."

34. *Comparison with Article 4A.* The proposal is identical to Article 4A-503, except for the last clause which is additional.

CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS

Article 11. *[Assistance and refund]*

A receiving bank other than the beneficiary's bank that accepts a payment order is obligated under that order:

(a) where a payment order is issued to a beneficiary's bank in an amount less than the amount in the

payment order issued by the originator to the originator's bank—to assist the originator and each subsequent sending bank, and to seek the assistance of its receiving bank, to obtain the issuance of a payment order to the beneficiary's bank for the difference between the amount paid to the beneficiary's bank and the amount stated in the payment order issued by the originator to the originator's bank;

(b) where a payment order consistent with the contents of the payment order issued by the originator and containing instructions necessary to implement the credit transfer in an appropriate manner is not issued to or accepted by the beneficiary's bank—to refund to its sender any funds received from its sender, and the receiving bank is entitled to the return of any funds it has paid to its receiving bank.

Prior discussion

A/CN.9/318, paras. 151 to 154

A/CN.9/328, paras. 54 to 58

A/CN.9/341, para. 56

Comments

1. Article 11 sets forth the basic obligations of a receiving bank to rectify the situation if problems arise in the implementation of a credit transfer. It contains prior article 5(3)(b) and (c) as it was drafted during the eighteenth session (A/CN.9/318, para. 154) with the order of the two subparagraphs reversed. The drafting group at the nineteenth session could not decide on a proper title for this new article, so it placed the provisional title in square brackets. The article was not considered at the twentieth or twenty-first sessions.

Subparagraph (a)

2. The first obligation of a receiving bank when the credit transfer has not been successfully carried out is to take the necessary steps to cause it to be carried out. If the receiving bank is the cause of the difficulties, it would carry out its obligation under subparagraph (a) by taking the necessary actions itself. If the difficulties occurred at a subsequent bank in the credit transfer chain, the receiving bank would be obligated to assist in causing the transfer to be carried out properly by such actions as finding out where the problem had occurred or sending new instructions to the subsequent bank.

3. Subparagraph (a) was adopted at the eighteenth session of the Working Group and was not discussed at the nineteenth session. However, the drafting group at the nineteenth session made a minor change in the text by referring to the issuance of a payment order for an amount "less" than, rather than an amount "different" from, the amount in the originator's payment order. That change made the provision more precise but did not change its substantive application, since the prior wording could itself have been applied only when the payment order had been for less than the correct amount. Consideration might be given to extending the subparagraph to the case where no payment order has been issued to the beneficiary's

bank, a result that cannot be reached by interpretation of the current text.

4. *Comparison with Article 4A.* There is no equivalent provision in Article 4A.

Subparagraph (b)

5. Subparagraph (b) sets forth one of the most important rules in the draft Model Law; if the credit transfer is not carried out in a manner consistent with the payment order issued by the originator, the sender has a right to a refund of any funds it has paid to the receiving bank. This right ultimately accrues to the benefit of the originator as the sender of the first payment order in the credit transfer chain.

6. Two different situations are envisaged under subparagraph (b): no payment order was accepted by the beneficiary's bank (perhaps because none was issued to it) and a payment order was accepted but it was inconsistent with the originator's payment order in some manner other than that it was for too small an amount. Subparagraph (b) as drafted would also apply where the payment order was for too small an amount, but in such a case the subparagraph should normally apply only to the deficiency and only if subparagraph (a) does not remedy the situation. It might apply to the entire amount in the rare situation where the transfer of too small an amount rendered the transfer commercially valueless.

7. The reason a credit transfer is not carried out successfully may be that the indication of the beneficiary or of the beneficiary's bank was incorrect on one of the payment orders in the transfer chain by reason of error or fraud. Other reasons why a credit transfer may fail to be carried out successfully are that the imposition of currency restrictions prevents the transfer from being made, for some reason a transfer cannot be made to the beneficiary's bank or to the country where the beneficiary's bank is located, the beneficiary's bank refuses to accept the payment order addressed to it or the account of the beneficiary is no longer open to receive credit transfers. In most cases where the indication of the incorrect beneficiary or beneficiary's bank was the result of an error, it could be expected that the error would be corrected and the credit transfer would be carried out as directed, though perhaps late. If the credit to the beneficiary's account is for an amount greater than the amount specified in the originator's payment order, subparagraph (b) should be interpreted to permit the sender to recover the payment it had made in excess of the correct amount, and it might be desirable to say so explicitly.

8. Although the general policy decision made by the Working Group at its sixteenth session, and affirmed by it on several occasions, that the originator should be able to hold its bank responsible for proper performance of the credit transfer is still open to discussion (A/CN.9/297, paras. 55 to 60; see A/CN.9/328, paras. 66 to 74 and 144; A/CN.9/329, para. 188, question 4 and A/CN.9/341, para. 56), the application of that policy to the return of the principal sum where the credit transfer failed was strongly endorsed at the nineteenth session (A/CN.9/328, paras. 54

to 58). The obligation of the receiving bank is absolute and the exemptions of article 13 would not apply. At the eighteenth session the Working Group rejected a suggestion that the obligation of a receiving bank should be to assign to its sender the right of reimbursement it would have from its receiving bank (A/CN.9/318, para. 153). The result of that suggestion would have been to place on the originator the obligation to pursue its claim for reimbursement from a subsequent bank in the transfer chain and to bear the risk that the reimbursement could not be fully recovered. As it is, under article 11(b) if a credit transfer is not completed and any receiving bank is not able to reimburse its sending bank, perhaps because of the insolvency of the receiving bank or because of the cessation of payments between the two States concerned, the sending bank to that non-reimbursing receiving bank would bear the loss. Such a non-reimbursing receiving bank would normally be an intermediary bank. It would be the beneficiary's bank only if the bank had not accepted the payment order even though it had received payment for the order from its sender, a situation that would rarely arise.

9. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom suggested a revision of the article as follows:

"(1) If no payment order consistent with the payment order issued by the originator to the originator's bank and containing instructions necessary to implement the credit transfer in an appropriate manner is issued to the beneficiary's bank, each receiving bank shall:

(a) assist the originator and each subsequent sending bank, and seek the assistance of its receiving bank, to obtain the issue to the beneficiary's bank of a payment order which is so consistent and contains such instructions;

(b) refund to its sender any funds received from its sender for payment for the payment order, or, where excess funds are received, refund the excess.

(2) Paragraph (1)(b) also applies where a payment order is rejected by the beneficiary's bank."

10. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom confirmed its belief that the beneficiary's bank should be included in article 11(b) as a bank that may have to return funds it has received. However, it now suggests that where the beneficiary's bank is no longer holding the funds, a further provision will be needed to limit the amount the beneficiary's bank is obligated to refund to the amount that is recoverable under the applicable law by the beneficiary's bank from the person to whom the funds have been paid.

11. At the nineteenth session a suggestion was made that the amount of the funds to be returned should be the original amount of the transfer less costs. It was said that this issue would have to be addressed at a later time (A/CN.9/328, para. 115). In line with the decision of the Working Group at the twenty-first session that article 14 should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the

transfer (A/CN.9/341, para. 20), the Working Group may believe that the question of the allocation of the costs of the transfer of the amount to be returned under article 11(b) should also not be determined by the Model Law.

12. At the twenty-first session it was stated that where the credit transfer was not completed and the sender of a payment order had the right to get his funds back under article 11(b), the sender should also be entitled to receive interest (A/CN.9/341, para. 118). Such a decision could be implemented by adding to the text of article 11(b) as proposed by the delegation of the United Kingdom as set out in comment 9 the words "with interest" following the words "return to its sender". See also comment 31 to article 12. The period of time for which the receiving bank would have to pay interest is not stated, but it should be understood to be from the date the bank received payment for the payment order from its sender to the date it returns the funds. If the receiving bank in question in turn sent the payment order to a subsequent receiving bank, it would have the right to the refund with interest for the time its receiving bank had the funds, thereby reducing its own final cost to the interest for the time that it was the holder of funds arising out of the failed transfer.

13. *Comparison with Article 4A.* Article 4A-402(c), (d) and (e) are the equivalent provisions. Paragraph (e) re-allocates the risk of loss arising out of the inability of an intermediary bank to return the funds because it is not permitted by applicable law or because the bank suspends payments when the sender to that bank acted in conformity with an instruction in the payment order it received. That provision is not contained in the Model Law.

Article 12. *Liability and damages*

(1) *Deleted*

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 9.

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and the intermediary bank executed the payment order received by it within the time required by article 9.

(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank], and

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds

at the disposal of the beneficiary in accordance with the terms of a pay date or execution date stated in the order, as provided in article 9.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

(a) loss of interest,

(b) *Deleted*

(c) expenses incurred for a new payment order [and for reasonable costs of legal representation],*

[(d) any other loss that may have occurred as a result, if the improper [or late] execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result.]

(6) If a receiving bank fails to notify the sender of a misdirected payment order as provided in article 6(3) or 8(2), and the credit transfer is delayed, the receiving bank shall be liable:

(a) if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank, or

(b) if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days.

(7) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)(d). A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

[(8) The remedies provided in this article do not depend upon the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available.]

Prior discussion

A/CN.9/297, paras. 55 to 63 and 70 to 72

A/CN.9/317, paras. 137 to 150

A/CN.9/328, paras. 66 to 74 and 117 to 144

A/CN.9/329, paras. 187 and 188

A/CN.9/341, paras. 105 to 131

Errors in A/CN.9/341, annex

Paragraph (4) uses the term "pay date" instead of "payment date", as adopted at the twenty-first session.

The text of paragraph (6) refers to articles 6(2) and 8(1) rather than to articles 6(3) and 8(2) as it should.

*Consideration may be given to allowing recovery of reasonable costs of legal representation even if they are not recoverable under the law of civil procedure.

Comments

1. The current text of article 12 is essentially the text as prepared by the Secretariat for the eighteenth session in A/CN.9/WG.IV/WP.39 on the basis of the discussion at the seventeenth session (A/CN.9/317). Certain amendments introduced at the nineteenth session are referred to below at the appropriate places. At the twentieth session a small group consisting of four delegations was asked to consider the liability provisions in general and to attempt to formulate an agreed position that might be considered by the Working Group, but they were unable to reach such an agreed position. Instead they identified four major issues and each of the delegations submitted their separate views for the consideration of the Working Group (A/CN.9/329, paras. 187 and 188). The Working Group did not have the opportunity to consider the matter further at the twentieth session.

2. At the twenty-first session the Working Group had before it a complete redraft of the article that had been proposed by the delegation of the United Kingdom in a communication to the Secretariat (A/CN.9/WG.IV/WP.46, comment 28 to article 12). However, "the Working Group decided that it would be a more appropriate procedure to discuss the original text of article 12, including paragraph (2), and to use the suggested redraft as a source of ideas for improving the text" (A/CN.9/341, para. 106). The discussion at the twenty-first session and the changes to the text that were adopted are indicated below.

Paragraph (1)

3. Paragraph (1) provided that a receiving bank was liable for its failure to fulfil its own obligations under article 5. Since there was a reference to article 5, the receiving bank contemplated was not the beneficiary's bank. The liability of the beneficiary's bank is considered in paragraph (4). At its nineteenth session the Working Group decided to retain the principle of paragraph (1), but to place it in square brackets until it had completed its consideration of the entire article on liability and damages in the expectation that it might be substantially redrafted (A/CN.9/328, para. 131). The Working Group deleted the paragraph at the twenty-first session "since the same matter was covered by paragraph (2)" (A/CN.9/341, para. 104).

Paragraph (2)

4. The general system of liability in paragraph (2) is that the originator can hold the originator's bank liable for the proper performance of the credit transfer. That means that the bank would be responsible to the originator for loss wherever the loss occurred. The types and extent of the losses for which the originator's bank would be liable would be those set forth in paragraph (5). In order to avoid liability the originator's bank would have to show that one of the exempting conditions in article 13 was relevant. If the loss for which the originator's bank is liable to the originator was caused by events that occurred at a subsequent bank in the credit transfer chain, the originator's bank could recover the loss from its receiving bank and each bank in turn could recover from its receiving bank

until, under paragraph (3), a bank could show that the payment order received by the beneficiary's bank was consistent with the payment order received by the bank in question.

5. This system of liability is based on the idea that the originator's bank provides a service to the originator that depends on it having established correspondent relations with other banks. It is a system of liability that is well known in other similar types of economic activity, such as the international transport of goods, where it is common for the carriage to be effected by several different carriers. In some, though not all, conventions on international carriage of goods the claim might be made either against the original contracting carrier or against the carrier where the damage occurred. The procedure envisaged by paragraph (2), similar to the procedure used in those conventions, would ease the procedural problems for the originator since he would not have to claim against a bank in a foreign country with which he had no business relationship. However, it would allow the originator's bank to have recourse against its receiving bank, a bank with which it normally had a continuing business relationship (A/CN.9/341, para. 111).

6. Against this system of liability is the concept that no one should be responsible for the actions of third parties. The originator's bank is not always in a position to know, much less to control, the route that an international credit transfer will take on its way to the beneficiary's bank. When the originator requests his bank to transfer funds to a foreign country, he should know that it was likely that independent intermediary banks might have to be used (A/CN.9/341, para. 108).

7. At the twenty-first session there were contradictory statements as to the standard of care for which the originator's bank would be held liable when the loss occurred because of the acts of an intermediary bank in a foreign country. Under one view the originator's bank would be responsible if the intermediary bank did not act in accord with the performance standards of the Model Law. The example given was that the intermediary bank did not execute the payment order on the day it was received because the standard in that country was next day execution. Under another view, under article 15(1) the actions of the receiving bank, and therefore the standard of care of the originator's bank, would be measured by the rules in force in the State of the receiving bank, i.e., of the intermediary bank (A/CN.9/341, paras. 109 and 110). See comment 10 to article 15.

8. It was decided at the seventeenth session of the Working Group that the originator should also be able to hold an intermediary bank directly liable for the losses suffered, since there may be occasions when recovery from the originator's bank may not be possible (A/CN.9/317, para. 139).

9. This system of liability was discussed at length at the nineteenth session without a final decision being reached as to whether it should be retained, abandoned or modified (A/CN.9/328, paras. 66 to 74 and 144). At the twentieth session the four delegations requested to reach an agreed

position in respect of article 12 were in general in agreement that the responsibility for loss should be that of the bank where the events occurred that caused the loss (A/CN.9/329, para. 188, question 4). At the twenty-first session the Working Group noted that the differences between the opposing views had not been reconciled and it decided, therefore, to retain the paragraph. It was noted that retention of paragraph (2) did not imply any judgment on the other paragraphs of article 12, and particularly on paragraph (5), although it was also recognized that there was a relationship between the type and extent of damages that could be claimed and the appropriate rules for determining which bank or banks should be responsible to the originator for those damages (A/CN.9/341, paras. 105 and 114).

10. Other decisions that have been made by the Working Group in respect of liability and damages may have a bearing on the significance of the provision. At the nineteenth session the Working Group decided that it would consider providing in the Model Law that, when there was a delay in a credit transfer, the beneficiary would have a direct right to recover interest resulting from the delay against the bank that had caused the delay (A/CN.9/328, paras. 131 and 132). At the twenty-first session it was noted that no text had been adopted, but the Working Group proceeded on the assumption that payment of the interest to the beneficiary would be the normal practice (A/CN.9/341, paras. 118 and 119; see also comments 25 to 33). At the twenty-first session paragraph (5)(b), providing that damages might include exchange losses, was deleted and it was decided that any possible recovery for such losses was to be considered in regard to indirect (consequential) damages (A/CN.9/341, para. 124; see comments 38 to 42). At the seventeenth session the degree to which indirect (consequential) damages would be recoverable was limited to situations in which the loss was caused by wilful or reckless action, while at the twenty-first session it was decided that only the bank at which those actions had occurred could be held liable (A/CN.9/317, paras. 115 to 117; A/CN.9/328, paras. 140 to 143; A/CN.9/341, paras. 114 and 126). As a result the only losses that would be subject to the procedures envisioned in paragraph (2) would be interest and the expenses for a new payment order and reasonable costs of legal representation under paragraph (5)(c).

11. It has also been decided that when a credit transfer is not carried out successfully, the originator has a right to a return of the principal sum transferred without regard to the reasons for the failure (article 11(b)). Although article 11(b) could be considered to implement the policy of paragraph (2), it is not considered to be a liability provision (see comment 8 to article 11).

12. At the twenty-first session the Working Group requested the Secretariat to propose to the Working Group a revision of the paragraph, and particularly of the second sentence (A/CN.9/341, para. 115). The Secretariat proposes that the paragraph be revised as follows:

"A receiving bank that is not the beneficiary's bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5)

of this article caused by a delay in the completion of the credit transfer, a failure to complete the credit transfer or a failure to complete it as instructed in the originator's payment order. A receiving bank is liable under subparagraph (5)(d) only to the extent that its actions caused the loss."

13. The opening words of the first sentence of this proposed redraft use the same words that are used in articles 5 and 6. Reference is made to a delay in the completion of the credit transfer, rather than completion of the transfer within the time required by article 9, since the text of article 9 as it has evolved provides for the time within which actions are to be taken in regard to a payment order that has been received but not for the time within which a credit transfer is to be completed. Although a failure to complete a credit transfer as instructed in the originator's payment order most often will lead to a delayed completion, it seems appropriate to include it as a separate item for which the bank is liable. The original second sentence has been deleted, rather than redrafted, since it seems to be currently unnecessary. The new second sentence is intended to implement the decision of the Working Group that only the bank where the error occurred should be liable for the losses under subparagraph (5)(d).

Paragraph (3)

14. Paragraph (3) places a limit on the effect of paragraph (2) when the credit transfer is completed in a manner inconsistent with the originator's payment order. No bank that is subsequent to the error or fraud that caused the inconsistency has any liability for the fact that the credit transfer was carried out improperly. However, such a bank would have obligations under article 11 to assist in correcting the situation. At the twenty-first session it was noted that the provision was technical but that there were matters of drafting and of substance that were contained in the redraft proposed in A/CN.9/WG.IV/WP.46, comment 28 to article 12 to which the Working Group would have to return at a later time. The relevant provision was as follows:

"A receiving bank is not liable under paragraph (2) if the payment order received by each subsequent receiving bank was consistent with the payment order received by it and neither it nor any subsequent receiving bank failed to execute the payment order it received within the time required by article 9 or to comply with any notification obligation mentioned in paragraph (6) [of the proposal]. A receiving bank that does not accept a payment order is liable under paragraph (2) only in respect of its failure to notify rejection in accordance with article 5(3)."

Paragraph (4)

15. The beneficiary's bank might cause loss to the beneficiary by such actions as failing to fulfil its obligations under article 8(4), by failing to accept a payment order it is obligated by contract with the beneficiary to accept or by accepting a payment order the beneficiary has instructed it not to accept.

16. It is a matter of judgment whether the Model Law should contain provisions covering such losses. On the one hand the losses would arise out of the failure in respect of the credit transfer. On the other hand it may be thought that it is not necessary to establish rules on the liability of the beneficiary's bank to the beneficiary, especially when those rules might differ from the domestic rules governing liability for an otherwise identical failure by the bank. Paragraph (4)(a) takes a middle position by referring to the existence of such liability but leaves the substance of the rules governing the liability to the law that governs the account relationship. At the seventeenth session the Working Group decided to defer any decision whether to retain or to delete the subparagraph until it had a more complete view of the entire text (A/CN.9/317, para. 150). At the twentieth session the Working Group considered a similar problem in connection with article 8 (see, article 8, comments 1 to 4).

17. At the twenty-first session the Working Group expressed a preference for the first of the two alternative formulations in square brackets, i.e., "account relationship" (A/CN.9/341, para. 117). The Working Group also decided that subparagraph (a) should include a reference to the failure of the beneficiary's bank to perform one of the obligations under article 8. In the proposal of the delegation of the United Kingdom that had been communicated to the Secretariat prior to the twentieth session, paragraph (6C) included the current text of subparagraph (4)(a) and added "or, if the beneficiary does not maintain an account with the bank, for its failure to notify him in accordance with article 8(6) that it is holding funds for his benefit" (A/CN.9/WG.IV/WP.46, para. 28). However, that does not appear to have been the intention of the Working Group. Although the report is not clear on the point, it appears that the reference to article 8 was intended to replace the words "for its improper execution or its failure to execute a payment order it has accepted". The *chapeau* and subparagraph (a) might, therefore, be drafted as follows:

"The beneficiary's bank is liable

(a) to the beneficiary for its failure to perform one of its obligations under article 8 to the extent provided by the law governing the account relationship, and"

18. While that formulation has the advantage of referring to the obligations set forth in the Model Law itself, it poses a certain difficulty in that no State would have rules that would provide liability for failure to perform an obligation under article 8. Nor would it be convenient to say

"The beneficiary's bank is liable

(a) to the beneficiary for its failure to perform one of the types of obligations set forth under article 8 to the extent provided by the law governing the account relationship, and"

19. If the reference to article 8 was not intended to replace the existing words, the provision might read as follows:

"The beneficiary's bank is liable

(a) to the extent provided by the law governing the account relationship, to the beneficiary for its improper execution or its failure to execute a payment order it has accepted as set forth in article 8, and"

20. The beneficiary's bank might cause loss to the sender or to the originator by failing to give one of the notices required by article 8. For the treatment of such losses, see paragraph (6) and comments 43 and 44. Failure to give a notice of rejection required by article 7(2) would not cause loss to the sender or to the originator since it would lead to acceptance of the payment order by the beneficiary's bank.

21. In addition, as indicated in paragraph (4)(b), the beneficiary's bank might cause loss to the sender or to the originator by failing to place funds at the disposal of the beneficiary in accordance with an execution or payment date. (The text continues to say "pay date" by mistake.) Compare article 8, comment 23.

22. In any redrafting of article 12, consideration might be given to reversing the order of subparagraphs (a) and (b), or to placing them in separate paragraphs.

Paragraph (5)

23. In essence, paragraph (5) applies to losses caused by late or non-completion of a credit transfer. In this sense, timely completion of a transfer for less than the full amount may be considered to be a late transfer for the difference between the proper amount and the amount transferred in fact.

24. Losses arising out of unauthorized payment orders are allocated by article 4(2) and (3). Liability for losses arising out of failure to give the notice required by articles 6(3) and 8(2) is set out in paragraph (6). The obligation of each receiving bank to refund to its sender any funds received from the sender where the transfer was not successfully completed is set forth in article 11(b).

Interest, subparagraph (a)

25. Interest losses may be suffered in several different ways as a result of a credit transfer that does not work as intended. If a receiving bank receives funds from its sender but delays execution of the payment order, the sender (who may be either the originator or a sending bank) may be said to have suffered a loss of interest because it has been deprived of funds earlier than was necessary for the bank to execute the payment order. If the receiving bank receives funds late from its sender but executes the order without waiting for the funds, the receiving bank suffers a loss of interest but no subsequent party, including the beneficiary, suffers any loss. If the result of a delay or error of any kind at a receiving bank is that the entire credit transfer is delayed, the beneficiary could be said to have suffered the loss of interest.

26. If the beneficiary could recover loss of interest from the originator because of late payment of the underlying obligation, the originator might claim for the interest it

had paid to the beneficiary from the bank where the delay occurred or from the originator's bank. In many cases the amount of interest the beneficiary could claim from the originator because of late payment of the underlying obligation would be more than the amount of interest due from the bank because of delayed performance of the credit transfer. At the twenty-first session, when it was suggested that the bank that had caused the delay should have to pay to the beneficiary or to the originator (if the originator had reimbursed the beneficiary) an additional amount equal to the interest due as a result of the late payment of the underlying obligation, less the amount already paid for the delay in the credit transfer, it was stated that such an additional amount was in the nature of indirect (consequential) damages and should be treated as such under the Model Law (A/CN.9/341, para. 120; see comment 41).

27. The Working Group considered the problem of interest extensively at the nineteenth and twenty-first sessions (A/CN.9/328, paras. 122 to 131; A/CN.9/341, paras. 118 to 123). It agreed that, in any case where the beneficiary had been credited later than it should have been because of a delay in the transfer, the receiving bank causing the delay should not benefit from the use of the funds during the period of the delay (A/CN.9/328, para. 122). It noted that it was current banking practice in many important banking centres for a bank at which a transfer was delayed to add an appropriate amount of interest to the amount being transferred. As a result the bank that received the transfer late would automatically receive the interest. This was said to be efficient and expeditious, not requiring any inquiry into the facts of the underlying transaction but giving a remedy that would normally be approximately equal to the loss suffered, and a practice that the legal system should recognize (A/CN.9/328, para. 126).

28. At the conclusion of the discussion at the nineteenth session the Working Group decided that it would be useful to consider providing in the Model Law that the beneficiary would have a direct right to recover interest resulting from the delay against the bank that caused the delay. Since the proposal raised a number of questions that would require consultation, the Working Group requested the Secretariat to prepare a draft of a provision for its consideration at its twentieth session (A/CN.9/328, para. 131). A provision was suggested in the working paper submitted by the Secretariat to the twentieth session, A/CN.9/WG.IV/WP.44, article 12, comment 17, but it was not considered at that session.

29. At the twenty-first session it was stated that where the credit transfer was not completed and the originator had the right to get his funds back under article 11(b), the originator should also be entitled to receive the interest (A/CN.9/341, para. 118).

30. It was also noted that the typical way in which banks compensated one another for interest due was to adjust the date of the credit to the account so that it showed "as of" the date on which the credit should have been entered (A/CN.9/341, para. 119). By changing the date of the credit, appropriate interest would be given automatically

to the bank receiving the credit. It was stated that, in practice, delay in executing a payment order was almost always because the payment order had been executed improperly. As soon as the error was brought to the attention of the bank, it would immediately execute the order correctly for the original amount. Interest adjustments would be made later, usually by way of an "as of" adjustment, although that method was less often used where the person receiving the adjustment did not maintain an account with the bank.

31. Whether the interest due as a result of the delay is credited to the account of the receiving bank as a sum of money or whether the receiving bank effectively receives interest by receiving a credit "as of" an earlier date, there is no guarantee that the receiving bank will pass it on to the next bank in the credit transfer chain, or to the beneficiary. Not only is there the fact that the receiving bank may not perceive any legal obligation to do so, but there are occasions when the receiving bank is the only party to have suffered a loss of interest. It was pointed out at the twenty-first session that in order to overcome that situation there was a proposed rule in the United States that would require the sender (in the case of the return of the amount paid under the equivalent of article 11(b)) or the receiving bank that was the recipient of an "as of" adjustment, but that was not the ultimate party entitled to the interest, to pass on the benefit of the "as of" adjustment to the ultimate originator or beneficiary in the form of interest (A/CN.9/341, para. 119; proposed Regulation J, sec. 210.32(b)(2)). It is suggested in comment 12 to article 11 that a requirement that the receiving bank return the amount of the failed credit transfer "with interest" would automatically cause the interest to be passed back to the originator.

32. An interest rate adjustment between banks would automatically be at the interbank rate in the currency concerned when it was effected by means of an "as of" adjustment of the date on which the account was credited. An "as of" adjustment of the date of crediting a non-bank beneficiary's account would not have the same automatic effect. The effective amount of interest a non-bank beneficiary would receive would depend on whether the account was in debit or in credit during that period of time, since the rate charged on a debit balance is always higher than the rate the beneficiary would receive if the account was in credit.

33. As a result, even though it was suggested that the Model Law should indicate the appropriate rate of interest to be paid, and that the interest should be calculated at the interbank rate in the currency in which the payment order was expressed, the Working Group decided that it would provide only that interest was payable without indicating how that interest should be calculated (A/CN.9/341, paras. 121 and 123).

34. In a communication to the Secretariat prior to the twentieth session the delegation of the United Kingdom suggested several provisions that involved the payment of interest. Those provisions are set out in A/CN.9/WG.IV/WP.46, comment 28 to article 12, paragraphs (6A), (6B)

and (6D). In respect of the right of the beneficiary to recover interest, the proposed paragraph (6B) provided

"If a credit transfer is delayed by the improper execution of a payment order that has been accepted by a receiving bank other than the beneficiary's bank, the bank is liable to compensate the beneficiary for loss of interest. The liability of the bank to the beneficiary is discharged to the extent that it transfers to its receiving bank an amount in addition to that it received from its sender."

35. The end of the second sentence might be amended by adding the words "or makes an appropriate adjustment in the date of the credit." Furthermore, in line with the proposed rule in the United States referred to in comment 31, consideration might be given to adding a new paragraph to the effect that

"If the receiving bank that is the recipient of interest for delay [including by means of an adjustment in the date of the entry of the debit or credit to an account] is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to its receiving bank."

Exchange losses, subparagraph (b)

36. Subparagraph (5)(b) provided that the bank would be liable for exchange losses arising out of delayed international credit transfers. After discussion at the nineteenth and twentieth sessions of the Working Group (A/CN.9/328, paras. 133 to 136; A/CN.9/329, para. 188), the subparagraph was deleted at the twenty-first session (A/CN.9/341, para. 125).

Expenses of new payment order and legal representation, subparagraph (c)

37. It was suggested at the nineteenth session of the Working Group that the first part of subparagraph (5)(c) was not of great importance because the amounts of money involved were minor, and the receiving bank might well have to bear the expenses of a new payment order as part of its obligation under article 11(a) to help rectify a credit transfer that had not been carried out properly. The second part of the subparagraph was put in brackets and the footnote was added because of the difficulties of formulating a rule that reflected the various means by which the costs of legal representation were distributed in the different legal systems (A/CN.9/328, paras. 137 to 139). At the twenty-first session the Working Group considered that the issues raised in the subparagraph were of minor importance that should be left for discussion at a later stage (A/CN.9/341, para. 125).

Other losses, subparagraph (d)

38. In respect of paragraph (5)(d) the Working Group decided at its seventeenth session that, in exchange for a relatively strict regime of liability, the bank liable would not be responsible for indirect losses unless more stringent requirements were met than for the other elements of loss (A/CN.9/317, paras. 115 to 117). That decision was reaffirmed in another context at the eighteenth session of the

Working Group (A/CN.9/318, paras. 146 to 150). As suggested at the seventeenth session the formula used in the current text was taken from article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). In order to recover the indirect losses, the claimant would have to prove the intent or the reckless behaviour of the bank.

39. At the nineteenth session retention of the essence of the provision was again reaffirmed (A/CN.9/328, paras. 140 to 143). However, the formulation of the subparagraph was criticized as being imprecise. It was said that the subparagraph was not clear as to the types of losses that were to be covered or that those losses should have been the direct consequence of the failure on the part of the bank. The formula taken from article 8 of the Hamburg Rules for limiting the right to recover was said not to reflect properly the problems of making credit transfers (A/CN.9/328, para. 142). After discussion the Working Group decided to place square brackets around the words "any other loss" and around the words taken from the Hamburg Rules to indicate its intention to redraft the provision.

40. At the twentieth session three of the four delegations that were asked to formulate an agreed position were in favour of retaining the provision in one form or another, while one delegation was in favour of deleting the provision (A/CN.9/329, para. 188, question 3).

41. At the twenty-first session the Working Group decided to limit the application of subparagraph (d) so that only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender (A/CN.9/341, para. 114 and 126). Following that decision the Working Group considered at length whether the provision should be retained at all (A/CN.9/341, paras. 127 to 131). At the end of the discussion a suggestion was made to delete both paragraph 5(d) and paragraph (8). Under that proposal the Model Law would not provide for consequential damages under any circumstances, but a party would not be precluded from relying on other doctrines of law that might be available in the relevant legal system to claim such damages. A similar suggestion was that paragraph (5)(d) and paragraph (8) might be combined so that banks would be subject to other relevant doctrines of law when they acted in the ways described in the current text of paragraph (5)(d). The Working Group decided that it would need more time to study the implications of the suggestions that had been made. It placed both texts in square brackets so that it could reconsider them at the next session.

42. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that, if its proposed redraft of paragraph (5)(d) was not accepted (A/CN.9/WG.IV/WP.46, comment 28 to article 12), the proposal to combine paragraph (5)(d) with paragraph (8) might be accomplished by adding to the end of the current text of paragraph (8) the following words:

"save any under which a bank is liable to compensate for loss because the improper or late execution or

failure to execute resulted from an act or omission of that bank done with the intent to cause such loss, or recklessly and with knowledge that such loss might result."

Paragraph (6)

43. In most cases of breach of duty under the Model Law the harm that is suffered is reasonably clear and the remedy of the injured party can be left to the general provisions of paragraph (5). When the Working Group adopted the provision requiring a receiving bank to notify its sender of a misdirected payment order, articles 6(3) and 8(2) in the current draft, it noted that the harm suffered might not always be easy to measure. Nevertheless, it was of the view that there should be a sanction for a bank's failure to notify the sender where that failure to notify delayed the transfer (A/CN.9/318, para. 122). Where the receiving bank was in possession of funds during the period it failed to notify the sender of the misdirection, the obligation to pay interest is in the nature of restitution of what the bank can be assumed to have earned from having been in possession of the funds as well as what the sender can be assumed to have lost. Where the receiving bank was not in possession of funds, the requirement to pay interest for up to 30 days serves only as a measure of the loss the sender can be assumed to have suffered.

44. In a redraft of the entire article suggested by the delegation of the United Kingdom in a communication to the Secretariat subsequent to the twentieth session that was set forth in A/CN.9/WG.IV/WP.46, comment 28 to article 12, the following provisions were relevant to the general problems considered in paragraph (6):

"(6) This paragraph applies to a receiving bank which is liable only in respect of its failure or the failure of a subsequent receiving bank to comply with any of the following notification obligations:

(a) to notify rejection in accordance with article 5(3) or 7(2), where payment has not been received from the sender;

(b) to notify misdirection in accordance with article 6(3) or 8(2);

(c) to notify a lack of sufficient data in accordance with article 6(4) or 8(3);

(d) to notify an inconsistency between the words and figures that describe the amount of money in accordance with article 6(5) or 8(4).

If a bank to which this paragraph applies is liable under this article to the originator or to its sender, it is obliged to compensate only for loss of interest for a maximum of 7 days or the period during which it held the funds, whichever is the longer."

Paragraph (7)

45. Paragraph (7) provides an important rule setting forth the extent to which the provisions of this article can be varied by agreement of the parties. Paragraph (7) would constitute a limitation on the general right of the parties to vary their rights and obligations by contract that is

contained in article 16 as it was adopted by the Working Group at the twenty-first session (A/CN.9/341, para. 52).

Paragraph (8)

46. Paragraph (8), making the liability provisions of this article not dependent on a contractual relationship and making them exclusive, was added at the suggestion of the Working Group at its seventeenth session (A/CN.9/317, para. 119). Without such a provision some legal systems might permit other remedies based on general theories of obligation, thereby destroying the uniformity of law the Model Law seeks to achieve.

47. At the twenty-first session it was suggested that both paragraph (5)(d) and paragraph (8) should be deleted or that they should be combined (A/CN.9/341, para. 130; see comments 41 and 42). At that session the Working Group decided to place both paragraphs in square brackets and to reconsider them at the next session.

Comparison with Article 4A

48. Article 4A-305 provides that a receiving bank is liable for its late or improper execution or failure to execute a payment order. In the case of late completion the bank "is obliged to pay interest to either the originator or the beneficiary . . .". In the case of other types of improper or non-execution, the bank "is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses . . . resulting from the improper execution. "If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute." In all cases additional "damages, including consequential damages, are recoverable [only] to the extent provided in an express written agreement of the receiving bank".

Proposed new paragraph

49. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that an additional difficulty with article 12 that had not so far been addressed by the Working Group was that a bank which is obliged to pay compensation to its sender or to the originator and which is entitled to recover the compensation from its receiving bank but is unable to do so because that bank is insolvent has no right to recover the compensation from a bank further down the chain. If the bank further down the chain has already paid the compensation to the insolvent bank or to an intermediary bank, it should not have to pay again, but if it has not yet paid, there seems to be no reason why it should not pass over the insolvent bank and pay the bank higher up the chain. To deal with that situation, the United Kingdom delegation suggested the following new paragraph, which is based on the structure of its redraft of article 12 in A/CN.9/WG.IV/WP.46, para. 28 to article 12:

"A bank which is entitled to recover compensation from its receiving bank under this article but is unable to do so owing to the latter's insolvency shall, subject

to paragraph (6E), be entitled to recover the compensation from any subsequent bank to the extent that that bank has not already paid compensation to its sender under this article, and that subsequent bank's liability to pay compensation to its sender shall be discharged to the extent that it pays such compensation to the first mentioned bank."

Article 13. *Exemptions*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 12 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to have taken into account at the time of the credit transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

Prior discussion

A/CN.9/297, para. 60

A/CN.9/317, paras. 151 to 156

Comments

1. Since the liability of a receiving bank for the interest loss and expenses incurred for a new payment order would arise out of the simple fact of failure of the transfer, article 13 provides the receiving bank with its sole basis of defence in such cases.

2. Article 13 does not apply to the obligation of a receiving bank under article 11(b) to refund to its sender any funds received from the sender when a payment order consistent with the contents of the payment order issued by the originator was not issued or accepted by the beneficiary's bank. It also does not seem to apply to the bank's obligation to pay "any other loss" under article 12(5)(d), since that provision has its own strict limitation on liability. (See article 12, comments 38 to 42.) Furthermore, it can be questioned whether the application of article 13 to loss of interest would be consistent with the decision of the Working Group at its nineteenth session that a bank that caused a delay in a credit transfer should not be allowed to earn interest on the funds that were in its possession because of the delay (A/CN.9/328, para. 122) or with the decision at the seventeenth session that the receiving bank that fails to notify its sender of a misdirected payment order should be liable for interest. (For the current situation in regard to the duty of a bank to pay interest because of a failure to fulfil one of its obligations, see article 12, comments 25 to 35 in regard to paragraph (5)(a), and comments 43 and 44 in regard to paragraph (6).)

3. Under article 13 the bank must prove the exempting condition. Although there is a list of specific circumstances that might exempt the bank from liability, the reference to "other circumstances" indicates that the list is

not exhaustive. The current draft of article 13 has not been discussed by the Working Group.

4. In a communication to the Secretariat subsequent to the twentieth session the delegation of the United Kingdom has suggested a redraft as follows:

"A receiving bank and any bank to which the receiving bank is liable under article 12 is exempt from liability for a failure to perform any of its obligations under that article if the bank proves that the failure was due to circumstances which were beyond the bank's control and which it could neither avoid nor overcome."

5. *Comparison with Article 4A.* There is no equivalent provision in Article 4A.

CHAPTER IV. CIVIL CONSEQUENCES OF CREDIT TRANSFER

Article 14. *Payment and discharge of monetary obligations; obligation of bank to account holder*

(1) *Deleted*

(2) If the transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash.

(2 *bis*) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.

(4) *Deleted*

Prior discussion

A/CN.9/317, paras. 157 to 164

A/CN.9/328, paras. 37 to 43

A/CN.9/329, paras. 189 to 192

A/CN.9/341, paras. 11 to 23

Comments

Paragraph (1)

1. Paragraph (1) provided that monetary obligations could be discharged by interbank credit transfers leading to credit to an account. The paragraph was deleted at the

twenty-first session (A/CN.9/341, para. 12). The reasons given were that, while many legal systems already recognized credit transfers as an acceptable method of making payment, it was a matter of the policy of each State to decide whether a monetary obligation could be discharged by a credit transfer and that it might be contrary to the monetary policy of some States to consider credit in an account in a bank as having the same legal significance as money issued by a central bank.

Paragraph (2)

2. Prior to the twenty-first session paragraph (2) provided that the obligation of the debtor was discharged when the beneficiary's bank accepted the payment order. The beneficiary's bank became indebted to the beneficiary at the same time. The drafting history of that prior provision is set forth in A/CN.9/WG.IV/WP.46, comments 5 to 9 to article 14. The current text was adopted at the twenty-first session (A/CN.9/341, paras. 13 to 17).

3. Although there was a widespread feeling in the Working Group that the Model Law should neither provide that a debtor had a right to discharge an obligation by transferring funds to the credit of the creditor in his bank account nor provide that if such a transfer was made the obligation would be discharged to the extent of the payment order received, there was a recognition that it would be useful to provide a rule that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, it was thought to be useful for the Model Law to indicate the time when such a discharge took place.

4. Paragraph (2) applies only if the transfer was for the purpose of discharging an obligation of the originator/debtor to the beneficiary/creditor and if that obligation could be discharged by credit transfer to the account indicated by the originator. Although it is unlikely that any State has a general prohibition against credit transfers, and especially international credit transfers, it is possible that certain obligations can be discharged only by payment in cash or by some other specified means. What is more likely is that in a given State an obligation is discharged by credit transfer to an account of the beneficiary only if the transfer is done with his consent. It may be that the consent need not be specific, that it could be implied from the very fact of having a particular type of account, from the indication of the bank account numbers on an invoice or from other similar circumstances.

5. If paragraph (2) applies, it provides that the obligation is discharged when the beneficiary bank accepts the payment order. Although not specifically so stated in paragraph (2), the payment order accepted by the beneficiary's bank must have been addressed to the proper account. If the payment order was addressed to the proper account but the beneficiary's bank failed to credit the account or credited the wrong account, the obligation from the originator to the beneficiary is discharged and if the beneficiary suffered loss as a result of the misapplication of the credit, he must look to his bank for reparation under the law applicable to the account relationship.

6. Paragraph (2) provides that the obligation is discharged to the extent that it would be discharged by payment of the same amount in cash. The amount in question is the amount of the payment order accepted by the beneficiary's bank. If the beneficiary's bank charges a fee for receiving and processing the payment order, the fee is at the cost of the beneficiary. However, if the payment order accepted by the beneficiary's bank is for an amount less than the amount in the payment order sent by the originator's bank as a result of fees charged by intermediary banks, the originator is not discharged of his obligation to the beneficiary to the extent of those fees. Compare comment 8.

7. In most cases when less than the full amount of the obligation is paid, the obligation is discharged to the extent of the payment. However, in some cases the obligation is indivisible and payment of less than the full amount does not operate as a discharge of any of the obligation (A/CN.9/328, para. 39). Those are questions that are settled by doctrines outside the law of credit transfers. However, in order to know the effect of a transfer of a sum that is less than the entire obligation, paragraph (2) provides that the obligation is discharged to the extent that it would be discharged by payment of the same amount in cash.

8. *Comparison with Article 4A.* Article 4A-406 has substantially the same rule in respect of time of discharge, subject to the qualification that the acts of acceptance of a payment order by a beneficiary's bank are slightly different in Article 4A-209(b) from what they are in article 7. Article 4A-406(c) provides that the extent of the discharge is the amount of the originator's order "unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges".

Paragraph (2 bis)

9. Although earlier versions of the draft Model Law had implied that the credit transfer was completed when the beneficiary's bank accepted the payment order, a specific rule as to when the credit transfer was completed was first introduced into the draft Model Law at the twentieth session when it was placed in the definition of "credit transfer" in article 2(a) (A/CN.9/329, paras. 31 to 33). At the twenty-first session it was moved to article 14 (A/CN.9/341, para. 17). As had previously been the case, the credit transfer is completed when the beneficiary's bank accepts the payment order.

10. Although the general policy of the Model Law is not to enter into the relationship between the beneficiary and the beneficiary's bank, paragraph (2 bis) goes on to say that when the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it. The provision does not provide when or how the beneficiary's bank must make the funds available to the beneficiary or the extent to which the beneficiary's bank can charge the beneficiary a fee for receiving and processing the transfer. Those are questions to be settled by the law applicable to the account relationship.

11. Paragraphs (2) and (2 *bis*) are complementary in that, if the credit transfer was for the purpose of discharging an obligation, the beneficiary's claim against the originator/debtor is discharged at the same moment and to the same extent that the beneficiary's claim arises against the beneficiary's bank.

12. *Comparison with Article 4A.* Article 4A-104(a) provides that "A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order." The acts of acceptance of a payment order by the beneficiary's bank are somewhat different in article 4A-209(b) from what they are in article 8.

Review of the concept of acceptance

13. At the twenty-first session the Working Group noted that by its adoption of paragraphs (2) and (2 *bis*) in their current form, it had decided that the point of time when the credit transfer was completed with the legal consequences that followed was when the beneficiary's bank accepted the payment order addressed to it. Consequently, the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in articles 5 and 7 (A/CN.9/341, para. 17).

14. In a communication to the Secretariat prior to the twentieth session the delegation of France proposed a different formulation for what is presently the first sentence of paragraph (2 *bis*). The French proposal is as follows:

"Unless otherwise agreed by the sender and the beneficiary, a transfer is completed when the beneficiary's bank places the funds at the beneficiary's disposal or notifies him that it is holding the funds for his benefit, in accordance with article 8(1) or (6)."

If the French proposal was accepted, consequential changes would have to be made to paragraph (2) and to the second sentence of paragraph (2 *bis*).

Paragraph (3)

15. Paragraph (3) is concerned with a problem that is difficult, even though it does not involve a significant amount of money, when credit transfers pass through several banks. It could be expected that the originator would be responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international credit transfer, it cannot provide for that eventuality. In order to overcome that problem, paragraph (3) as it is set out above provides that the obligation is discharged by the amount of the charges that have been deducted as well as by the amount received by the beneficiary's bank. Therefore, the originator would not be in breach of contract for late or inadequate payment. Nevertheless, unless the beneficiary agrees to pay the charges,

which often occurs, the originator would be obligated to reimburse the beneficiary for them.

16. At the twenty-first session the Working Group decided that paragraph (3) should be redrafted to state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20).

17. In implementation of that decision the Secretariat would suggest that paragraphs (2 *bis*) and (3) should be redrafted as follows:

"(2 *bis*) A credit transfer is completed when the beneficiary's bank accepts a payment order consistent with the payment order issued by the originator. A payment order issued to the beneficiary's bank is consistent with the payment order issued by the originator even though the amount of the transfer has been reduced by fees charged by one or more intermediary banks. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.

(3) The provisions of paragraph (2 *bis*) do not prejudice any right the beneficiary may have to recover from the originator the amount of the fees deducted from the amount of the transfer."

18. A provision that the originator's bank has fulfilled its obligations to the originator when the credit transfer is completed has not been included, since it would seem to be a natural consequence of completion of the transfer.

19. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested that the decision of the Working Group might be implemented by the following redraft of paragraph (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 any receiving bank has 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."

20. *Comparison with Article 4A.* Article 4A-302(d) contains a prohibition on the collection of charges "by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges . . ." unless instructed by the sender to do so.

Article 4A-406(c) provides that if charges of one or more receiving bank have been deducted (perhaps by a foreign bank) "payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges".

Paragraph (4)

21. Paragraph (4) provided that the account of a sender, including but not limited to the originator, was to be considered debited, and the amount owed by the bank to the sender reduced or the amount owed by the sender to the bank increased when the receiving bank accepted the payment order. Paragraph (4) would have had its most important application in determining whether credit was still available in the account holder's account if legal process had been instituted against the account or insolvency proceedings had been instituted against the sender. At the twenty-first session the Working Group deleted the paragraph (A/CN.9/341, para. 22).

Order of paragraphs

22. With the new content of paragraph (3) the Working Group might consider that the logical order for article 15 would be paragraphs (2 *bis*), (3), (2), to be renumbered as (1), (2) and (3). Alternatively, current paragraph (2) might become a separate article.

New title of article and of chapter

23. At the twenty-first session the Working Group noted that the title of the article should be changed to reflect the current content of the article (A/CN.9/341, para. 23). If article 14 is divided into two articles, as suggested above, article 14 might be entitled "Completion of credit transfer" and article 14 *bis* might be entitled "Time and extent of discharge of obligation". If the article 14 is not divided, the title might be "Completion of credit transfer and discharge of obligation".

24. Whether or not current article 14 is divided, the title of the chapter might be changed to "Completion of credit transfer and discharge of obligation".

CHAPTER V. CONFLICT OF LAWS

Article 15. *Conflict of laws*

[(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an

originator and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.]

Prior discussion

A/CN.9/297, paras. 34 to 36

A/CN.9/317, para. 165

A/CN.9/WG.IV/WP.42, paras. 69 to 80

A/CN.9/341, paras. 24 to 49

Comments

1. The Working Group at its seventeenth session requested the Secretariat to prepare a draft provision on conflict of laws (A/CN.9/317, para. 165). The draft provision set out above was prepared for the eighteenth session of the Working Group. The problem of conflict of laws was considered in more detail in the report of the Secretary-General to the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80. That report considered the issues especially in light of the decisions of the Working Group at its eighteenth session that the text under preparation should be in the form of a model law for adoption by national legislative bodies and that it should be restricted to international credit transfers. At the twenty-first session the Working Group made a number of policy decisions that have not as yet been incorporated into the text. It also decided to place the entire article in square brackets pending a final review at a later session (A/CN.9/341, para. 49).

Inclusion of conflict of laws provisions in the Model Law

2. At the twenty-first session there was a long discussion as to whether the Model Law should retain any provision on conflict of laws (A/CN.9/341, paras. 33 to 37). One objection to retaining any provision was that a certain number of States were already parties to bilateral or multilateral conventions on conflict of laws, and in particular to the Rome Convention on the Law applicable to Contractual Obligations between the member States of the European Communities, and that it would be difficult for those States to adopt any conflict of laws provisions that might be in the Model Law. A second objection was that no single conflicts rule would be appropriate for both high-speed electronic transfers and paper-based transfers. A third objection was that, considering the complexity of the issues involved, the current text did not have the degree of refinement that would make it acceptable to most States.

3. The Working Group decided to retain a provision on conflict of laws, primarily on the grounds that it could not be anticipated that the law governing international credit transfers would be uniform in the entire world by virtue of all States having adopted the Model Law in its entirety.

Therefore, it was necessary for parties in States that had adopted the Model Law to know what law would govern the various relationships in an international credit transfer. Although it was possible that some States that would adopt the Model Law might have difficulties in adopting the conflict of laws provisions because of bilateral or multilateral conventions to which they might be a party, that was no more of a reason not to include such provisions in the Model Law than the existence of national provisions on the substance of the law governing credit transfers would be a reason not to include equivalent substantive provisions in the Model Law.

Paragraph (1)

4. One of the primary difficulties that the Working Group faced in preparing a legal regime for international credit transfers is the dichotomy between the point of view of the originator and beneficiary of the credit transfer (particularly when neither of those parties is a bank) and that of the implementing banks. From the point of view of the originator and the beneficiary, the transfer is a single operation in which their rights and obligations in respect of the transfer itself should be governed by a single law. From the viewpoint of the banks an international credit transfer is effectuated by a series of individual payment orders giving rise to rights and obligations of the sender and the receiving bank. From that point of view, each bilateral relationship in the credit transfer chain is a separate banking transaction. Being a separate banking transaction, the law applicable to that relationship might be different from the law applicable to the other bilateral relationships that taken together constitute the credit transfer chain. That, however, is unsatisfactory in that the smooth implementation of international credit transfers requires that the rights and obligations of all parties are consistent with one another.

5. The following proposal was made at the twenty-first session to overcome those difficulties:

"A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high-speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail."

6. In support of the proposal it was stated that it was particularly important that one set of rules govern the rights and obligations of all the parties when the transfer was a high-speed transfer (A/CN.9/341, paras. 24 to 32). It was said that, unless there was a means for the parties to elect the application of a single law as was here proposed, the general rules of choice of law reflected in article 15(1) would lead to the result that the law of different States would apply to the different segments of the credit transfer and that there would be no single law that would govern the entire credit transfer. It was pointed out that the technique suggested had already been implemented by CHIPS in its new rule 3 and the law of New York had been chosen to govern the entire transfer if any

part of it passed through CHIPS. (The CHIPS rule is set out in A/CN.9/WG.IV/WP.47.)

7. The proposal was rejected by the Working Group on the grounds that, even if it might be reasonable when restricted to the relationships between the banks, the proposal was excessive when it attempted to impose a law upon non-bank originators and beneficiaries that was different from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen. The proposal would have given the funds transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds transfer system might choose a law that was particularly favourable to the banks and unfavourable to the non-bank originators and beneficiaries.

8. At the twenty-first session the Working Group tried to find other rules that would also have led to the application of a single law to the entire transaction. One suggestion was that the substantive provisions of the Model Law applicable to the relations between the originator and the originator's bank should be governed by the law of the originator's bank but that the rest of the credit transfer should be governed by the law of the beneficiary's bank (A/CN.9/341, para. 38). Finally, it was decided that the only way to ensure that the Model Law might become applicable to the entire credit transfer was by its adoption by the several States concerned (A/CN.9/341, para. 39).

9. While the Working Group had not been willing to allow any group of banks to decide that the Model Law or any other law would apply to parties to the transfer that were not parties to the choice-of-law agreement, the Working Group was in favour of permitting the parties to choose any law they wished to govern their relationship (A/CN.9/341, paras. 44 and 45).

10. The Working Group decided that in the absence of a choice of law by the parties, the law of the receiving bank should apply to that segment of the transfer (A/CN.9/341, paras. 46 and 47). The only exception was that it should be made clear that the Model Law did not purport to determine what law would determine the authority of the actual sender to bind the purported sender under article 4(1).

Paragraph (2)

11. Although there was widespread sentiment at the twenty-first session for deleting paragraph (2) entirely, it was provisionally retained since a rule had been retained in article 14(2) as to the time when an obligation would be discharged by a credit transfer (A/CN.9/341, para. 48).

Comparison with Article 4A

12. Article 4A-507 is generally consistent with paragraph (1), as the Working Group decided at the twenty-first session to modify it, and with the second sentence of paragraph (2), except that Article 4A would apparently

apply the law of the receiving bank to the question whether an actual sender was authorized to send a payment order. Article 4A-507(c) is a slightly more complicated version of the provision set out in comment 5 that was rejected by the Working Group at the twenty-first session.

Proposed redraft of article 15

13. In a communication to the Secretariat subsequent to the twenty-first session the delegation of the United Kingdom suggested the following redraft of article 15:

"(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) Where the rights and obligations referred to in paragraph (1) are embodied in a contract, that paragraph shall not affect the application of any rule of law

(a) for determining which law governs the formal validity of the contract; or

(b) applying the law of another State if it appears from the circumstances as a whole that the contract is more closely connected with that State.

(4) Paragraph (1) shall not apply to the extent that its application would be manifestly incompatible with the public policy of the forum.

(5) The application of the law of any State specified by this article means the application of the rules of law in force in that State other than its rules of private international law.

(6) 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 of a bank in different States shall be considered to be separate banks."

14. The delegation of the United Kingdom noted that the purpose of paragraph (3) was to make article 15 compatible with the Rome Convention on the Law Applicable to Contractual Obligations. It also noted that its proposed redraft would delete the current paragraph (2).

Article 16

Except as otherwise provided in this Law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party.

Prior discussion

A/CN.9/318, para. 34

A/CN.9/WG.IV/WP.47

A/CN.9/341, paras. 50 to 52

Comments

1. At its eighteenth session the Working Group decided that the extent to which the Model Law would be subject to the agreement of the interested parties would be considered in connection with the individual provisions (A/CN.9/318, para. 34). As a result a number of the individual articles contained a provision permitting or restricting the parties from derogating from the specific provision. A part of a proposal submitted by the United States prior to the twenty-first session, and distributed as A/CN.9/WG.IV/WP.47, contained two paragraphs in respect of the right to vary the provisions of the Model Law. The first paragraph of the proposal was adopted by the Working Group as article 16 (A/CN.9/341, para. 52). The second paragraph, which was not pursued by the United States delegation after a corresponding proposal in respect of article 15 had been rejected (see comment 7 to article 15), provided that rules adopted by a funds transfer system could be effective between the participating banks "even if the rule conflicts with this law and indirectly affects another party to the funds transfer who does not consent to the rule."

2. Under article 16 the agreement of the affected party need not be with the party to the credit transfer who claims under the agreement. For example, an agreement of the originator with the originator's bank that the beneficiary's bank in another State could execute the payment order it received on the basis of the account number only would be binding on the originator as against the beneficiary's bank.

3. When the Working Group adopted article 16 it decided to review each of the substantive articles to determine whether the statements in the individual substantive provisions as to the effect of an agreement should be retained or could be deleted (A/CN.9/341, para. 52). In the current draft mention of the effect of contractual rules is made in articles 2(j), 4(4), 5(2)(b), 6(5), 7(1)(b), 8(4), 10(3), 10(4), 10(5), 12(7), 14(1), 14(3), 15(1) and 15(2). See the comments to those provisions as to the effect of article 16.

4. *Comparison with Article 4A.* Article 4A-501(a) is identical to article 16. Article 4A-501(b) is a longer version of the provision referred to in comment 1 and set forth in A/CN.9/WG.IV/WP.47 that was rejected by the Working Group at the twenty-first session.

Proposed title and location of the article

5. It is suggested that article 16 might be entitled "Variation by agreement". It is suggested that article 16 might be moved to article 3.

II. PROCUREMENT

A. Report of the Working Group on the New International Economic Order on the work of its twelfth session (Vienna, 8-19 October 1990)

(A/CN.9/343) [Original: English]

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*Gaps appearing in the numbering of the second draft of articles 1 to 27 are due to the deletion and consolidation of several articles contained in the first draft pursuant to decisions taken by the Working Group at the eleventh session.

INTRODUCTION

1. At its nineteenth session in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order.¹ The Working Group commenced its work on this topic at its tenth session, held at Vienna from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat.² The Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussions and decisions at the session.³

2. A draft of the model law on procurement and an accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25) were considered by the Working Group at its eleventh session (5 to 16 February 1990). The Working Group requested the Secretariat to revise the text of the model law taking into account the discussion and decisions at the session. It was agreed that the revision need not attempt to perfect the structure or drafting of the text. It was also agreed that the commentary would not be revised until after the text of the model law had been settled, and that no revision of the commentary would be prepared for the twelfth session of the Working Group. In addition, the Working Group requested the Secretariat to prepare for the twelfth session draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity.⁴

3. At its twenty-third session (25 June to 6 July 1990), the Commission expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously.⁵

4. The Working Group, which was composed of all States members of the Commission, held its twelfth session at Vienna from 8 to 19 October 1990. The session was attended by representatives of the following States members of the Working Group: Argentina, Bulgaria, Canada, Chile, China, Czechoslovakia, Egypt, France, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Morocco, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia.

5. The session was attended by observers from the following States: Finland, Kuwait, Lebanon, Oman, Pakistan, Philippines, Republic of Korea, Romania, Saudi Arabia, Switzerland, Thailand, Turkey.

6. The session was also attended by observers from the following international organizations:

(a) *United Nations organizations*: International Bank for Reconstruction and Development, International Labour Office, International Trade Centre UNCTAD/GATT, United Nations Industrial Development Organization;

(b) *Intergovernmental organizations*: League of Arab States, Office Central des Transports Internationaux Ferroviaires (OTIF);

(c) *International non-governmental organizations*: International Bar Association.

7. The Working Group elected the following officers:

Chairman: Mr. Robert Hunja (Kenya)

Rapporteur: Ms. Jelena Vilus (Yugoslavia).

8. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.V/WP.26);

(b) Procurement: review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law on Procurement (A/CN.9/WG.V/WP.27);

(c) Procurement: second draft of articles 1 to 35 of Model Law on Procurement (A/CN.9/WG.V/WP.28).

9. The Working Group adopted the following agenda:

(a) Election of officers;

(b) Adoption of the agenda;

(c) Procurement;

(d) Other business;

(e) Adoption of the report.

10. With respect to its consideration of item (c), the Working Group decided to turn its attention first to the second draft of articles 1 to 35 of the Model Law on Procurement (A/CN.9/WG.V/WP.28). It was decided to defer consideration of the review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law on Procurement (A/CN.9/WG.V/WP.27) until such time as the review of the second draft of articles 1 to 35 was completed.

DELIBERATIONS AND DECISIONS

I. Discussion of second draft of articles 1-27 of model law on procurement (A/CN.9/WG.V/WP.28)

Article 1 Application of Law

11. It was generally agreed that the application of the Model Law should be as broad as possible so as to achieve the greatest degree of uniformity in the law relating to procurement. To that end, the Working Group agreed that the word "all" should be added to the opening provision

¹Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 243.

²A/CN.9/WG.V/WP.22.

³A/CN.9/315, para. 125.

⁴A/CN.9/331, para. 222.

⁵*Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17 (A/45/17)*, para. 29.

of article 1, so that the provision would read along the following lines: "This Law applies to all procurement by procuring entities."

12. It was recognized, however, that some States might be reluctant to adopt the Model Law without the ability to exclude its application to certain types of procurement. In particular, it was said that States should be able to exclude procurement in cases where national defence or national security was involved, and possibly in other cases involving important national interests. An opposing view was that providing for exclusions from the application of the Model Law ran counter to the objective of uniformity of law.

13. The national security exclusion presently appearing in paragraph (2) of article 1 was regarded as too narrow, since it referred only to procurement for national security or national defence "purposes" and did not cover other cases involving national security or national defence (see also paragraphs 225 and 226 below).

14. It was agreed that a State should be able to exclude the application of the Model Law to particular types of procurement in a general manner, e.g., by setting forth the exclusions in article 1 of the Model Law enacted by it or in the procurement regulations, or on a case-by-case basis. Exclusions on a case-by-case basis should not be made in a secretive or informal manner. It was also agreed that a procuring entity should be able to apply the Model Law to procurement that fell within an exclusion if the entity wished to do so. In order to promote transparency, the applications of the Model Law in such cases should be brought to the attention of the contractors and suppliers in the tender solicitation documents.

Article 2 Definitions

15. It was observed that several of the definitions in this article served to delineate the scope of application of the Model Law. It was agreed that those definitions should be drafted as broadly as possible so as to maximize the coverage of the Model Law and thus promote uniformity of law.

16. It was stated that careful consideration should be given to whether some of the definitions provided in the article were necessary. Definitions that merely referred to other articles of the Model Law were said to be unnecessary. It was said that, in principle, definitions should be provided only when needed to assist the user of the Model Law in understanding its provisions, or to define terms of art that could be wrongly interpreted if not defined.

17. Reference was made to the importance of aligning the definitions provided in the article with the substantive provisions of the Model Law in which the defined terms were dealt with in order to avoid conflicts between the definitions and the substantive provisions. To deal with the possibility of such conflicts, a proposal was made to

add a provision establishing, in the event of an inconsistency, whether the definition or the substantive article was to prevail. The proposal was not adopted. A provision of that nature was said to be unknown in the legislative practice of many States. In addition, it was observed that definitions should be drafted so as not to conflict with substantive articles. It was noted that in the final stages of the drafting of the Model Law the definitions would have to be re-examined to ensure their consistency with the substantive articles.

18. A view was expressed that the *chapeau* of the article should be changed to read, "In this Law".

"Procurement" (new subparagraph (a))

19. It was agreed that the definition of "procurement" should read along the following lines:

"'Procurement' means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves, but not services in themselves."

20. The Working Group reaffirmed its earlier decisions (A/CN.9/331, para. 20; A/CN.9/315, para. 25) to deal at the present stage only with the procurement of goods and construction and not of services, except services that were incidental to the goods or construction being procured. It was noted that services were an important element of the Uruguay Round of trade negotiations currently being held under the auspices of the General Agreement on Tariffs and Trade (GATT), and it was said to be inappropriate to attempt to deal with services in the Model Law before those negotiations were completed. In addition, it was observed that, since services were not procured on the same basis or with the same procedures as goods and construction, additional provisions would have to be formulated for the Model Law if services were to be covered. In accordance with its decision not to deal with services, the Working Group agreed that the words "and the acquisition of telecommunications, transport or insurance services", that presently appeared at the end of the definition of "procurement", and the references to services that appeared elsewhere in the text, not be retained.

21. A view was expressed that the commentary to the Model Law should indicate whether the acquisition of goods or construction in the context of joint ventures, licensing, and other arrangements not specifically referred to in the definition of "procurement" were covered by the definition.

"Procuring entity" (subparagraph (a))

22. A proposal was made to not define "procuring entity" in the Model Law, but, instead, to indicate that each State should specify in an annex to the Model Law as enacted by it those entities that were to be covered by the Model Law. The proposal was not adopted. The prevailing view was that a definition of "procuring entity" along the lines presently provided in subparagraph (a) was useful

because it clarified that organs of the Government (referred to in subparagraph (a)(i)) as well as public and other entities that were not part of the Government (referred to in subparagraph (a)(ii)), were covered by the Model Law. In addition, by covering all organs of the Government except those specifically excluded, subparagraph (a)(i) was regarded as consistent with the policy of maximizing the coverage of the Model Law. In response to a view that a State should not be able to exclude any organs of the central Government from the coverage of the Model Law, it was observed that the ability to exclude certain organs was important for some States, and that those States might be reluctant to enact the Model Law if no exclusions were permitted.

23. It was agreed that the reference to "the administration" should be deleted from subparagraph (a)(i), as its meaning was not clear and it did not seem to add anything to the provision.

24. It was noted that subparagraph (a)(i) presented a difficulty in at least one country where governmental organs did not engage in procurement themselves, but, rather, did so through commercial enterprises owned by them. It was agreed that that situation could be addressed in the commentary to the Model Law.

25. A view was expressed that subparagraph (a)(i) should cover not only organs of the Government of the State enacting the Model Law, but also organs of governments of subdivisions of the State (e.g., governmental organs of units of a federation and of local units). In response, it was noted that, in some federal systems, the national Government could not legislate in respect of procurement for units of the federation or for local governmental units. However, units of the federation could adopt the Model Law themselves.

26. The Working Group considered various possible ways to cover in subparagraph (a)(i) organs of all levels of government and also to take account of the needs of federal States that could not legislate for governments of their subdivisions, but no satisfactory solution was found. Ultimately, the Working Group agreed to provide two alternative versions of subparagraph (a)(i). One version would cover all governmental organs, including governmental organs of subdivisions of a federation. It would be adopted by non-federal States and by federal States that could legislate for their subdivisions. The other version would cover only organs of the national Government; it would be adopted by federal States that could not legislate for their subdivisions.

27. A view was expressed that the criterion for determining whether an entity was to be covered by subparagraph (a)(ii) should be whether or not it engaged in procurement with funds provided by the Government. It was pointed out that in some States there were enterprises that in some cases engaged in procurement with funds provided by the State and in other cases engaged in procurement with their own funds. In response to that view it was generally agreed that the commentary should discuss the criteria that should be used for determining which entities should be covered by the subparagraph.

28. It was noted that a State might either specify categories of entities or identify specific entities to be covered by subparagraph (a)(ii).

"Goods" (subparagraph (b))

29. A proposal was made to refer in subparagraph (b) only to "moveable" goods, so as not to cover real property. It was pointed out, however, that the term "moveable" had particular juridical meanings in different legal systems, and that using the term might have unintended consequences in some legal systems.

30. With respect to the words within square brackets at the end of subparagraph (b), it was generally agreed that the reference to goods in solid, liquid or gaseous form should be retained. With respect to the references to energy, it was agreed that reference should be made only to electricity and not to nuclear or other energy. In that connection it was stated that only electricity itself, and the equipment that produced it, could be the subject of procurement.

31. A view was expressed that petroleum should be excluded from the definition of goods, as it was not purchased by procedures provided in the Model Law. It was noted that States where special rules for petroleum were needed could, in enacting the Model Law, determine how petroleum should be treated.

"Construction" (subparagraph (c))

32. It was generally agreed that subparagraph (c) be reformulated along the following lines:

"'Construction' means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities in connection with construction."

33. An opinion was expressed that activities such as drilling, mapping satellite photography and seismic investigation should be covered even if they were not connected with construction, since they were generally procured on the same basis and by means of the same procedures as goods and construction. The prevailing view, however, was that, without the link with construction, those activities might be regarded as services, which were not at the present stage to be dealt with in the Model Law; thus, the activities should be covered only where they were connected with construction.

"Procurement proceedings" (subparagraph (d))

34. Doubts were expressed as to whether the definition of "procurement proceedings" was needed. It was noted that the definition as presently formulated would be too restrictive if the Working Group were to decide to include in the Model Law types of proceedings in addition to those currently specified in the definition. It was decided

to delete the definition, recognizing that it would be possible to re-examine that decision if consideration of subsequent provisions of the Model Law revealed that a definition would be useful.

"International tendering proceedings"
(subparagraph (e))

35. Several difficulties were said to arise with respect to the definition of "international tendering proceedings" contained within square brackets in article 2(e). It was said that the definition gave rise to difficulties, for example, with respect to its application in the case of a contractor and supplier that had established a residence in a State solely to benefit from the State's advantageous taxation provisions, and in the case of a contractor or supplier that had places of business in more than one State. In the case of a contractor or supplier that was organized as a corporation, the definition gave rise to questions as to whether it referred to the State of incorporation, or to the States where the officers or shareholders had their residences or places of business. It was also pointed out that some States imposed different rules for determining who was a national of the State depending on the purpose for which nationality was relevant. In addition, the words "encourage and promote" were said to constitute statements of policy rather than legal norms. Various proposals were made with the aim of improving the definition, including a proposal that the reference to "habitual residences" be deleted and proposals directed at making the reference to places of business more specific.

36. It was questioned whether a definition of "international tendering proceedings" was necessary at all. In that connection, the Working Group considered the role of the term in the Model Law and the relationship among articles 2(e), 3(b) and 11. It was noted that, as provided in article 3(b), an underlying objective of the Model Law was to foster and encourage participation in procurement proceedings by competent contractors and suppliers, including, where appropriate, by what were referred to generally as "foreign" contractors and suppliers. It was observed that the Model Law provided various special procedures to be used in tendering proceedings when participation in those proceedings by "foreign" contractors and suppliers was to be fostered and encouraged. The function of article 11 was to establish when those special procedures were to be used.

37. The term "international tendering proceedings" was used in article 11 as a convenient way to refer to tendering proceedings involving the use of those special procedures. That usage of the term "international tendering proceedings" formed the basis of the definition that was contained in article 2(e).

38. In view of the close relationship between article 2(e) and article 11, the Working Group decided to defer further discussion of article 2(e) until it reached article 11, when the two articles would be considered together. At that stage the question of whether a definition of "international tendering proceedings" was needed, and, if so, its content could be reviewed. That subsequent discussion is reflected in paragraphs 118 to 120 below.

"Tender security" (subparagraph (f))

39. A proposal was made to delete the definition of "tender security". The definition was said to be unnecessary in view of the fact that the nature of the security required by the procuring entity would be stipulated in the tender solicitation documents. However, the definition was found to be acceptable in substance, subject to certain modifications and clarifications.

40. It was questioned whether the examples of types of tender securities listed in the definition were necessary. The prevailing view was that the examples were useful. It was agreed that a reference should be made to additional types of instruments that were used as securities, such as stand-by letters of credit, surety bonds, promissory notes and bills of exchange. It was also agreed that the reference to financial institutions should be deleted, since some types of tender securities were issued by institutions that in some States may not be regarded as financial institutions (e.g., by insurance companies).

41. In the light of the foregoing discussion, the following definition of tender security was found to be generally acceptable:

"'tender security' means a security for the performance of the obligations of a tenderer, including such arrangements as guarantees, surety bonds, letters of credit, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange."

"Currency" (subparagraph (g))

42. The Working Group found the definition of "currency" to be generally acceptable.

"Tendering proceedings" (subparagraph (g bis))

43. The Working Group found the definition of "tendering proceedings" to be generally acceptable.

"Competitive negotiation proceedings"
(subparagraph (h))

44. The definition presently set forth within square brackets was said to present the danger of conflicting with article 34. Pursuant to that view, a suggestion was made that the words within square brackets should be deleted and that the definition should simply refer to article 34. In opposition to that suggestion, it was said such a definition would serve no purpose.

45. The prevailing view was that the definition presently set forth within square brackets provided useful information to the user of the Model Law. It was agreed, however, that the wording should be expanded so as to refer to negotiations on a competitive basis between the procuring entity and "at least two" contractors and suppliers.

"Single source procurement" (subparagraph (i))

46. The Working Group found the definition of "single source procurement" to be generally acceptable.

"Contractor or supplier" (subparagraph (i bis))

47. A question was raised as to the suitability of the term "contractor", since a person or enterprise would not become a "contractor" until it entered into the procurement contract. It was agreed, however, that since the definition referred to "any potential party" to a procurement contract the definition was satisfactory.

"Responsive tender" (subparagraph (j))

48. It was generally agreed that the opening words of the definition should be changed to read along the following lines: " 'Responsive tender' means a tender that . . .".

49. It was observed that, in providing that a tender was responsive if it conformed to the requirements of the tender solicitation documents, the definition was inconsistent with article 28(4), which contained an exception to the necessity for conformity to the tender solicitation documents. To remedy that inconsistency, it was agreed that a reference to article 28(4) should be added to the definition. It was also agreed that the definition should be modified so as to refer to conformity with "all" requirements set forth in the tender solicitation documents.

50. A proposal was made that the definition should refer to "mandatory" requirements of the tender solicitation documents, in order to distinguish specifications or stipulations in the tender solicitation documents to which tenders must conform from those to which tenders need not conform and in respect of which tenderers might make offers to enhance their tenders. The proposal was not accepted because the word "requirement" itself implied that conformity was mandatory.

51. It was agreed that the words at the end of the definition beginning with "including requirements concerning" were superfluous and should be deleted.

52. In the light of the foregoing discussion, it was generally agreed that the definition should be reformulated along the following lines:

" 'Responsive tender' means a tender that conforms to all requirements set forth in the tender solicitation documents, subject to article 28(4)."

Article 3
Underlying objectives

53. It was agreed that the word "objectives" appearing within square brackets in the *chapeau* of article 3 should be retained.

54. A view was expressed that the statement of objectives should be retained in article 3. It was generally agreed, however, that since the statement of objectives of the Model Law presently set forth in article 3 did not create substantive rights or obligations for parties, it should be set forth in a preamble to the Model Law rather than in the body of the Law itself.

55. It was noted that, as article 3 was presently formulated, the objective of economy in procurement, set forth

in paragraph (a), was subordinate to the objective of efficiency, which was set forth in the *chapeau*. It was generally agreed that the objectives of economy and efficiency should be given equal status by removing the reference to efficiency from the *chapeau* and placing it in subparagraph (a), which would read, "to maximize economy and efficiency in procurement".

56. A view was expressed that the word "economy" that was used in the phrase "economy in procurement" in subparagraph (a), and the word "economic" used in the phrase "most economic tender" in article 28(7)(c), were unclear, and it was questioned whether the two words were intended to convey the same meaning. It was also said that both words should be defined. In response, it was stated that "economy in procurement" was a general term that referred to the procuring entity's obtaining the best value in the procurement, while "most economic tender", as defined in article 28(7)(c), referred to the two optional criteria to be used by the procuring entity for selecting the successful tender, namely, the tender with the lowest price or the lowest evaluated tender. It was also believed that no confusion between the terms "economy in procurement" and "most economic tender" was likely to arise, especially once the objective of economy in procurement was moved to the preamble.

57. It was agreed that the statement of the objectives of the Model Law should be expanded and should include a reference to the objective of promoting international trade.

58. It was agreed that the reference in subparagraph (b) to participation by contractors and suppliers whose places of business or habitual residences were located outside the enacting State would have to be aligned with the results of the consideration by the Working Group of the definition of "international tendering proceedings" in article 2(e). With respect to subparagraph (c), a view was expressed that the words "to promote competition between contractors and suppliers" should be changed to "to promote equal competition between contractors and suppliers".

Article 3 bis
International agreements or other international obligations of this State relating to procurement

59. There was general agreement with the rule in article 3 bis that, if the Model Law conflicted with a treaty entered into by a State enacting the Model Law, the treaty would prevail. Objection was expressed, however, to the rule whereby, in the event of a conflict of the Model Law with agreements between the enacting State and organs of other States, or with agreements between the enacting State and international financing institutions, those agreements would prevail over the Model Law. It was said that such agreements should not be treated in the same manner as treaties. It was noted that the rule that the agreements were to prevail conflicted with the principle in some legal systems that courts must apply national legislation even if that legislation was inconsistent with the State's international obligations. It was also said that the effect of the rule would be to authorize executive departments to enter

into agreements that abrogated legislation enacted by parliament, which would not be acceptable in some countries. Finally, it was stated that it would often be possible for States, in negotiating agreements with financing institutions, to avoid conflicts between those agreements and the Model Law enacted by the States.

60. The prevailing view was that the rule that international agreements were to prevail should be retained. The rule was said to be consistent with constitutional and legal principles in many legal systems, and reflected practice in connection with financing by international financing institutions. It was common for a borrowing State to agree that its loan agreement with the international financing institution would prevail over inconsistent provisions of national law. Such loan agreements were usually ratified by the parliaments of the borrowing States and were said to be in the nature of treaties. Thus, the agreements would, as a matter of law, usually prevail over inconsistent provisions in national legislation. Nevertheless, the express rule to that effect in article 3 *bis* was desirable in that it would prevent uncertainty on the part of procurement officers as to whether the agreement or the Model Law would prevail and would prevent consequent delays in procurement. It was stated that the concerns that some States might have about the conclusion by the executive branch of government of an agreement that prevailed over a law enacted by the parliament could be alleviated somewhat if the States were to designate in their procurement regulations the governmental organs that were authorized to enter into agreements with financing institutions.

61. It was pointed out that, according to the final phrase of article 3 *bis*, agreements with organs of other States and with international financing institutions would not completely replace the Model Law, but would apply only to the extent of a conflict with the Model Law. A view was expressed that, in order to emphasize the presumption of the applicability of the Model Law, article 3 *bis* should be redrafted to state that all procurements were to be governed by the Model Law, except to the extent that the Model Law conflicted with treaty or other international obligations of the enacting State.

62. It was agreed that article 3 *bis* should be modified so as to clarify that only agreements with governmental international financing institutions, and not agreements with non-governmental institutions, would prevail over inconsistent provisions of the Model Law. A proposal to expand the article to refer to agreements with all international institutions was not accepted. It was also agreed that the article should refer not only to obligations "under" treaties or agreements entered into by States but also obligations "arising out of" such treaties and agreements, in order to ensure that, for example, directives of the European Community (EC), which were promulgated pursuant to the EC Treaty, would prevail over inconsistent provisions of the Model Law.

63. A question was raised as to whether it was appropriate for article 3 *bis* to provide that not only existing treaties and agreements, but also future ones, prevailed over inconsistent provisions of the Model Law. That feature of article 3 *bis* was generally found to be acceptable.

Article 4

Procurement regulations

64. It was agreed that article 4 should be modified to take into account provisions of the procurement regulations excluding the application of the Model Law to certain types of procurement (see paragraph 14 above).

Article 5

Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

65. The Working Group found article 5 to be generally acceptable.

Article 6

Control and supervision of procurement

66. It was observed that, in some States, the organ that was to approve acts and decisions of the procuring entity might vary depending upon the act or decision in question. Accordingly, the Working Group decided to delete article 6, which vested in a single organ authority to approve all acts and decisions that were subject to approval. It also decided that each article dealing with an act or decision that was subject to approval should designate the organ that was to exercise the approval function. In order to enable a State to change the organ without having to amend the Model Law enacted by the State, it was suggested that the State should be able to change the organ by designating the new organ in the procurement regulations.

67. It was noted that the approval of acts and decisions of the procuring entity by another administrative authority was contrary to practice in some States. It was accepted that such States could delete references to the approval function when they enacted the Model Law.

Article 7

Methods of procurement and conditions for their use

68. The Working Group agreed with the approach presently reflected in paragraph (1), namely, that tendering was the preferred method of procurement.

69. With respect to paragraph (2), differing views were expressed as to the desirability of providing in the Model Law for procurement by competitive negotiation. According to one view, it was dangerous to provide for that method of procurement since it gave the procuring entity broad and uncontrolled freedom to negotiate with contractors and suppliers in any manner that it saw fit. In the absence of any procedural structure to control the negotiating process, the negotiations could potentially be engaged in by the procuring entity in a commercially inappropriate manner. Furthermore, no objective criteria were provided with respect to the selection of the contractor or supplier with which the procurement contract would

be concluded. Such criteria were said to be important in order to provide guidance to the procuring entity with respect to the negotiations, and to provide standards against which the decision of the procuring entity could be evaluated by an approving authority or in proceedings instituted for review of the decision. In short, the method was said to lack transparency and to be open to abuse. The view was also expressed that other, more appropriate, methods of procurement were available for procurement in the situations in which it was contemplated that competitive negotiation would be used.

70. The prevailing view was that competitive negotiation should be retained in the Model Law. It was said to be used in practice in several countries. It was also said to be the most appropriate method of procurement in certain cases, for example, in the procurement of goods or construction with a substantial technological component; thus it should be made available to procuring entities. Control could be exercised over the use of competitive negotiation by requiring the procuring entity to obtain approval for the use of that method from a higher supervisory authority or by subjecting its use to other methods of control and supervision. It was noted that, in some countries, administrative control over procurement was exercised by means of audit procedures after the procurement proceedings. It was questioned, however, whether that was an adequate method of control over the conduct of the proceedings. It was agreed that the conditions set forth in paragraph (2) as to when competitive negotiation could be used were not appropriate and should be revised.

71. The Working Group agreed that single source procurement, provided for in paragraph (3), should be retained in the Model Law. It also agreed that the method of procurement presently referred to in article 31 as two-stage tendering proceedings should be retained, but should be provided for in the Model Law as a separate method of procurement, and should not be dealt with in the section of the Model Law dealing with tendering proceedings.

72. It was generally agreed that the present draft of the Model Law did not provide a sufficient range or variety of appropriately differentiated methods of procurement to meet the needs of procuring entities. It was agreed, therefore, that additional methods should be provided, namely, request for proposals, to be used in cases where the procuring entity sought a variety of proposals for meeting its procurement need, and request for quotations, to be used for relatively low value procurement of readily identifiable goods.

73. As to the structure of article 7, the Working Group considered two possible approaches. Under one approach, article 7 would list each of the procurement methods provided by the Model Law and describe the conditions under which each method could be used. Under the other approach, the conditions for the use of the various methods would be set out in the articles of the Model Law dealing with those methods.

74. The Working Group appointed an ad hoc Working Party to consider the content and structure of article 7 in

the light of its discussion and decisions. The ad hoc Working Party was requested to elaborate conditions for the use of procurement methods other than tendering and the procedures involved in those methods. The following paragraphs reflect the discussion and decisions of the Working Group based on the recommendations of the ad hoc Working Party. The Secretariat was requested to take account of the discussion and decisions in preparing the next draft of the Model Law.

75. It was agreed that article 7 should contain a listing of all methods of procurement provided for in the Model Law. They would be: tendering, two-stage tendering, request for proposals, competitive negotiation, request for quotations and single source procurement. The conditions under which each method could be used, and the procedures involved in those methods, would be set out in individual articles of the Model Law dealing with each method. It was also agreed, subject to the decision of the Working Group concerning the treatment in the Model Law of the approval function, to provide that the decision of the procuring entity to use a method of procurement other than tendering would be subject to approval. The question of which organ would give such approval would be left to each State.

76. It was observed that the issue of whether tendering proceedings were to be open to contractors and suppliers without regard to nationality was dealt with in article 11. It was agreed that the issue of such participation in other methods of procurement should be dealt with in the articles dealing with each of those methods.

77. It was observed that the conditions under which a procuring entity would be entitled to engage in limited tendering proceedings was dealt with in article 12(2). The Working Group agreed that the Model Law should also deal with the conditions under which participation in proceedings involving other methods of procurement could be limited to particular contractors and suppliers chosen by the procuring entity.

Tendering proceedings

78. With respect to tendering proceedings, it was agreed that the substance of article 7(1) should be retained.

79. It was noted that, when the use of a method of procurement other than tendering proceedings was justified, the circumstances of a particular procurement might justify the use of more than one such method. For those cases, it was agreed that the following order of preference should be established: (i) two-stage tendering; (ii) request for proposals; (iii) competitive negotiation; (iv) request for quotations; (v) single source procurement.

Two-stage tendering

80. It was agreed that the conditions for use and procedures for two-stage tendering should be in essence those presently provided in article 31, with appropriate modifications made to take into account that the method was to be a separate method.

Request for proposals

81. It was agreed that the procuring entity should be entitled to use the request for proposals method when it had not identified a particular solution to its procurement need and required proposals as to various possible solutions. The Working Group did not accept a proposal to limit the use of that method to cases in which the use of two-stage tendering was not practicable.

82. As to the procedures to be followed in procurements involving this method, the procuring entity would request from contractors and suppliers proposals as to the means of solving its procurement need. The selection of the contractor or supplier with which to enter into a procurement contract would be based not only on price but also on other objective and quantifiable criteria. The evaluation of the proposals would involve the use of a list of weighted criteria, which would be clearly disclosed to contractors and suppliers. Contractors and suppliers would also be informed of the relative weights of the criteria to be used. The criteria would measure both the competence of the contractor or supplier submitting the proposal and the effectiveness of its proposal in meeting the procuring entity's procurement need. The effectiveness of the proposal would be evaluated separately from the price.

83. Disagreement was expressed with the requirement that the criteria for the selection of the contractor or supplier with which to enter into the contract had to be objective and quantifiable. It was noted that, for the procurement of some types of goods, such as computer systems, it was not possible to establish quantifiable criteria. In the circumstances in which the request for proposals method was designed to be used, it was frequently necessary for the evaluation process to contain a subjective element. In response to the suggestion that the request for proposals method should be adapted to the procurement of computer systems, it was pointed out that, because of the particular nature of those systems, special rules and procedures were being developed in practice for their procurement.

84. Disagreement was also expressed with the feature of the request for proposals method, contained in the formulation agreed to by the Working Group, that the competence of contractors and suppliers was to be evaluated together with the effectiveness of the proposal. It was stated that the competence of contractors and suppliers should be evaluated separately, and in accordance with precise and objective criteria of the type presently contained in article 8. It was said that to permit the procuring entity to evaluate the competence of contractors and suppliers together with the effectiveness of the proposal could introduce a subjective element in the evaluation of the effectiveness of the proposals, which would be undesirable.

Competitive negotiation

85. It was agreed that a procuring entity should be entitled to engage in procurement by means of competitive negotiation in the following circumstances:

(a) when, due to the nature, scope or volume of goods or construction, and in order to obtain the most satisfactory solution to its procurement needs, it is necessary to negotiate with contractors or suppliers in order to enable the procuring entity to evaluate their responses to its needs and to obtain the solution which represents the best value;

(b) when there is an urgent need for the goods and tendering would therefore be impossible or imprudent;

(c) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods and quantities sufficient to establish their commercial viability or to recover research and development costs; or

(d) when, for reasons of national defence or national security, there is a need for secrecy in respect of the procuring entity's procurement needs.

86. Disagreement was expressed with the circumstances referred to in subparagraphs (a) and (b) of paragraph 85, above. It was proposed that those circumstances should be narrowed so as to permit competitive negotiation to be used:

(a) when no other method of procurement was applicable, or the use of another method of procurement failed to result in a procurement contract because of a lack of responsive tenders or offers by qualified contractors or suppliers, or the selected contractor or supplier failed to enter into a procurement contract;

(b) when there was a special emergency, not created or suffered by the procuring entity, resulting in an urgent need for the goods or construction and it would not be possible to satisfy that need by any other methods of procurement.

87. It was said that such a formulation defined more concretely and clearly the circumstances in which competitive negotiation could be used, and would help ensure that that method of procurement, which was subject to few controls, would be used only when it was appropriate. It was also stated that the proposed formulation was in line with the stricter conditions for the use of competitive negotiation found in the directives issued by the Commission of the European Communities concerning procurement of supplies and public works. The proposal was not adopted. The formulation in the proposal of the circumstances in which competitive negotiation could be used was found to be too restrictive. The circumstances enumerated in paragraph 85, above, were found to be more consistent with practice in several countries and to meet the needs of procuring entities more satisfactorily. With respect to the circumstances mentioned in paragraph 86(a), above, it was pointed out that, in some situations, competitive negotiation might not be the only method of procurement available, but it might be the most appropriate method. It was said to be more desirable for those situations to be dealt with by the ranking system referred to in paragraph 79 than to prevent the competitive negotiation method from being used altogether. It was also said that the conditions for engaging in competitive negotiation

should relate to the nature of the procurement rather than to the failure of some other procurement method.

88. An objection was also raised to the formulation of the "emergency" situation in paragraph 86(b), above. It was said that preventing the procuring entity from using competitive negotiation when the emergency was imputable to the procuring entity was not in the public interest, and would make the Model Law unacceptable in some States.

89. It was agreed that the provisions of the Model Law concerning the procedures to be used for competitive negotiation should be along the lines of article 34 of the present draft.

Request for quotations

90. It was agreed that the request for quotations method should be used for the procurement of readily identifiable goods for which there was a commercial market. It would typically be used where the goods were of a relatively low total quantity and value.

91. With respect to the procedures to be followed in that method, the procuring entity would request quotations from several contractors and suppliers. It was suggested that, for procurements above a specified value, the procuring entity be obligated to advertise for price quotations. Each contractor and supplier would give one price quotation and would not be permitted to change its quotation. The procuring entity would not be permitted to negotiate with contractors and suppliers. The contract would be awarded to the contractor or supplier quoting the lowest price.

Single source procurement

92. The Working Group expressed general agreement with the conditions for the use of single source procurement set forth in article 7(3), and the procedures set forth in article 35.

Article 8

Qualifications of contractors and suppliers

New paragraph (1)

93. The Working Group found new paragraph (1) to be generally acceptable.

Paragraph (1)

94. Support was expressed for the approach of paragraph (1)(a)(i), which specified the national law that would govern the legal capacity of the contractor or supplier to enter into the procurement contract. That approach enabled the contractor or supplier to know whether or not it met the requirement of legal capacity and to submit the proper documentation to prove its capacity. As to the question of which State's law should apply, support was expressed for the law of the State of which the contractor or supplier was a national, as presently provided within

square brackets in paragraph (1)(a)(i). According to another view, the paragraph should refer to the law of the place of procurement.

95. The prevailing view, however, was that the paragraph should not specify the law of a particular State, but should leave that issue to be resolved by relevant conflict of laws rules, and that the words that presently appeared within square brackets in paragraph (1)(a)(i) should be deleted. In support of that view, it was pointed out that the law governing capacity to enter into a contract varied under the conflict of laws rules of different legal systems. It was stated that the Model Law should not attempt to unify those conflict of laws rules. It was also pointed out that it was not sufficient merely to designate the law of a particular State to govern the issue of capacity to enter into the contract, since it would be uncertain whether or not the designation included the conflict of laws rules of that State. If the designation did include conflict of laws rules, those rules might point to the law of some other State as governing the issue, and the question of whether or not a contractor or supplier had legal capacity might be resolved differently in the two States. It was also stated that not specifying which law was to govern the issue was unlikely to create any problems for contractors and suppliers, since disputes rarely arose concerning the question of capacity to enter into the contract. It was agreed that the commentary to the Model Law should discuss the various issues and problems that arose in connection with that question.

96. It was agreed that the word "receivership" within square brackets in paragraph (1)(a)(ii) should be retained.

97. The Working Group found paragraph (1)(a)(iii) to be generally acceptable.

98. A proposal was made that paragraph (1)(a)(iv) should be deleted for the reason that it was not possible in some countries for a contractor or supplier to obtain official certification that it had not been convicted of a criminal offence or held liable in civil proceedings. In response, it was noted that a contractor or supplier might submit to the procuring entity an affidavit to that effect. The utility of such an affidavit, however, was questioned, particularly if the procuring entity could not verify the information contained in it.

99. The Working Group decided to retain the reference in paragraph (1)(a)(iv) to convictions of contractors and suppliers of criminal offences, and the words within square brackets, "or based on the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract". It was proposed that reference should also be made to false statements or misrepresentations concerning the products of contractors and suppliers. The proposal was not adopted. The meaning of "products" was found to be uncertain and it was pointed out that some States had laws concerning misrepresentation and false advertising which dealt with the issue adequately.

100. A view was expressed that it should be clarified whether the reference in paragraph (1)(a)(iv) to criminal

convictions referred to convictions of the contractor or supplier itself, or also of its principal personnel and officers.

101. The Working Group decided to delete from paragraph (1)(a)(iv) the words, "and have not been held liable in civil proceedings for loss arising from the performance or failure to perform a procurement contract". That criterion for disqualification was found to be too broad, as the fact that a contractor or supplier had been held liable in civil proceedings did not necessarily impugn its qualifications to perform the procurement contract.

102. A proposal was made that paragraph (1)(a)(vi) should be located more prominently in the article, as it set forth the most important criteria with respect to the qualifications of contractors and suppliers. The Working Group decided to retain the words "managerial capability, reliability, experience and reputation" that appeared within square brackets in the paragraph.

103. Objections were raised to the right of the procuring entity to inspect the books of contractors and suppliers, provided for within square brackets in paragraph (1)(b). In support of that provision, it was stated that the ability to inspect the books can provide the procuring entity with sound and reliable information concerning the qualifications of a contractor or supplier. It was noted that contractors and suppliers were safeguarded by the *chapeau* of paragraph (1), which contained the proviso, "subject to the right of contractors and suppliers to protect their intellectual property or trade secrets". After discussion, the Working Group agreed that the ability to inspect the books of contractors and suppliers should be deleted from paragraph (1)(b), and that, instead, contractors and suppliers should be required to provide such verification of their statements concerning their qualifications as the procuring entity may reasonably require.

Paragraph (2)

104. The Working Group found paragraph (2) to be generally acceptable.

Paragraph (2 bis)

105. The Working Group found paragraph (2 bis) to be generally acceptable.

Paragraph (2 ter)

106. A view was expressed that the prohibition of discrimination against foreign contractors and suppliers in connection with the criteria and procedures for evaluating their qualifications was formulated too broadly. It was said that the paragraph could be interpreted so as to prevent differential treatment of foreign and domestic contractors and suppliers to achieve socio-economic objectives, and to prevent a State from requiring contractors and suppliers to be incorporated in that State as a condition for participation in procurement proceedings. In response, it was stated that socio-economic factors should play no role in evaluating the qualifications of contractors and suppliers, and that the paragraph would not prohibit

laws requiring contractors and suppliers to be incorporated in the State as a condition for participation in procurement proceedings if foreign contractors and suppliers were given a reasonable opportunity to become incorporated there.

107. The Working Group decided that paragraph (2 ter) should be retained in its present form and that the concerns that had been expressed in opposition to the formulation of the paragraph should be addressed when the Working Group considered article 11. It also agreed that the reference to "foreign" contractors and suppliers would have to be modified to accord with the decision of the Working Group concerning the definition of "international tendering proceedings" in article 2(e), and that the words "discriminates against" foreign contractors and suppliers should be changed to "discriminates against or among".

Paragraph (3)

108. It was agreed that the words within square brackets, "subject to the efficient operation of the procurement system", should be deleted, as they provided too much scope for arbitrary exclusion of contractors and suppliers from procurement proceedings.

109. It was agreed that paragraph (3) should be modified so as to preclude its application where prequalification proceedings had been engaged in, since a contractor or supplier that was not prequalified should not be able to participate in procurement proceedings under this paragraph.

110. It was observed that the paragraph as presently formulated was ambiguous as to whether it applied only to contractors and suppliers that met the qualification criteria but had merely been unable to supply the requisite proof, or also to contractors and suppliers that did not meet the criteria but wished to take steps to do so during the procurement proceedings. The Working Group agreed that the formulation should be clarified so that the paragraph would apply only to contractors and suppliers that met the qualifications criteria but had been unable to supply the requisite proof, perhaps by replacing the word "demonstrate" with "provide proof". It was also agreed that the paragraph should clarify that the contractor or supplier must submit the proof prior to the end of the procurement proceedings.

Article 10

Rules concerning documentary evidence provided by contractors and suppliers

111. Views were expressed that article 10 should be deleted. The article was said to be too detailed, and presented the danger of being used by a procuring entity to exclude a contractor or supplier from participation in the procurement proceedings on the basis of a failure by the contractor or supplier to comply with a formality specified in the article. In addition, it was observed that many States had laws concerning the legalization of documents, and those States could not be expected to adopt separate rules for documents used in procurement proceedings. It was

suggested that the issues dealt with in the article should be discussed in the commentary.

112. Support was expressed for the article in principle, as it would help prevent the procuring entity from excluding a contractor or supplier unfairly on the basis of a formality. However, paragraphs (2) and (3) were found to be too detailed. In addition, it was observed that the notarial function, referred to in paragraph (2), did not exist in all States, and that the paragraph lacked reference to various other categories of persons who had authority to certify documents, such as accountants. The utility of paragraph (3)(b) was also questioned.

113. The Working Group decided to retain paragraph (1), including the words "when the procuring entity requires that the documentary evidence be legalized". Those words ensured that the article would not be interpreted as requiring all documents provided by contractors and suppliers to be legalized, and clarified that the rules in the article would apply only when the procuring entity required a document to be legalized. In substitution for paragraphs (2) and (3), it was agreed that the article should provide that the procuring entity did not have the authority to impose any requirements as to the legalization of documentary evidence of the qualifications of contractors and suppliers other than requirements provided for in laws of the State enacting the Model Law relating to the legalization of documents of that type.

Article 11

International tendering proceedings

114. Support was expressed for the approach presently reflected in article 11, according to which the decision of whether or not to engage in international tendering proceedings was left to the discretion of the procuring entity. According to other views, however, the procuring entity should be required to engage in international tendering proceedings in certain cases, such as when the goods or construction to be procured exceeded a certain monetary value, or when engaging in such proceedings was necessary in order to achieve economy and efficiency in the procurement.

115. It was noted that the first draft of article 11 had contained an additional paragraph stipulating that the procuring entity was required to engage in international tendering proceedings when the goods or construction to be procured exceeded a certain monetary value, unless it obtained approval not to engage in international proceedings (A/CN.9/WG.V/WP.24, article 11(2)). It was said that, with the deletion of that paragraph pursuant to the decision of the Working Group at its eleventh session (A/CN.9/331, para. 58), the article was deprived of much of its function, namely, to establish when the procuring entity was to engage in international tendering proceedings. In its present form, the article merely stated the obvious, i.e., that the procuring entity "may" engage in international tendering proceedings. It was also said that the article could be given the undesirable interpretation that domestic tendering proceedings were the norm and

the procuring entity had to justify the use of international tendering proceedings as an exception.

116. The prevailing view favoured an approach to article 11 whereby there would be a presumption in favour of the use of international tendering proceedings, except where engaging in international proceedings would be contrary to the objectives of economy and efficiency or could be avoided on grounds specified in the procurement regulations. Each State enacting the Model Law would be able to specify its own grounds based upon its needs and circumstances. The requirement that the grounds had to be specified in the procurement regulations would promote transparency. A view was expressed that the presumption favouring the use of international proceedings should apply not only to tendering proceedings but also to other methods of procurement provided for in the Model Law.

117. A concern was expressed that the approach agreed upon did not provide sufficient guidance to States or procuring entities in determining when international tendering proceedings should be used. It was noted that the Model Law was being prepared for use by States worldwide, and such guidance was said to be of particular importance to countries that had little experience with international procurement. To meet that concern, it was stated that guidance could be provided in the commentary.

118. In connection with its discussion of article 11, the Working Group further considered the definition of "international tendering proceedings" in article 2(e). It was suggested that the difficulties with respect to the definition that had been raised during the earlier discussion of article 2(e) (see paragraphs 35 to 38 above) might be avoided by reformulating article 11 in a manner that did not involve the use of the term "international tendering proceedings". Accordingly, the Working Group decided that there was no need to retain the definition in article 2(e).

119. It was noted that the term was used in the Model Law as, in essence, a convenient way to refer to various special procedures, provided for in the Model Law, designed to make tendering proceedings conducive to participation by foreign contractors and suppliers. Those special procedures were to be used in tendering proceedings in the cases mentioned in article 11.

120. Based on the general approach upon which it had agreed with respect to article 11, the Working Group decided to reformulate the article along the following lines. The article would specifically refer to all special procedures that were encompassed within the term "international tendering proceedings" and would require the procuring entity to employ those special procedures in tendering proceedings, except where their use would be contrary to the objectives of economy or efficiency or to other grounds specified in the procurement regulations. Contractors and suppliers would be permitted to participate in those tendering proceedings without regard to nationality, except where, upon the grounds mentioned above, the procuring entity decided to permit only domestic contractors and suppliers to participate. Each enacting State would define "domestic" in accordance with its own

laws concerning nationality. Contractors and suppliers from particular States could also be excluded for other lawful reasons.

121. It was agreed that the Model Law should require the procuring entity to specify in the invitation to prequalify or in the invitation to tender whether the tendering proceedings were open to participation by contractors and suppliers regardless of nationality, or whether there were any restrictions with respect to the nationalities of the contractors and suppliers. Furthermore, it was agreed that the procuring entity should not be able to change a declaration that the tendering proceedings were open to participation by contractors and suppliers without regard to nationality and that the entity should be required to conduct the tendering proceedings in accordance with the declaration. It was agreed that article 14 was the appropriate location for such a provision.

Article 12 *Solicitation of tenders and* *applications to prequalify*

Paragraph (1)

122. It was agreed that the term "notice of proposed procurement", which in the present draft of the Model Law referred both to the medium by which applications to prequalify were solicited and the medium by which tenders were solicited, should be replaced by the separate terms "invitation to prequalify" and "invitation to tender".

123. It was agreed that the first sentence of paragraph (1) should be reformulated so as to avoid the implication that an invitation to prequalify and an invitation to tender must be published simultaneously, perhaps by using the words "solicit tenders or, where applicable, applications to prequalify". It was noted that, where prequalification proceedings were used, no invitation to tender would be needed since contractors and suppliers that were prequalified would automatically receive the tender solicitation documents and would be entitled to submit tenders.

124. A view was expressed that the phrase "language customarily used in international trade" was vague, and that greater precision should be provided with respect to the language in which the invitation to prequalify or the invitation to tender must be published when tendering proceedings were open to contractors and suppliers regardless of nationality. It was proposed that each State should specify in the procurement regulations the languages to be used. In opposition, it was stated that the proposed approach was unsatisfactory because a State might specify languages that were not widely understood. It was stated that the question of which language was to be used did not result in problems in practice, since it was in the interest of the procuring entity to use a language that was widely understood and that was appropriate for the procurement in question. After discussion, the Working Group agreed that the reference to "a language customarily used in international trade" should be retained and that issues concerning the languages of publication,

including the desirability of widespread dissemination and understanding of invitations to tender and invitations to prequalify, should be discussed in the commentary.

125. A view was expressed that the words "of wide international circulation" were an insufficiently precise categorization of the types of newspapers and other publications in which invitations to prequalify or invitations to tender were to be published. A proposal that the publications in which the invitations were to be published should be specified by an enacting State in an annex to the Model Law was not adopted, as it was found to be difficult to implement and potentially too rigid. Accordingly, the Working Group decided to retain the words "of wide international circulation", but to clarify that they referred both to newspapers and to trade publications and technical journals.

126. The Working Group decided that the sentence within square brackets at the end of paragraph (1) that read, "The foregoing provisions do not preclude the use of additional means of bringing the notice of proposed procurement to the attention of contractors and suppliers", should be deleted, and that the purport of the words should be expressed by stating that the invitations must be published, "at a minimum", in the publications referred to in the second sentence of the paragraph.

127. It was understood by the Working Group that nothing in article 12 or elsewhere in the Model Law prevented an enacting State from restricting, pursuant to international agreements of the enacting State, participation in procurement proceedings to contractors or suppliers from certain States or regions or from excluding contractors and suppliers from certain States, and that article 3 *bis* adequately gave effect to that understanding.

Paragraph (2)

128. A suggestion was made that the word "communicating" should be changed to "given" in order to avoid an implication that the invitation to prequalify or the invitation to tender must be received by the contractors and suppliers.

129. It was observed that both alternative versions of subparagraph (a) combined, on the one hand, the circumstances in which participation in tendering proceedings could be limited to certain contractors and suppliers, and, on the other hand, the rules concerning the selection of contractors and suppliers to participate and the manner in which tenders were to be solicited from them. It was proposed that the circumstances in which participation could be limited should be dealt with in article 7.

130. The Working Group decided to adopt alternative 1 of subparagraph (a). Alternative 2 was found to be too detailed and complex, and its content was adequately covered by alternative 1. It was agreed that the substance of alternative 2 should be discussed in the commentary. A proposal was made to use the words "limited participation", rather than "restricted participation," in order to avoid an unintended implication that the subparagraph dealt with restrictions on participation in tendering

proceedings to contractors or suppliers from certain States (see paragraph 6 above).

131. It was agreed that subparagraph (b) should be retained, subject to certain drafting improvements, e.g., with regard to the word "communication", and deletion of the reference to services.

Article 14

Contents of notice of proposed procurement

132. It was noted that the terminology used in article 14, such as "notice of proposed procurement" and "solicitation documents", would have to be changed in accordance with previous decisions of the Working Group.

133. It was agreed that subparagraphs (i) and (j) should be deleted from paragraph (1).

134. It was noted that the declaration as to whether or not the tendering proceedings were open to contractors and suppliers regardless of nationality (see paragraph 121 above) would have to be added to the listing in paragraph (1) of the information to be included in the invitation to prequalify and the invitation to tender.

135. While paragraph (2) was found to be generally acceptable, it was questioned whether it was necessary or appropriate to require certain of the types of information listed in paragraph (1), and incorporated by reference into paragraph (2), to be included in the invitation to prequalify. Some of that information, such as the deadline for submitting tenders, might not yet be known when the invitation to prequalify was issued. The necessity to state in the invitation to prequalify the price of the tender solicitation documents was also questioned. The Secretariat was requested to review paragraph (2) in light of those observations.

Article 16

Prequalification proceedings

136. A view was expressed that the placement of article 16 should be reconsidered, since, chronologically, prequalification proceedings took place prior to the solicitation of tenders, which was dealt with in article 12. According to another view, the Model Law should provide for prequalification proceedings not only in connection with tendering proceedings, as was the case in the present draft, but also in connection with other methods of procurement, such as competitive negotiations and requests for proposals. The views expressed were referred to the Secretariat for further consideration.

137. An observation was made that the cross-references that appeared in this and other articles complicated the text, and their usefulness was questioned. It was also stated that the wording of some cross-references should be reconsidered. It was generally agreed that the cross-references were useful and should be retained, and the Secretariat was requested to ensure consistency by including cross-references wherever relevant in the text.

138. It was stated that a degree of duplication existed among articles 8, 14 and 16, and the Secretariat was requested to consider the possibility of consolidating duplicated provisions.

139. It was agreed that the sentence within square brackets that read, "However, prequalification proceedings shall not be engaged in where participation in tendering proceedings is restricted pursuant to article 12(2)" should be deleted, since the procuring entity should be able to use prequalification proceedings even in the case of limited tendering.

140. A proposal to delete the final sentence, which appeared within square brackets, was regarded as a matter of drafting, and was left to be considered at the final drafting stage.

Paragraph (2)

141. Paragraph (2) was found to be generally acceptable, subject to possible consideration, at the final drafting stage, of the necessity of the words "a set of".

Paragraph (3)

142. Concern was expressed about the degree of detail that was contained in this paragraph and in other provisions of the Model Law. It was said that excessive detail could prejudice enactment of the Model Law in some States and thus defeat the objective of uniformity of law.

143. There was general agreement that the detailed requirements that had been included in the present draft, such as those in paragraph (3), were necessary in order to achieve economy and efficiency, fairness and other objectives of the Model Law. They were essential elements of the procurement system established by the Model Law and therefore should be implemented by enacting States in a mandatory and normative form. However, it was stated that, in order to simplify the text and thus enhance its worldwide acceptability, it was preferable for those detailed requirements to be deleted from the text of the Model Law and left to be implemented by enacting States in the procurement regulations. The commentary could provide guidance to States in implementing those requirements in the regulations. According to a further view, the Commission could, in the commentary, strongly urge enacting States to implement the requirements in a mandatory and normative form.

144. The prevailing view was that the detailed requirements should not be deleted from the text of the Model Law. To do so would leave many provisions of the Model Law with little more than precatory language. If the requirements were not set forth in the Model Law itself, they might not be adopted in some States, and might not be adopted in a satisfactory manner in other States, defeating the objectives of the Model Law and prejudicing uniformity of law. The commentary, which would not have a normative legal status, could not ensure that the requirements would be adopted as expected by the Commission.

145. It was noted that retaining the detailed requirements in the text of the Model Law would not preclude a State from enacting those requirements in the form of regulations if it wished to do so, as long as the requirements were enacted in the form set forth in the Model Law. To assist such States, a suggestion was made that the text of the Model Law might somehow indicate which provisions might be suitable to be transposed into procurement regulations. The Secretariat was requested to consider possibilities along those lines.

146. It was observed that certain types of information required by paragraph (3) to be included in the prequalification documents were also required by article 14 to be contained in the tender solicitation documents. The Working Group reaffirmed the decision at its eleventh session that such duplication was useful and should be retained (A/CN.9/331, para. 74).

147. It was generally agreed that the opening words of the *chapeau* of paragraph 3, requiring that the prequalification documents contain "all information", be changed to "the" information. Requiring that the prequalification documents contain "all" information would give rise to the possibility of claims by contractors or suppliers that certain information had been omitted from the documents. It was suggested that wording should be used in the *chapeau* to the effect that the information listed in paragraph (3) was the minimum information to be given in the documents.

148. It was agreed that the word "plus" that appeared towards the end of the *chapeau* be changed to "including". It was noted that the words "except subparagraph (e) thereof" should be changed to read "except subparagraph (e) or (g) thereof", to correct a typographical omission. A proposal to terminate paragraph (3) after the phrase "submit applications to prequalify" in the *chapeau* was not adopted.

149. The Working Group agreed that subparagraph (b) should be deleted. It was said that the provision was dangerous, in that it would give rise to the possibility of claims by contractors and suppliers that certain information claimed to be encompassed by the provision had not been given in the prequalification documents. It was also said that, with the change of the word "all" to "the" in the *chapeau*, the substance of the provision was covered by the *chapeau*. A view was also expressed that the information called for by the provision was not necessary in prequalification proceedings.

150. In other respects, the Working Group found paragraph (3) to be generally acceptable.

Paragraph (3 bis)

151. It was generally agreed that the word "promptly" should be deleted from the first sentence, and that the sentence should be reformulated to require the contractor or supplier to make its request for clarification and the procuring entity to respond to the request within a reasonable time prior to the deadline for the submission of applications to prequalify, so as to enable the contractor or

supplier to take account of the response in its application prior to the deadline. To that effect, wording along the following lines was suggested: "The procuring entity shall respond to any request by a contractor or supplier for clarification of the prequalification documents, made within a reasonable time prior to the deadline for the submission of applications to prequalify, so as to enable the contractor or supplier to make a timely submission of its application to prequalify."

Paragraphs (4) and (5)

152. The Working Group agreed that the procuring entity should be required to inform each contractor and supplier whether or not it had been prequalified, as presently provided in the first sentence of paragraph (4). It was agreed, however, that the relevant portion of the sentence should be reworded so as to require the procuring entity to notify "each" contractor and supplier whether or not "it" had been prequalified.

153. Competing considerations were noted with respect to disclosure of the names of contractors and suppliers that had been prequalified. On the one hand, it was said that disclosure of that information to the general public would enable members of the public to provide the procuring entity with information that might be relevant to the qualifications of a contractor or supplier. It was stated, however, that disclosure of the information after the acceptance of a tender, as provided by the words within square brackets in paragraph (4), would be too late to enable members of the public to come forward with potentially relevant information. Furthermore, it was important for contractors and suppliers that had not been prequalified by the procuring entity to know at an early stage those contractors and suppliers that had been prequalified, since that information was relevant for a possible challenge of the decision of the procuring entity denying prequalification.

154. On the other hand, it was said that disclosure at an early stage of the names of contractors and suppliers that had been prequalified could facilitate collusion among contractors and suppliers in the tendering proceedings. Pursuant to that consideration, it was said that disclosure should not be made until after a tender had been accepted or, at the earliest, after the deadline for submission of tenders. In response, it was doubted whether non-disclosure of the information would prevent collusion. Furthermore, it was observed that there existed in several countries laws relating to fair competition which could deal with the problem of collusion, although it was pointed out that the law in that area was not well developed in all countries.

155. Based on the foregoing considerations various proposals were made. One proposal was to terminate paragraph (4) after the words, "whether or not they have been prequalified", allowing each enacting State to determine what further information should be disclosed, to whom and at what time. A second proposal was to delete the words within square brackets, "after a tender has been accepted", so as to require disclosure to the general public of the names of contractors and suppliers that had been prequalified. However, each enacting State should be

allowed to specify when that disclosure should be made. A third proposal was to require the procuring entity to provide the information on request to each contractor and supplier submitting a prequalification application, and to require the disclosure of the information to the general public only after a tender had been accepted. A fourth proposal was to allow the procuring entity flexibility with respect to the disclosure of the information, but to require it to specify in the prequalification documents what information would be disclosed, to whom and at what time. A fifth proposal was that the names of contractors and suppliers that had been prequalified should be disclosed only to those that had not been prequalified. The rationale of the proposal was to provide unsuccessful contractors and suppliers with information they might need to challenge the prequalification proceedings, and to prevent collusion among contractors and suppliers that had been prequalified. It was said, however, that such a solution could lead to undesirable practices, such as the sale of the information by an unsuccessful contractor or supplier to a successful one. The Working Group requested the Secretariat to present those various possible approaches as alternatives in the next draft of the Model Law.

156. It was agreed that paragraph (5) should be reformulated so as to clarify and amplify the distinction between "grounds" for the denial of prequalification and "reasons to substantiate those grounds".

Paragraph (6)

157. It was noted that the issue addressed in paragraph (6) was also addressed in article 28(8 *bis*). However, paragraph (6), which referred to "re-evaluating" the qualifications of "contractors and suppliers that have been prequalified", was inconsistent with article 28(8 *bis*), which referred only to the contractor or supplier submitting the most economic tender and under which that contractor or supplier would be required "to reconfirm" its qualifications.

158. It was proposed that paragraph (6) should be deleted, as its purpose was more satisfactorily achieved by article 28(8 *bis*), particularly in view of the stipulation in article 28(8 *bis*) that the criteria to be used for the reconfirmation had to be the same as those used in the prequalification proceedings.

159. It was stated, however, that article 28(8 *bis*) was unclear as to whether the contractor or supplier would merely have to update information previously submitted with respect to its qualifications, or whether its qualifications would be completely re-evaluated. In addition, a view was expressed that, when prequalification proceedings were used, article 28(8 *bis*) should merely give the procuring entity the right to require the successful tender to reconfirm its qualifications; the procuring entity should not be obliged to do so, as was presently the case under article 28(8 *bis*). It was noted that, if the Model Law were to provide for prequalification proceedings in connection with methods of procurement in addition to tendering, the provisions concerning the reconfirmation of qualifications would have to be made applicable to those other methods as well.

160. It was said that paragraph (6) might have some utility if it were reformulated so as to give the procuring entity the right to revise its decision that a contractor or supplier was qualified if it subsequently appeared that the contractor or supplier was not qualified.

161. The prevailing view was that paragraph (6) was unacceptable in its present form. The Working Group decided to defer its decision on the necessity for the paragraph or its formulation of the paragraph until its consideration of article 28(8 *bis*).

Article 17

Provision of solicitation documents to contractors and suppliers

162. The Working Group found article 17 to be generally acceptable.

Article 18

Contents of solicitation documents

163. The discussion and decision of the Working Group on the subject of cross-references in connection with article 16, reflected in this report in paragraph 137, above, also applied in respect of article 18.

164. The Working Group decided to change the word "all", appearing within square brackets in the *chapeau*, to "the". A proposal that the final words of the *chapeau*, "including, but not limited to, the following information", should be changed to "namely", was not adopted, as that change was said to reduce the scope of the information required by the *chapeau*. It was decided that the words within square brackets, "and information concerning the procedures for the opening, examination, comparison and evaluation of tenders", should be retained.

165. The Working Group found subparagraphs (a), (i), (k), (m), (o), (q), (r) and (t) to be generally acceptable.

166. In subparagraph (b), in the reference to criteria for "the evaluation of the qualifications of contractors and suppliers or relative to the reconfirmation of qualifications", the Working Group decided to replace the word "or" with the word "and" in order to make clear that the criteria set out in article 8 are to govern evaluation of qualifications at any stage of the procurement proceedings.

167. The Working Group decided to delete the words within square brackets in subparagraph (d), since they were not needed in view of the change to article 10 that had been agreed upon by the Working Group.

168. In connection with subparagraph (e), it was agreed that the cross-reference to article 20 should be relocated so as to more clearly relate to "technical and quality characteristics".

169. A proposal was made that, in the opening words of subparagraph (f), the word "required" in reference to the

terms and conditions of the procurement contract should be changed to "mandatory". The word "mandatory" was said to have a more precise meaning than "required". According to another view, however, the use of words such as "required" or "mandatory" gave rise to unintended and undesirable implications, e.g., that some terms or conditions of the contract might not be mandatory, or that certain aspects of tenders could be subject to negotiations.

170. A further view was that subparagraph (f) should require the tender solicitation documents to contain all the terms and conditions of the contract. In addition, it was proposed that the documents should contain a form of the contract that was to be signed by the successful tenderer. In response, it was observed that the successful tenderer would not necessarily be called upon to sign a written procurement contract; in some cases, the contract might be formed simply by the notification to the tenderer that its tender had been accepted. In that connection, a proposal was made to change the words "of the procurement contract" to "of any procurement contract". It was also stated that it should not be necessary for the tender solicitation documents to contain all of the contractual terms and conditions, since the procuring entity might not be in a position to finalize certain terms and conditions (i.e., those not relating to the essence of the contract) when the tender solicitation documents were issued. It was suggested that subparagraph (f) require the documents to contain the "essential" contractual terms and conditions. In response to that suggestion, however, it was stated that it was difficult to distinguish between essential and non-essential terms and conditions.

171. In the light of the foregoing discussion, the Working Group decided to omit any characterization of the contractual terms and conditions to be included in the tender solicitation documents, and to avoid an implication that a contract document must be signed in all cases, by changing the opening words of subparagraph (f) to refer to "the terms and conditions of the procurement contract and the contract form, if any, to be signed by the parties".

172. Views were expressed in favour of retaining the material within square brackets in subparagraph (f). According to that view, it was important to maintain the reference to the allocation between the parties of the risk of higher costs of performing the contract. Retention of the reference was said to be important in view of the deletion by the Working Group, at its eleventh session, of article 21, which dealt with the same subject. In opposition, it was stated that retention of the reference would be inconsistent with the decision to delete article 21. A further view was that the references to certain additional terms and conditions, such as the means of settling disputes, were useful and should be retained.

173. The decision of the Working Group was that the material within square brackets in subparagraph (f) should be deleted in its entirety, since the choice of examples of types of contractual terms and conditions to be mentioned was arbitrary and, in any event, the examples mentioned were already covered by the opening words of the subparagraph.

174. It was agreed that the word "solicited" in subparagraph (g) should be changed to "permitted", in view of the decision by the Working Group at its eleventh session that the Model Law should not deal with the solicitation of alternative tenders.

175. It was agreed that the word "designation" in subparagraph (h) should be changed to "description".

176. In connection with subparagraph (k), a suggestion was made that article 12(1) should be divided into two subparagraphs in order to differentiate in a clear manner the rule of general application, contained in the first sentence, from the rule applicable only in the case of international tendering proceedings, contained in the remainder of the paragraph.

177. The Working Group decided to delete the words at the end of the first sentence of subparagraph (l), relating to any choice offered by the procuring entity with respect to the tender security, since that subject-matter was covered by the preceding wording of the subparagraph. It was also agreed that subparagraph (l) should include references to any other types of security, such as securities for the performance of the contract and other securities such as labour and materials bonds, that the procuring entity required.

178. It was agreed that the reference in subparagraph (n) to the time and place of a meeting of contractors and suppliers should be reformulated so as to require the procuring entity to stipulate in the tender solicitation documents only whether or not it planned to hold such a meeting. It was noted that the time and place might not be known when the tender solicitation documents were prepared.

179. The Working Group agreed to consider subparagraph (n bis) when it considered article 22(2) (see paragraph 199 below).

180. It was agreed that subparagraph (p) should terminate immediately after the reference to article 28(7)(c). The material following that reference was found to be unnecessary, as its subject matter was already covered by the preceding wording of the subparagraph. Including that material was said to present the danger of inconsistency with article 28. A proposed addition to the subparagraph, that the tender documents should state how solicited and unsolicited alternative tenders would be treated, was not adopted, since that issue was covered by the portion of the subparagraph that the Working Group had decided to retain.

181. Objections were raised to subparagraph (s) in its entirety. The subparagraph was said to put too onerous a burden on the procuring entity to identify the laws referred to in the subparagraph. It was noted that laws pertinent to the performance of the procurement contract, in particular, were potentially wide-ranging, and the procuring entity might not be aware of all of them. A particular problem was noted in the case of States with federal systems, where it was sometimes difficult to ascertain whether the national law or the law of subdivisions of the federation

applied. It was also stated that contractors and suppliers should be expected to obtain their own competent professional legal advice with respect to the relevant laws. Furthermore, subparagraph (ii) was said to be outside the proper ambit of the Model Law, as it dealt with laws pertinent to the performance of the procurement contract, rather than to the tendering proceedings. A view was expressed that subparagraph (s) in its present form should be replaced by the formulation used in article 16(3 *bis*).

182. According to an opposing view, it was reasonable to expect the procuring entity to be aware at least of the laws and regulations pertinent to the procurement proceedings in which it was engaging. The information required by subparagraph (s)(i) was said to be useful to contractors and suppliers and it was stated that the provision should be retained, subject to the removal of the reference to "other laws and regulations . . . directly pertinent to the tendering proceedings" and the relocation of that reference to subparagraph (s)(ii). Subparagraph (s)(ii) was also said to be useful, and a proposal was made to retain that provision, subject to deletion of the words "of itself" so that an omission of a law or regulation referred to in the provision would not constitute grounds for review under any circumstances. A further proposal was to retain subparagraph (s)(i) subject to deletion of the word "all" from the phrase "all other laws and regulations", but to delete subparagraph (s)(ii).

183. The decision of the Working Group was to retain subparagraph (s)(i), to delete the word "all", to add a proviso to the effect that "the omission of any such reference shall not constitute grounds for review under article 36 or give rise to liability on the part of the procuring entity", and to delete subparagraph (s)(ii).

184. It was agreed that, instead of referring only to countertrade commitments, subparagraph (u) should refer to all commitments to be made by the contracts or supplier outside the contract, such as commitments relating to countertrade and to the transfer of technology. It was said to be important for contractors and suppliers to be aware that such commitments would be required, as they could alter the balance of the commercial relationship between the parties.

185. It was agreed that subparagraph (v) should be deleted, as the subject-matter of the subparagraph was sufficiently addressed in the Model Law itself and required no further elaboration in the tender solicitation documents.

186. A view was expressed that the information required by subparagraph (w) was of fundamental importance to contractors and suppliers and that the subparagraph should be retained. In opposition, it was stated that the subject-matter of the subparagraph was already covered by subparagraph (s). Another view was that the right of review would be dealt with in the section of the Model Law dealing with review, and that it was unnecessary for the right to be mentioned in the tender solicitation documents. The Working Group decided to defer its decision with respect to the subparagraph until it discussed the section on review.

187. The Working Group decided to retain subparagraph (x), on the grounds that it was important for tenderers to know that the procuring entity had the right to reject all tenders.

188. With respect to subparagraph (y), the Working Group agreed that it was important for a tenderer to know what formalities would be required for the contract to enter into force. It was also agreed that the commentary should mention what formalities were envisaged by this subparagraph, including such formalities, where applicable, as the signing of a contract document and approval of the contract by a supervisory body.

Article 19

Charge for solicitation documents

189. A view was expressed that it would be preferable for article 19 to provide that the charge for the tender solicitation documents must "not exceed" the cost of printing the documents and providing them to contractors and suppliers, rather than, as in the present draft, that the charge "shall reflect only" that cost. In support of the present wording, it was observed that accounting practices for determining such costs were not uniform and differed among States, and that it was not practicable to require the procuring entity to calculate the costs precisely. The Working Group decided to retain the article in its present form.

Article 20

Rules concerning description of goods or construction in prequalification documents; language of prequalification documents and solicitation documents

190. A view was expressed that the present title was too lengthy and that the title of the article in the first draft (A/CN.9/WG.V/WP.24), which read, "Rules concerning formulation of prequalification documents and procurement documents", was preferable. The Working Group decided to retain the present title.

191. The Working Group decided to delete the word "unnecessary", which appeared within square brackets in paragraph (1), as it was said that the word contained a subjective element and that its use could lead to disputes as to whether or not obstacles to participation were "necessary".

192. A proposal was made to delete the word "objective", used in paragraph (2) in reference to technical and quality characteristics of the goods or construction to be procured. Its meaning was said to be uncertain. It was also said that the word was not needed since technical and quality characteristics were inherently objective. Various proposals were made with a view towards expressing more satisfactorily the intent of the word "objective" in the context of paragraph (2), namely, to prevent the use of subjective terms in describing the technical and quality characteristics of the goods or construction. After

discussion, the Working Group decided to retain the word "objective".

193. The Working Group found subparagraphs (a) and (b) of paragraph (3) to be generally acceptable. It was noted that, at its eleventh session, the Working Group had decided to delete the rule that had appeared in article 20(3)(c) of the first draft to the effect that, in international procurement proceedings, international standards should be used, where available, in the formulation of the prequalification documents and the tender solicitation documents. A view was expressed that the rule should be reintroduced into paragraph (3), since the use of national standards by the procuring entity might create difficulties for foreign contractors and suppliers, who might be unfamiliar with those standards or who might not be able to comply with them. There was insufficient support in the Working Group for revising its previous decision to delete the preference for the use of international standards.

194. It was agreed that the final sentence of paragraph (4), which appeared within parentheses and read, "In the event of a variation or conflict between language versions, the version in the language customarily used in international trade shall prevail", should be deleted. It was said that a State enacting the Model Law would be unlikely to agree to a provision according to which another language was to prevail over its own official language. It was also agreed that the commentary should discuss the problems and issues arising from conflicts between different language versions of the prequalification documents and the tender solicitation documents. It was further agreed that the commentary should suggest that the different language versions of the tender solicitation documents should be issued separately, as the issuance of tender solicitation documents in bilingual versions was reported to cause difficulties in practice.

Article 22

Clarifications and modifications of solicitation documents

Paragraph (1)

195. A proposal was made to delete the word "promptly". Instead, the second sentence of paragraph (1) should specify a period of time prior to the deadline for submission of tenders by which the procuring entity must respond to a request for clarification of the tender solicitation documents. In response, it was said to be impossible to stipulate a specific period of time that would be appropriate in all cases of procurement and for conditions in all regions of the world. The Working Group agreed that the sentence should be reformulated so as to accord with the decision taken by the Working Group in connection with article 16(3 *bis*) (see paragraph 151 above).

196. With respect to the final sentence of paragraph (1), a view was expressed that the response by the procuring entity to a request for clarification of the tender solicitation documents should have to be communicated to all contractors and suppliers that were provided with the tender solicitation documents only if the response affected

all such contractors and suppliers, and not just the contractor or supplier that made the request. In response, it was said that the sentence as presently formulated ensured equal treatment of all contractors and suppliers, and avoided the necessity for the procuring entity to make a judgment as to whether or not a response to a request for clarification had general applicability.

Paragraph (2)

197. In connection with paragraph (2), the Working Group engaged in a discussion concerning the right of the procuring entity to modify the tender solicitation documents. Views were expressed that some limits should be imposed on that right in order to protect contractors and suppliers that had invested considerable amounts of time and money in preparing their tenders. One proposal was that the procuring entity should not be able to make "substantive" modifications to the tender solicitation documents. Another proposal was that the procuring entity should be permitted to modify the documents only "within a reasonable time", with the intent that modifications would not be permitted at a late stage in the preparation of tenders. It was also proposed that remedies, such as compensation, should be provided to contractors and suppliers who suffered loss as a result of the modifications if the modifications were occasioned by factors attributable solely to the procuring entity. It was said that such a provision would provide greater balance with respect to the rights of the parties.

198. The prevailing view was that the right of the procuring entity to modify the tender solicitation documents should not be restricted in the Model Law. It was accordingly decided that the words in paragraph (2), "provided that the right to do so has been specified in the solicitation documents", and the companion provision in article 18(*n bis*), should be deleted. In support of that view, it was stated that the right of the procuring entity to modify the tender solicitation documents was fundamental and necessary in order to enable the procuring entity to obtain goods or construction that met its needs. That right should not be restricted to non-substantive modifications. It was also agreed, however, that contractors and suppliers should be given reasonable notice of the modifications and an opportunity to take the modifications into account in their tenders. The possibility that the tender solicitation documents might be modified was said to be a normal commercial risk that was generally accepted by contractors and suppliers as a normal part of doing business. It was observed that, under articles 25(3) and 26(2)(*d*), contractors and suppliers could withdraw their tenders without forfeiting their tender securities if they did not wish to accommodate their tenders to modifications in the tender solicitation documents. It was also pointed out that, if the procuring entity encountered a need to modify the tender solicitation document but was unable to do so under the Model Law, its only other possible course of action would be to reject all tenders and recommence procurement proceedings, which would work a greater hardship on contractors and suppliers than modification of the documents. The Working Group also agreed, however, that the commentary advise the procuring entity to try to avoid modifying the documents.

199. A proposal was made to reformulate article 18(*n bis*) in such a manner that the statement to be included in the tender solicitation documents concerning the right of the procuring entity to modify those documents would merely constitute information given to contractors and suppliers, and that inclusion of the statement would not be a condition to the exercise of that right. The proposal was not adopted. It was said that such a formulation could be misinterpreted to mean that inclusion of the statement would be a condition to the exercise of the right to modify the documents. In addition, specification in the tender solicitation documents of the right of the procuring entity to modify the documents was encompassed by an earlier decision of the Working Group that matters adequately dealt with in the Model Law itself need not be reflected in the tender solicitation documents.

Paragraph (3)

200. A view was expressed that the words contained within square brackets in paragraph (3) could give the erroneous impression that, when a procuring entity responded by telephone to a request for clarification from a contractor or supplier, a written confirmation of the response was to be given only to the contractor or supplier that made the request. It was agreed that the paragraph should be reformulated so as to clarify that the written confirmation must be given to all contractors and suppliers to which the procuring entity sent the tender solicitation documents. A view was expressed that paragraph (3) might be merged with paragraph (1).

Paragraph (4)

201. The Working Group found paragraph (4) to be generally acceptable.

Article 23
Language of tenders

202. It was stated that the present formulation of article 23 was ambiguous as to whether or not the procuring entity could permit tenders to be submitted in languages other than those in which the tender solicitation documents had been issued. In order to remedy that ambiguity, it was agreed that the words "or in any other language which the procuring entity specifies in the tender solicitation documents" should be added at the end of the article.

Article 24
Submission of tenders

Paragraphs (1) and (2)

203. A view was expressed that the portion of paragraph (1) making particular reference to foreign contractors and suppliers should be deleted, in order to avoid an impression that those contractors and suppliers should receive special treatment. In conformity with that view, the Working Group decided to reformulate the second sentence of the paragraph so as to read along the following lines: "The deadline shall allow sufficient time for all

interested contractors and suppliers to prepare and submit their tenders." It was further agreed that the deleted portion of the sentence, making special reference to foreign contractors and suppliers, should not be added to the commentary.

204. The Working Group found paragraph (2) to be generally acceptable.

Paragraph (2 bis)

205. A view was expressed that the words "unforeseen circumstances" were ambiguous in that it was uncertain whether foreseeability was to be ascertained according to an objective or a subjective standard. It was accordingly agreed that the words should be replaced by a reference to circumstances beyond the control of contractors and suppliers. It was also agreed that the commentary should explain that, under the paragraph as thus amended, the determination as to the existence of circumstance beyond the control of contractors and suppliers, and the decision to extend the deadline for submission of tenders, rested with the procuring entity.

Paragraph (2 ter)

206. It was agreed that the final sentence of paragraph (2 *ter*), contained within square brackets, should be reformulated so as to clarify that any notice of extension of the deadline for submission of tenders given by telephone had to be given by telephone to all contractors and suppliers to which the procuring entity had provided the tender solicitation documents. To that end, it was agreed to add, after the words "provided that", words along the following lines: "such telephone notice is given to all such contractors and suppliers and provided that . . .". It was agreed that the same addition should be made in other provisions of the Model Law containing the same wording in reference to notices or other communications by telephone.

Paragraphs (3) and (4)

207. It was agreed that the second sentence of paragraph (4), contained within square brackets, should be deleted, since the submission of tenders by means other than in writing and in sealed envelopes would be inconsistent with the principle that tenders must remain secret until their opening. In consequence of that decision, it was agreed that the words "or considered" in paragraph (3) were no longer necessary and should be deleted.

Article 25
*Period effectiveness of tenders;
modification and withdrawal of tenders*

Paragraph (1)

208. The Working Group found paragraph (1) to be generally acceptable.

Paragraph (2)

209. In connection with subparagraph (*a*), the Working Group decided to delete the words "in exceptional

circumstances", since they created a potential for disputes. It was agreed that the final sentence of the subparagraph, contained within square brackets, should be retained, subject to alignment with changes made by the Working Group to the same wording used in other provisions of the Model Law (see, e.g., paragraph 206 above).

210. With respect to subparagraph (b), it was generally agreed that, for the protection of the procuring entity, a contractor or supplier that agreed to an extension of the period of validity of its tender should also be required to extend its tender security. However, making it mandatory for the procuring entity to require such contractors and suppliers to extend their tender securities was found to be unsatisfactory. It was said to be inconsistent with the general tenor of the Model Law, which was directed mainly to the relationship between the procuring entity and contractors and suppliers to it. The obligation imposed on the procuring entity by the subparagraph as presently formulated was not directed at that relationship. It was accordingly agreed that the subparagraph should be reformulated so as to provide that a contractor or supplier that agreed to extend the period of validity of its tender should also extend the validity of its tender security.

Paragraph (3)

211. A view was expressed that modifications of tenders should have to be submitted in writing and in sealed envelopes.

212. A drafting suggestion was made that all provisions in the Model Law using similar wording concerning the form in which notices or other information was to be communicated should be consolidated into a single provision so as to avoid duplication.

213. It was agreed that paragraph (3) should be retained, but that the words "but not thereafter" should be inserted after the words "deadline for the submission of tenders", appearing towards the beginning of the paragraph, in order to clarify that a tender may not be modified or withdrawn after the deadline.

Article 26 Tender securities

Paragraph (1)

214. The Working Group found subparagraph (a) to be generally acceptable.

215. Subparagraph (b) was found to be unsatisfactory in its present form. The drafting of the subparagraph was found to be difficult to understand, and the meaning of certain terms, such as "foreign institution or entity", was said to be unclear. With respect to the substance of the paragraph, it was observed that many States had laws governing various aspects of securities and guarantees of the nature dealt with in article 26. It was said that the acceptability of the Model Law to States would be prejudiced if the subparagraph required a procuring entity to accept a tender security that it would not otherwise be

permitted to accept under the law of that State, or if the subparagraph were otherwise inconsistent with that law.

216. It was stated that subparagraph (b), which restricted the ability of the procuring entity to reject a tender security on the ground that it was issued by a foreign institution, seemed inconsistent with the principle, presently contained in subparagraph (c), that the tender security should be from an institution that was acceptable to the procuring entity. That principle was said to be important in order to enable the procuring entity, for example, to reject a tender security from an institution that was not creditworthy.

217. According to another view, subparagraph (b) served no useful purpose as, in essence, it did little more than provide that the tender security must conform with the law of the State of the procuring entity. In response, it was noted that underlying the subparagraph was the principle of non-discrimination against foreign contractors and suppliers with respect to tender securities. When subparagraph (b) was considered in connection with subparagraph (c), the general principle emerged that, subject to there being no discrimination against foreign contractors and suppliers, the tender security must be acceptable to the procuring entity. The Working Group agreed with that general principle and requested the Secretariat to find a means to express it in a more satisfactory manner, either in two subparagraphs, as in the current draft, or in a single paragraph. For the possibility of expressing it in a single paragraph, wording along the following lines was proposed:

"In international tendering proceedings, a contractor or supplier shall not be precluded from providing a tender security issued by a foreign institution or entity from which such security is acceptable to the procuring entity, unless the issuance of the security would be in violation of a law of (this State) relating to the issuance of securities of the type in question."

218. After the foregoing discussion, the Working Group examined subparagraph (c) in greater detail. It was noted that, in some countries, a tender security issued by a foreign institution must be confirmed by a local institution. The Working Group agreed to a proposal that wording should be added to the effect that not only the institution or entity issuing the tender security, but also the confirming institution or entity, if any, must be acceptable to the procuring entity.

219. According to another view, however, the Model Law should not encourage the requirement of confirmation by a local institution of a foreign tender security. It was said that such a requirement could constitute an obstacle to the participation by foreign contractors and suppliers in tendering proceedings, since they could have difficulty in obtaining the confirmation in time for the submission of tenders. It was also pointed out that the requirement of a confirmation could add to the tender prices of foreign tenderers a cost that did not have to be incurred by local tenderers. It was said that, as long as the foreign institution was creditworthy and otherwise acceptable to the procuring entity, local confirmation of the

tender security should not be required. The Working Group agreed that the problems of requiring local confirmation of a tender security issued by a foreign institution should be discussed in the commentary.

220. It was noted that, with the use of the word "shall" in the *chapeau* of subparagraph (d), the subparagraph in effect provided that, if the procuring entity required a tender security, it must require that the security contain the terms stipulated in the subparagraph. That approach was regarded by the Working Group as inappropriate. It therefore agreed that the word "shall" should be changed to "may". In order to avoid an implication that the procuring entity could not require the tender security to contain terms other than those stipulated in the subparagraph, it was agreed that words should be inserted at the beginning of the *chapeau* along the following lines: "Without limiting its right to stipulate other circumstances under which it shall be entitled to claim the amount of the tender security".

221. It was agreed that subparagraph (d)(i) should be clarified by reformulating it along the following lines: "withdraws or modifies its tender after the deadline for submission of tenders." It was agreed that subparagraph (d)(ii) should be deleted, as forfeiture of the tender security was regarded as too harsh a consequence for a refusal to accept a correction of an arithmetical error. The rejection of the tender on that ground pursuant to article 28(2)(b) was regarded as sufficient. It was also stated in that connection that whether or not a correction was "arithmetical" was sometimes questionable.

222. The Working Group found subparagraph (d)(iii) to be generally acceptable.

Paragraph (2)

223. The Working Group found paragraph (2) to be generally acceptable, subject to the redrafting of subparagraph (d) to read along the following lines: "the withdrawal of the tender in connection with which the tender security was supplied prior to the deadline for the submission of tenders".

Article 27 **Opening of tenders**

Paragraph (1)

224. The Working Group found paragraph (1) to be generally acceptable.

Paragraph (2)

225. It was generally agreed that the right under paragraph (2) of tenderers or their representatives to be present at the opening of tenders should not apply in cases of national security or national defence. It was noted that, although those cases were excluded from the scope of application of the Model Law by article 1, a procuring entity would nevertheless have the option to apply the Model Law in such cases (see paragraph 14 above). The exception to the right of contractors and suppliers or their

representatives to be present at the opening of tenders was said to be needed for procurement proceedings in which the procuring entity exercised that option. A proposal was also made that the Model Law should deal with questions of procurement involving national security and national defence in a separate omnibus provision, rather than in individual articles. The Secretariat was requested to consider those proposals in redrafting the Model Law.

226. A view was expressed that the concepts of "national security" and "national defence" should not be introduced into the Model Law, since they were given different meanings and content in different countries, and sometimes led to disagreement (see also paragraph 13 above).

227. It was noted that the Model Law could not deal with the problem of the inability of a contractor or supplier to attend the opening of tenders due to the denial of a visa or other action over which the procuring entity had no control. In that connection, it was agreed that the paragraph should be reformulated so as to specify that the contractors and suppliers or their representatives should be permitted "by the procuring entity" to be present at the opening of tenders.

Paragraph (3)

228. The requirement in paragraph (3) that the procuring entity had to communicate the names and addresses of tenderers and their tender prices to all contractors or suppliers who were not present or represented at the opening of tenders was found to impose too heavy a burden on the procuring entity and to be contrary to practice. It was noted, however, that some contractors or suppliers might not be able to attend for various legitimate reasons. It was agreed, therefore, that the procuring entity should be required to communicate that information on request to tenderers who were not present or represented at the opening. In addition, the Working Group agreed that the words contained within square brackets, "and recorded immediately in the records of the tendering proceedings required by article 33", should be retained, subject to changing the reference to read "article 33(1)".

II. FUTURE WORK AND OTHER BUSINESS

229. The Working Group decided that at its next session it would complete its consideration of the draft articles of the Model Law set forth in A/CN.9/WG.V/WP.28 by taking up articles 28 through 35, and would consider A/CN.9/WG.V/WP.27, dealing with the review of acts and decisions of, and procedures followed by, the procuring entity. For the next session of the Working Group, the Secretariat was requested to revise articles 1 through 27 of the Model Law to take into account the discussions and decisions concerning those articles at the current session. The Working Group noted that, according to the decision of the Commission at its twenty-third session (A/45/17, para. 79), the thirteenth session of the Working Group would be held from 15 to 26 July 1991 in New York and the fourteenth session would be held from 2 to 13 December 1991 at Vienna.

B. Working papers submitted to the Working Group on the New International Economic Order at its twelfth session

1. Procurement: review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law on Procurement: report of the Secretary-General (A/CN.9/WG.V/WP.27) [Original: English]

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REVIEW OF ACTS AND DECISIONS OF, AND PROCEDURES FOLLOWED BY, THE PROCURING ENTITY UNDER THE MODEL LAW ON PROCUREMENT

1. The present document has been prepared pursuant to the request of the Working Group at its eleventh session (5-16 February 1990) that the Secretariat prepare for the twelfth session of the Working Group draft provisions dealing with review of acts and decisions of, and procedures followed by, the procuring entity (A/CN.9/331, para. 222). (Those acts, decisions and procedures are hereinafter collectively referred to as "acts".)

2. There exist in most States mechanisms and procedures for review of acts of administrative organs and other public entities. In some States, review mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts.

3. Certain important aspects of proceedings for review, such as the forum where review may be sought and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of State administration in every country. Many

legal systems provide for review of acts of administrative organs and other public entities before an administrative body that exercises hierarchical authority or control over the organ or entity (hereinafter referred to as "hierarchical administrative review"). Hierarchical administrative review is not, however, a feature of other legal systems. In legal systems that provide for hierarchical administrative review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the State administration. In the context of procurement, for example, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g., a central tender board); in other States the review function is performed by the body that exercises financial control and oversight over operations of the Government and of the public administration. Some States provide for review by the head of State in certain cases.

4. In some States, the review function in respect of particular types of cases involving administrative organs or other public entities is performed by specialized independent administrative bodies whose competence is sometimes referred to as "quasi-judicial". Those bodies are not, however, considered to be courts within the judicial system.

5. Many legal systems provide for judicial review of acts of administrative organs and public entities. In several of

those legal systems judicial review is provided in addition to administrative review, while in other systems only judicial review is provided. Some legal systems provide only administrative review, and not judicial review. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for administrative review have been exhausted; in other systems the two means of review are available as options.

6. In some legal systems that provide for judicial review there are considerable differences as to the nature of the courts that are competent to review acts of administrative organs and public entities. In some countries, a separate system of administrative courts exists to review those acts. In other countries, competence to review those acts is vested in courts within a unified court system. In some of the latter countries the courts are courts of general jurisdiction, while in others the courts constitute a separate division of a unified court system. In yet other countries, competence to review acts of administrative organs and public entities is divided between administrative courts and civil courts.

7. The types of remedies that may be granted for unlawful acts of an administrative organ or public entity vary among legal systems. Remedies that may be granted by hierarchical administrative bodies in many legal systems include annulling or revising the act that is the subject of the complaint. In other legal systems the administrative body cannot annul or revise the act, but it can grant other types of remedies.

8. The nature of judicial remedies that may be granted by courts is in many legal systems linked to the nature of the legal action commenced in the court or to the competence of the court. In some systems, for example, in one category of legal action the court may only annul the act complained of and may not, for example, revise the act or award damages; in another category of legal action, however, damages and other types of remedies may be awarded. In other legal systems, a court may be competent to annul or revise acts found to be unlawful, but not be competent to order an administrative organ or public entity to act lawfully or to enjoin it from acting unlawfully. In addition, the grounds on which courts may grant particular types of remedies differ among legal systems, and depend upon the substantive law in each system.

9. The fact that proceedings for review of procurement actions, decisions and procedures involve fundamental conceptual and structural aspects of legal systems and systems of State administration, and the wide diversity among countries with respect to those aspects, make it difficult to formulate provisions on mechanisms and procedures for review designed for universal application. Any such provisions would have to avoid impinging upon those fundamental aspects, since it is unrealistic to expect countries to adopt provisions that conflict with those fundamental aspects or to adapt their legal or administrative systems to accommodate the Model Law. Accordingly, the provisions have to be more skeletal and contain more variants than in the case of uniform legislation in

areas that do not present the difficulties mentioned above and in respect of which a greater degree of harmonization or unification is possible.

10. In light of the foregoing considerations, the Secretariat suggests for consideration by the Working Group three possible approaches to the treatment of the question of review proceedings. The first possible approach is to prepare provisions intended to be adopted by an implementing State as an integral part of the Model Law on Procurement. Although the provisions would have to be skeletal, such an approach would not necessarily be unusual or undesirable. Several existing national procurement laws examined by the Secretariat treat the question of review in a very basic manner and leave the details of the substantive and procedural aspects of the review proceedings to be governed by other laws, regulations or practices in the country. Some national procurement laws do no more than vest a particular administrative organ with competence over disputes concerning irregularities in procurement proceedings. Pursuant to the first approach, the Secretariat has prepared and set forth in annex I to the present document draft provisions on review that might be included in the Model Law on Procurement, together with a commentary on those provisions.

11. The second possible approach is to prepare provisions dealing with review, but to intend those provisions to have a function different from that of the main body of the Model Law on Procurement. The main body of the Model Law would provide a comprehensive uniform legal framework for procurement proceedings (subject to supplementation by procurement regulations in the implementing State). An implementing State would be expected to enact it without change or with only such minimal changes as were necessary to meet particular important needs in the implementing State. The provisions on review, by contrast, would be intended to serve as guidance to implementing States in evaluating the sufficiency and effectiveness of their mechanisms and procedures for review of procurement actions, decisions and procedures. The provisions would contain all of the elements considered by the Commission to be essential components of a sufficient and effective means of review. Further, the provisions could provide some legislative guidance to States that found that their review mechanisms and procedures lacked certain essential elements. Provisions along the lines set forth in annex I to the present document, with or without an accompanying commentary, might be regarded as serving such a function. In adopting the Model Law on Procurement, the Commission could clearly express its differing intentions with respect to the main body of the Model Law and the provisions on review, and strongly encourage implementing States to ensure the sufficiency and effectiveness of their review mechanisms and procedures using the review provisions in the Model Law as a guide.

12. Under the third possible approach, the Model Law on Procurement would not contain provisions of a legislative nature on review. Rather, the adoption of the Model Law by the Commission would be accompanied by an expression by the Commission of the necessity for an effective means of review, and set forth, in the form

of a recommendation to States, the elements that it considered essential. A possible formulation for such a recommendation has been set forth in annex II to the present document.

13. The formulation set forth in annex II is modelled after a Directive adopted by the Council of the European Communities (EC) dealing with review in cases covered by EC Directives on the award of public supply contracts and public works contracts (Council Directive of 21 December 1989 on the Co-ordination of the Laws, Regulations and Administrative Provisions relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts (89/665/EEC), hereinafter referred to as the "EC review Directive"). Member States of the EC must implement the Directive in their respective legal systems by 1 December 1991 (article 5 of the EC review Directive).

14. If either the second approach (paragraph 11 above) or the third approach (paragraph 12 above) is adopted, the Commission may wish to consider, at an appropriate time, whether it should prepare comprehensive review provisions tailored to different legal systems. That might involve, for example, the preparation of several sets of provisions, each set adapted to the particular circumstances of one of the principal types of legal systems in the world. Or, it might involve providing technical assistance, upon request, directly to a State to aid it to prepare review provisions tailored to the individualized circumstances of that State. The Commission might also wish to consider possible means of providing technical assistance to requesting States in elaborating procurement regulations to supplement the Model Law on Procurement. The Secretariat raises the foregoing possibilities without necessarily expecting the Working Group to act on them at the present time.

ANNEX I

DRAFT PROVISIONS ON REVIEW FOR MODEL LAW ON PROCUREMENT

Chapter IV. Review

Commentary

[*Working Group note:* sources: A/CN.9/WG.V/WP.22, paras. 214-218; A/CN.9/315, para. 114. The commentary contains notes within square brackets, designated as "*Working Group notes*", that are intended for the information and guidance of the Working Group in considering the draft provisions. They would not appear in the final version of the commentary to the Model Law.]

An effective means to review acts and decisions of the procuring entity and procedures followed by the procuring entity is essential to guard against misapplication of the Model Law on Procurement or of the procurement regulations, to ensure the proper functioning of the procurement system and to promote confidence in that system. This chapter sets forth provisions establishing a right of review and setting forth provisions governing its exercise. In order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems throughout the world, only basic features of the right of review and its exercise are dealt with. Procurement regulations to be formulated by an implementing State might include more detailed rules concerning matters that are not dealt with by the Model Law on Procurement or by other legal rules in the State. In some cases, alternative approaches to the treatment of particular issues have been formulated and placed within square brackets; an implementing State should choose the formulation that it regards as the most appropriate.

* * *

Article 36. *Right to review*

Any natural or juridical person, regardless of nationality, who has an interest in obtaining a procurement contract

resulting or anticipated to result from procurement proceedings covered by this Law and who claims to suffer, to risk suffering or to have suffered detriment due to an unlawful act or decision of, or procedure followed by, the procuring entity in relation to those procurement proceedings may seek review of the act, decision or procedure in accordance with articles 37 through [42] at any stage of the procurement proceedings or after the procurement proceedings have terminated.

* * *

Commentary

1. Under this article, review may be sought by a person "who has an interest in obtaining a procurement contract . . . and who claims to suffer, to risk suffering or to have suffered detriment". The right to seek review thus appertains not only to contractors and suppliers participating in procurement proceedings, but also to persons who have not participated, such as contractors and suppliers who have been unlawfully precluded from participating in procurement proceedings. The article does not deal with the nature or degree of interest or detriment that is required for the person to be able to seek review, or with other issues relating to the capacity of the person to seek review. Those issues are left to be resolved in accordance with the relevant legal rules in each implementing State.

[*Working Group note:* one such issue to be left to other rules in each implementing State may be whether the right to review is restricted to cases where particular types of provisions are alleged to have been violated. For example, in some legal systems, a distinction might be drawn between, on the one hand, requirements imposed on the procuring entity that are directed to its relationship with contractors and suppliers and that are intended to constitute legal obligations towards contractors and suppliers, and, on the other hand, other requirements that are regarded as being only "internal" to the administration, and that are not intended to constitute legal obligations of the procuring

entity towards contractors and suppliers. In those legal systems the right to review would be restricted to cases where the first type of requirement is violated by the procuring entity.]

2. An act, decision or procedure would be "unlawful" if it did not conform to the Model Law on Procurement as implemented by the State, to the procurement regulations or to another applicable legal rule.

3. Review may be sought at any stage of the procurement proceedings or after the procurement proceedings have terminated, even if the procurement contract has entered into force, subject to article 37(2) [and (3)], subject to any time limits for the submission of complaints set forth in the procurement regulations or elsewhere in the law applicable to the review proceedings and subject to any rules in the implementing State relating to prescription or to limitation of actions. [*Working Group note:* the reference to paragraph (3) of article 37 has been placed within square brackets pending a decision of the Working Group as to whether or not that paragraph should be retained.]

4. The reference to article 42 has been placed within square brackets because the article number will depend on whether or not the implementing State provides for hierarchical administrative review (see paragraph 1 of commentary to article 38).

* * *

Article 37. *Review by procuring entity or by approving authority*

(1) [Unless the procurement contract has already entered into force,] a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to [this Law], the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure. A reference in [this Law] to the head of the procuring entity or the head of the approving authority includes any person designated by him.

(2) The head of the procuring entity or of the approving authority shall not entertain a complaint unless it was submitted within [10] days after the earlier of the time when the person submitting it became aware of the circumstances giving rise to the complaint or the time when he should have become aware of those circumstances.

[(3) The head of the procuring entity or of the approving authority shall not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.]

(4) Unless the complaint is resolved by mutual agreement of the person that submitted it and the procuring entity, the head of the procuring entity or of the approving authority shall, within [20] days after the submission of the complaint, issue a written decision. The decision shall:

(a) state the reasons for the decision; and

(b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken. Those measures may include the payment of compensation [for any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings] [for loss suffered by the person submitting the complaint] as a result of an unlawful act or decision of, or procedure followed by, the procuring entity.

(5) If the head of the procuring entity or of the approving authority does not issue a decision by the time specified in paragraph (4), the person submitting the complaint or the procuring entity shall be entitled immediately thereafter to institute proceedings under article [38 or 40]. Upon the institution of such proceedings the competence of the head of the procuring entity or of the approving authority to entertain the complaint shall cease.

(6) The decision of the head of the procuring entity or of the approving authority shall be final unless proceedings are instituted under article [38 or 40].

* * *

Commentary

[*Working Group note:* sources: A/CN.9/WG.V/WP.22, para. 219; A/CN.9/315, paras. 115 and 116. With respect to the forum before which review can be sought, the Working Group agreed at its tenth session that the Model Law on Procurement should provide generally formulated alternatives from which a State could choose those that it wished to implement (A/CN.9/315, para. 116).

The opening words of paragraph (1) ("unless the procurement contract has already entered into force") and paragraph (3) have been placed within square brackets in order to invite the Working Group to consider whether those provisions should be retained. The underlying policy of those provisions is that, once the procurement contract has entered into force, there are no corrective measures that the head of the procuring entity or of the approving authority could usefully require (apart from compensation—see paragraph 3 of the commentary to the present article), unless he were to be authorized to annul the procurement contract. That may be thought to be an extraordinary power to confer on such an officer. The power to annul the contract, if it is to exist at all, may be thought to be more appropriately vested in a court, or at least in a hierarchical administrative body. The purpose of providing for first-instance review to the head of the procuring entity or of the approving authority is essentially to enable that officer to correct defective acts, decisions or procedures. Once the procurement contract has entered into force, it is too late for him to do so. If the provisions within square brackets were to be retained, hierarchical administrative review or judicial review would be available for complaints arising after the entry into force of the procurement contract.]

1. The present article provides for review to be sought in the first instance from the head of the procuring entity or of an approving authority, and subsequent articles provide for hierarchical administrative review and for judicial review. Pursuant to paragraph (1), seeking review under this article in the first instance is a prerequisite to hierarchical administrative review or judicial review.

[*Working Group note:* the period of time specified in paragraph (2) has been placed within square brackets in order to invite the Working Group to consider what period of time would be appropriate.]

2. Paragraph (4)(b) leaves it to the head of the procuring entity or of the approving authority to determine what corrective measures would be appropriate in each case (subject to any rules on that matter contained in the procurement regulations; see paragraph 5 of the commentary to the present article). Possible corrective measures may include the following: requiring the procuring entity to revise the procurement proceedings so as to be in conformity with the Model Law on Procurement, the procurement regulations or other applicable rule of law; if a

decision has been made to accept a particular tender and it is shown that another tender should be accepted, requiring the procuring entity to accept that other tender; or terminating the procurement proceedings and ordering new proceedings to be commenced.

3. Paragraph (4)(b) expressly authorizes the head of the procuring entity or of the approving authority to require the payment of compensation to the person submitting the complaint. Normally, the compensation would be payable by the procuring entity. However, where the act, decision or procedure complained of was approved by an approving authority, the head of that authority might decide that compensation should be paid by the authority.

[Working Group note: with respect to the types of losses in respect of which compensation may be required, two alternative possibilities are set forth within square brackets for the consideration of the Working Group. Under the first possibility, compensation may be required in respect of any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings as a result of the unlawful act, decision or procedure. Those costs do not include profit from the procurement contract that was lost because of non-acceptance of the tender or offer of the person submitting the complaint. The types of losses that are compensable under the second possibility are broader than those under the first possibility, and might include lost profit in appropriate cases. The question as to the types of losses that should be compensable was addressed at the tenth session of the Working Group, but no decision was taken (A/CN.9/315, para. 120).]

4. An implementing State should take the following action with respect to the references within square brackets in paragraphs (5) and (6) to article "38 or 40". If the implementing State provides judicial review but not hierarchical administrative review (see paragraph 1 of commentary to article 38), the reference should be only to the article appearing in this Model Law as article 40. If the implementing State provides both forms of review but requires the person submitting the complaint to exhaust his right to hierarchical administrative review before seeking judicial review, the reference should be only to article 38. If the implementing State provides both forms of review but does not require the right to hierarchical administrative review to be exhausted before seeking judicial review, the reference should be to "article 38 or 40".

5. An implementing State may include in the procurement regulations detailed rules concerning review proceedings under this article (e.g., concerning the right of contractors and suppliers participating in the procurement proceedings, other than the one submitting the complaint, to participate in the review proceedings (see article 39); the submission of evidence; the conduct of the review proceedings; and the corrective measures that the head of the procuring entity or of the approving authority may require the procuring entity to take (see paragraphs 2 and 3 of the commentary to the present article)).

6. Review proceedings under this article should be designed to provide an expeditious disposition of the complaint. If the complaint cannot be disposed of expeditiously, the proceedings should not unduly delay the institution of proceedings for hierarchical administrative review or judicial review. To that end, paragraph (4) requires the head of the procuring entity or of the approving authority to issue a decision within [20] days after the submission of the complaint. If the decision has not been issued by the deadline, paragraph (5) permits proceedings for hierarchical administrative review or for judicial review to be instituted immediately thereafter. [Working Group note: the time limit is placed within square brackets in the text of paragraph (4) and in

the foregoing sentence to invite the Working Group to consider what length of time should be allowed.]

7. Certain additional rules applicable to review proceedings under this article are set forth in article 39.

* * *

Article 38. Administrative review

(1) A person may submit his complaint in writing to [insert name of administrative body];

[(a) if his complaint cannot be submitted or entertained under article 37 because of the entry into force of the procurement contract;]

(b) pursuant to paragraph (5) of article 37; or

(c) if the person claims to be adversely affected by a decision of the head of the procuring entity or of the approving authority under article 37.

(2) The [insert name of administrative body] may grant one or more of the following remedies:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision;

(f) annul the procurement contract, if it has entered into force;

(g) require the payment of compensation [for any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings] [for loss suffered by the person submitting the complaint] as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

(h) order that the procurement proceedings be terminated.

(3) The [insert name of administrative body] shall issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(4) The decision shall be final unless an action is commenced under article 40.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 220, 222, 223, 226; A/CN.9/315, paras. 115, 116, 119-121; A/CN.9/331, paras. 10, 153 and 204.]

1. This article provides for hierarchical administrative review. States where hierarchical administrative review against administrative actions, decisions and procedures is not a feature of the legal system might choose to omit this article and provide only for judicial review (article 40).

2. In some legal systems that provide for both hierarchical administrative review and judicial review, proceedings for judicial review may be instituted while administrative review proceedings are still pending, or vice versa, and rules are provided as to whether or not, or the extent to which, the judicial review proceedings supplant the administrative review proceedings. If the legal system of an implementing State that provides both means of review does not have such rules, the State may wish to establish them, e.g., in the procurement regulations.

3. An implementing State that wishes to provide for hierarchical administrative review but that does not already have a mechanism for such review in procurement matters should vest the review function in a relevant administrative body. The function may be vested in an appropriate existing body or in a new body created by the implementing State. The body may, for example, be one that exercises overall supervision and control over procurement in the State (e.g., a central tender board; see article 6 and the accompanying commentary), a relevant body whose competence is not restricted to procurement matters (e.g., the body that exercises financial and control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), a special administrative body whose competence is exclusively to resolve disputes in procurement matters, such as a "procurement review board", or an arbitral tribunal. It is important that the body exercising the review function be independent of the procuring entity. In addition, if the administrative body is one that, under the Model Law as implemented in the State, is to approve certain actions or decisions of, or procedures followed by, the procuring entity, care should be taken to ensure that the section of the body that is to exercise the review function is independent of the section that is to exercise the approval function.

[Working Group note: subparagraph (a) of paragraph (1), set forth within square brackets, should be retained if the Working Group were to decide, in connection with article 37, that the head of the procuring entity or of the approving authority should not be competent to entertain a complaint under that article after the procurement contract enters into force (see Working Group note preceding paragraph 1 of commentary to article 37). Otherwise, it should be omitted.]

4. The persons entitled to institute proceedings under paragraph (1)(c) are not restricted to persons who participated in the proceedings before the head of the procuring entity or of the approving authority (see article 39(2)), but include any other persons claiming to be adversely affected by a decision of the head of the procuring entity or of the approving authority.

5. With respect to paragraph (2), the means by which the person submitting the complaint establishes his entitlement to a remedy depends upon the substantive and procedural law applicable in the review proceedings.

6. Differences exist among national legal systems with respect to the nature of the remedies that bodies exercising hierarchical administrative review are competent to grant. In implementing the Model Law on Procurement, a State may include all of the remedies listed in paragraph (2), or only those remedies that an administrative body would normally be competent to grant in the legal system of that State. If in a particular legal system an administrative body can grant certain remedies that are not already set forth in paragraph (2), those remedies may be added to the paragraph. The paragraph should list all of the remedies that the administrative body may grant. [Working Group note: the approach of the present article, which specifies the remedies that the hierarchical administrative body may grant, contrasts with the more flexible approach taken with respect to the corrective measures that the head of the procuring entity or of the

approving authority may require (article 37(4)(b)). The policy underlying the approach in article 37(4)(b) is that the head of the procuring entity or of the approving authority should be able to take whatever steps are necessary in order to correct an irregularity committed by the procuring entity itself or approved by the approving authority. Hierarchical administrative authorities exercising review functions are, in some legal systems, subject to more formalistic and restrictive rules with respect to the remedies that they can grant, and the approach taken in article 38(2) seeks to avoid impinging on those rules.]

7. Paragraph 3 of the commentary to article 37, concerning the payment of compensation to the person submitting the complaint, also applies to paragraph (2)(g) of the present article. [Working Group note: the Working Group note following paragraph 3 of the commentary to article 37 also applies in respect of paragraph (2)(g) of the present article.]

8. If the procurement proceedings are terminated pursuant to paragraph (2)(h), the procuring entity may institute new procurement proceedings. The provisions of article 7 are relevant in that respect.

9. If detailed rules concerning proceedings for hierarchical administrative review do not already exist in a State implementing the Model Law on Procurement, the State may provide such rules in the procurement regulations. Rules may be provided, for example, concerning the time limit for instituting the hierarchical administrative review proceedings; the right of contractors and suppliers, other than the one instituting the review proceedings, to participate in the review proceedings (see article 39(2)); the burden of proof; the submission of evidence; and the conduct of the review proceedings.

10. Certain additional rules applicable to review proceedings under this article are set forth in article 39.

* * *

Article 39. *Certain rules applicable to review proceedings under article 37 [and article 38]*

(1) Promptly after the submission of a complaint under article 37 [or article 38], the head of the procuring entity or of the approving authority [, or the [insert name of administrative body], as the case may be,] shall notify all contractors and suppliers participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) [[Variant A] Where a complaint is submitted under article 37 [or article 38], after a tender has been accepted or a procurement contract has entered into force, by a person other than the contractor or supplier whose tender has been accepted or who is a party to the procurement contract, that contractor or supplier shall be entitled to participate in the review proceedings to the same extent as the procuring entity.]

[[Variant B] Any such contractor or supplier claiming that its interests are or could be affected by the review proceedings may request to participate in the review proceedings. The head of the procuring entity or of the approving authority [, or the [insert name of administrative body], as the case may be,] shall decide whether or not the contractor or supplier may participate and, if so, the terms of such participation.]

(3) A copy of the decision of the head of the procuring entity or of the approving authority [, or of the [insert name of administrative body], as the case may be,] shall be

furnished within [5] days to the person submitting the complaint, to the procuring entity and to any other person that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

* * *

Commentary

[Working Group note: This article applies only to review proceedings before the head of the procuring entity or of the approving authority, and before a hierarchical administrative body, but not to judicial review proceedings. There exist in many States rules concerning the matters addressed in this article. Those rules vary from State to State, and it may be considered unfeasible or undesirable for the Model Law on Procurement to establish a uniform rule that may conflict with those rules.]

1. References within square brackets in the heading and text of this article to article 38 and to the administrative body should be omitted by an implementing State that does not provide for hierarchical administrative review.

2. The purpose of paragraphs (1) and (2) of this article is to make contractors and suppliers aware that a complaint has been submitted concerning procurement proceedings in which they have participated or are participating and to enable them to take steps to protect their interests. Those steps may include intervention in the review proceedings under paragraph (2), and other steps that may be provided for under applicable legal rules. [Working Group note: the following sentence may be included if variant A of paragraph (2) is adopted: While paragraph (2) limits itself to the right to intervene by a contractor or supplier whose tender has been accepted or who has become a party to a procurement contract, the procurement regulations or other rules of national law might enable intervention by other contractors and suppliers participating in the procurement proceedings, and might deal with intervention even before a tender has been accepted or a procurement contract has entered into force (see paragraph 5 of commentary to article 37 and paragraph 10 of commentary to article 38).]

[Working Group note: variant A is intended to ensure that the right to participate in the review proceedings is available at least to a contractor or supplier whose tender has been accepted or who has entered into a procurement contract. Under variant B, any contractor or supplier participating in the procurement proceedings, who claims that his interests are or could be affected by the review proceedings, could request to intervene, but the decision upon such a request is left to the forum of the review proceedings. A distinction is made in variant A between the time of acceptance of a tender (when tendering proceedings are used) and the time of entry into force of the procurement contract (when other means of procurement are used) because, under draft article 32, when the entry into force of the procurement contract is subject to the signature of a written contract, a time gap may exist between the time a tender has been accepted and the time the contract enters into force.]

3. In paragraph (3), "any other person that has participated in the review proceedings" refers to contractors and suppliers participating pursuant to paragraph (2) and any other persons permitted to participate in the review proceedings under the legal rules and practices applicable to those proceedings.

* * *

Article 40. Judicial review

The [insert name(s) of court(s)] shall have jurisdiction over an action commenced by a person referred to in article 36 to review an act or decision of, or a procedure followed by, the procuring entity. Such an action may be commenced by the person:

[(a) as an alternative to submitting a complaint under article 38;]

[(b) if his complaint cannot be submitted or entertained under article 37 because of the entry into force of the procurement contract;]

[(c) pursuant to paragraph (5) of article 37;] or

(d) if the person claims to be adversely affected [by a decision of the head of the procuring entity or of the approving authority under article 37] [or] [by a decision of the [insert name of administrative body] under article 38].

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 221, 226; A/CN.9/315, paras. 115, 116, 119-121; A/CN.9/331, paras. 153 and 204.]

1. This article provides for judicial proceedings. It confers jurisdiction on the specified court or courts, and specifies the circumstances in which an action may be commenced. The procedural and other aspects of the judicial proceedings, including the remedies that may be granted, will be governed by the law applicable to the proceedings. [Working Group note: that minimalist approach has been adopted so as to avoid impinging on national laws and procedures relating to judicial proceedings.]

2. Subparagraph (a), which appears within square brackets, should be omitted by a State that does not provide hierarchical administrative review, or that requires a person to exhaust his right to hierarchical administrative review under article 38 before seeking judicial review. It should be retained by an implementing State that provides hierarchical administrative review but that does not have that requirement.

[3. Subparagraph (b), which appears within square brackets, should be omitted by a State requiring the person seeking review to exhaust his right to hierarchical administrative review before seeking judicial review. It should be retained by a State that does not have that requirement or that does not provide hierarchical administrative review.] [Working Group note: subparagraph (b) and the preceding paragraph of the commentary should be included if the Working Group were to decide, in connection with article 37, that the head of the procuring entity or of the approving authority should not be competent to entertain a complaint under that article after the procurement contract enters into force (see Working Group note preceding paragraph 1 of commentary to article 37). Otherwise, they should be omitted.]

4. Subparagraph (c), which appears within square brackets, should be omitted by an implementing State that requires the person seeking review to exhaust his right to hierarchical administrative review before seeking judicial review, but should be retained by a State that does not have that requirement or that does not provide hierarchical administrative review.

5. An implementing State should take the following action with respect to the references set forth within square brackets in subparagraph (d). If the implementing State does not provide hierarchical administrative review, the reference should be only

to a decision of the head of the procuring entity or of the approving authority under article 37. If the implementing State provides both hierarchical administrative review and judicial review and does not require the person seeking review to exhaust his right to hierarchical administrative review before seeking judicial review, the reference should be to a decision of the head of the procuring entity or of the approving authority under article 37 "or" a decision of the administrative body under article 38. If the implementing State provides both forms of review but requires the person seeking review to exhaust his right to hierarchical administrative review before seeking judicial review, the reference should be only to a decision of the administrative body under article 38.

6. The law applicable to the judicial proceedings will govern the question of whether, in an action commenced pursuant to subparagraph (d), the court is to examine *de novo* the aspect of the procurement proceedings complained of, or is only to examine the legality or propriety of the decision reached in the review proceedings under article 37 or 38.

* * *

Article 41. *Suspension of procurement proceedings [and of performance of procurement contract]*

[Variant A] The timely submission of a complaint under article 37 [or article 38] or the timely commencement of an action under article 40 shall suspend the procurement proceedings [, or the performance of the procurement contract, if it has entered into force,] pending the disposition of the review proceedings unless the head of the procuring entity or of the approving authority, [the [insert name of administrative body]] or the court, as the case may be, determines that the suspension would not be in the public interest.

[Variant B] After the timely submission of a complaint under article 37 [or article 38], or the timely commencement of an action under article 40, the head of the procuring entity or of the approving authority, [the [insert name of administrative body]] or the court, as the case may be, may suspend the procurement proceedings [, or the performance of the procurement contract, if it has entered into force,] in order to preserve the rights of the person submitting the complaint or commencing the action pending the disposition of the review proceedings.

* * *

Commentary

1. The purpose of this article is to enable the rights of the person instituting review proceedings to be preserved pending the disposition of those proceedings. [Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 224 and 225; A/CN.9/315, paras. 117 and 118. Two variants are presented for the consideration of the Working Group. Variant A provides for automatic suspension of the procurement proceedings when review proceedings are commenced, unless the head of the procuring entity or of the approving authority, the administrative body or the court determines, on the grounds stipulated in the variant, that the procurement proceedings should not be suspended. That approach is followed in the procurement laws of some countries as an exception to a general rule in judicial or administrative proceedings that the burden is on the party seeking relief. A principal reason in support of the approach is that

a person submitting a complaint or commencing a judicial action may not have sufficient time to seek and obtain interim relief. In particular, it will usually be important for the person to avoid the entry into force of the procurement contract pending disposition of the review proceedings and, if he must establish his entitlement to interim relief, he may not have sufficient time to do so to avoid entry into force of the contract (e.g., where the procurement proceedings are in their final stages); see A/CN.9/331, para. 212. Variant B takes into account the fact that serious disruption could be caused by suspension of the procurement proceedings or performance of the procurement contract. Under that approach, the procurement proceedings or performance of the procurement contract is not suspended automatically; rather, the decision of whether or not to suspend rests with the forum.

The references in the text of the article and in the commentary to suspension of the performance of the procurement contract have been placed within square brackets to invite the Working Group to consider whether or not suspension of the contract should be provided for. Although each variant deals with suspension of performance of the procurement contract in the same manner as suspension of the procurement proceedings, it would also be possible to treat those two situations differently, for example by providing for automatic suspension of the procurement proceedings, but providing that performance of the procurement contract may be suspended only if the forum so decides.]

2. In applying the provisions of this article, the forum of the review proceedings would employ any criteria set forth in the procurement regulations or contained in other rules of law applicable to the review proceedings. Such criteria might include, for example, whether the negative consequences from suspending the procurement proceedings [or performance of the procurement contract] are disproportionate to the advantages of the suspension, and the likelihood of the claimant succeeding in the review proceedings.

3. This article does not interfere with a power that the forum of the review proceedings may have under applicable legal rules to grant other forms of interim remedies. Also, it does not interfere with a power to require the person instituting the review proceedings to supply a security to cover possible losses of the procuring entity if the procurement proceedings [or the performance of the procurement contract] are suspended but the complaint of the person seeking review is not successful.

4. The references within square brackets to article 38 and to the administrative organ will depend upon whether or not the implementing State provides hierarchical administrative review.

* * *

Article 42. *Disciplinary, administrative or criminal responsibility of procuring entity*

The results of review proceedings under this chapter shall have no effect on any disciplinary, administrative or criminal responsibility that the procuring entity, or an officer or employee thereof, may bear under the law of [this State].

* * *

[Working Group note: see A/CN.9/331, para. 151.]

ANNEX II

DRAFT RECOMMENDATION OF THE COMMISSION TO ACCOMPANY ITS ADOPTION
OF THE MODEL LAW ON PROCUREMENT

[Working Group note: the following recommendation could be included in the decision of the Commission adopting the Model Law on Procurement, or it could be adopted as a separate decision, with appropriate additional preambular language. The recommendation has been modelled on articles 1 and 2 of the EC review Directive. Some provisions of the Directive that may be necessary or appropriate because of the mandatory character of the Directive have been omitted from the recommendation or have been modified where it was believed that the provisions in question were unnecessary or inappropriate in a recommendation. Other changes have been made to accord with the terminology or concepts used in the Model Law on Procurement.]

The United Nations Commission on International Trade Law,

Being convinced that an effective means to review the lawfulness of acts and decisions of, and procedures followed by, procuring entities in the context of procurement covered by the Model Law on Procurement is essential to guard against misapplication of the Model Law or of procurement regulations adopted thereunder, to ensure the proper functioning of national procurement systems and to promote confidence in those systems,

Recommends to Governments:

1. that they take the measures necessary to ensure that, as regards procurement falling within the scope of the Model Law on Procurement, the lawfulness of acts and decisions of, and procedures followed by, procuring entities may be reviewed effectively;
2. that they ensure that there is no discrimination between foreign and domestic persons with respect to the right to seek

and obtain review or with respect to any other aspect of the review proceedings;

3. that they ensure that review proceedings are available at least to any person having or having had an interest in obtaining a particular procurement contract and who suffers or risks suffering detriment as a result of an unlawful act or decision of, or procedure followed by, a procuring entity in the context of procurement;

4. that they ensure that the review proceedings referred to in the foregoing paragraphs include provision for the powers:

(a) to take, at the earliest opportunity, interim measures with the aim of preventing further detriment to the person concerned, including measures to suspend or to ensure the suspension of the procurement proceedings, the implementation of any decision taken by the procuring entity or the performance of the procurement contract;

(b) either to set aside or to ensure the setting aside of decisions taken unlawfully;

(c) to award compensation to persons suffering detriment as a result of an unlawful act, decision or procedure;

5. that they ensure that decisions taken by bodies responsible for review proceedings can be effectively enforced;

6. that written reasons for decisions in review proceedings before non-judicial bodies shall always be given;

7. that, even where non-judicial review proceedings are provided, provision also be made for judicial review proceedings;

8. that, except in the case of review proceedings instituted in the first instance before the procuring entity, the bodies responsible for review proceedings be independent of the procuring entity.

2. Procurement: second draft of articles 1 to 35 of Model Law on Procurement: report of the Secretary-General (A/CN.9/WG.V/WP.28) [Original: English]

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INTRODUCTION

1. The Commission decided at its nineteenth session in 1986 to undertake work in the area of procurement as a matter of priority and entrusted that work to its Working Group on the New International Economic Order (A/41/17, para. 243). The Working Group commenced its work at its tenth session in October 1988. It devoted that session to deliberations on the basis of a study of procurement prepared by the Secretariat that discussed possible objectives of national procurement policies and that examined national procurement laws and practices and the roles and activities of various international institutions and development funding agencies in connection with procurement (A/CN.9/WG.V/WP.22). After completing its consideration of the study the Working Group requested the Secretariat to prepare a first draft of a Model Law on Procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125).

2. The first draft of articles 1 to 35 of the Model Law on Procurement and the accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25) were considered by the Working Group at its eleventh session in February 1990. (The draft articles contained in those documents is hereinafter referred to as the "first draft".) Draft provisions on review of acts and decisions of, and procedures followed by, the procuring entity were not included in the first draft and were to be prepared subsequent to the preparation of that draft.

3. After considering the first draft and the accompanying commentary, the Working Group requested the Secretariat to revise the text of the Model Law taking into account the discussion and decisions at that session of the Working Group. It was agreed that the revision need not attempt to perfect the structure or drafting of the text. It was also agreed that the commentary would not be revised until after the text of the Model Law had been settled, and that no revision of the commentary would be prepared for the twelfth session of the Working Group. In addition, the Working Group requested the Secretariat to prepare for the twelfth session draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity (A/CN.9/331, para. 222). The revision of draft articles 1 to 35 of the Model Law is contained in the present document; draft provisions on review, consisting of articles 36 to 42, are contained in A/CN.9/WG.V/WP.27.

4. In preparing the present draft, the Secretariat has sought to incorporate all deletions, changes and additions agreed upon by the Working Group at its eleventh session. In addition, an attempt has been made to incorporate proposals and suggestions made at that session but in respect of which agreement was not reached. Wording reflecting proposals and suggestions upon which agreement was not reached at the eleventh session are, in most cases, placed within square brackets. However, wording reflecting proposals and suggestions that, it is believed, are not likely to be controversial or to encounter opposition (e.g., improvements in drafting that do not affect the substance of the text) have not been placed within square brackets. Proposals and suggestions have not been reflected in the text where they would conflict with an approach agreed upon by the Working Group or where

they would for other reasons be difficult to incorporate. Such proposals and suggestions were few in number.

5. In the present draft, changes of and additions to wording that appeared in the first draft are underlined, except in the case of headings to articles, all of which are underlined as a matter of style. Deletions from the first draft are indicated in the notes following each article.

6. The present draft may serve as a useful compendium of elements that the Working Group considers are, or that may be, important for an efficient, effective and fair procurement system, and thus may facilitate the further work of the Working Group in the area of procurement. It will be observed, however, that the addition to the text of the wording and provisions upon which the Working Group has agreed makes the text longer, more complex and more cumbersome; further additions will make the text even more so. Those characteristics, particularly in a Model Law intended for global application, can impede the usefulness and acceptability of the text. In considering the present draft, the Working Group may wish to re-examine critically each provision of the text with respect to the possibility of rendering the text less complex and cumbersome as well as from the point of view of substance. For example, in the light of the early decision of the Working Group that the Model Law should be a "framework" law, setting forth only the essential elements of procurement procedure, some matters of detail that currently appear in the text might be left to be dealt with in the procurement regulations.

7. Unless otherwise indicated in the notes accompanying the draft articles, the Secretariat will, in preparing the next draft of the Model Law, proceed on the assumption that proposals and suggestions for changes and additions in respect of which the Working Group took no decision at its eleventh session (such proposals, suggestions and provisions being reflected in the present (second) draft within square brackets) are not to be incorporated in the text, except those that the Working Group affirmatively decides to retain or to modify. Additions that are not retained or modified by the Working Group will be deleted from the text; where necessary, the wording of the first draft will be reinstated. With respect to changes to wording that appeared in the first draft that are not retained or modified by the Working Group, the wording used in the first draft will be reinstated.

SECOND DRAFT OF ARTICLES 1 TO 35
OF MODEL LAW ON PROCUREMENT

Chapter I. General provisions

Article 1. *Application of Law**

(1) This Law applies to procurement by procuring entities.¹

*Article headings are for reference purposes only and are not to be used for purposes of interpretation.

¹The remainder of the text of article 1 in the first draft has been deleted and is incorporated in the definition of "procurement" that has been added in new subparagraph (a) of article 2. See note 1 to article 2.

(2) *This Law does not apply to procurement for national security or national defence purposes, except where the procuring entity expressly declares that it applies.*²

²See A/CN.9/331, para. 139.

* * *

Article 2. Definitions

For the purposes of this Law:

[(new a) "procurement" means the acquisition, through purchase, rental, lease, hire-purchase or any other means, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves[, and the acquisition of telecommunications, transport or insurance services].]¹

(a) "procuring entity" means:

(i) any department, agency, organ or other unit, or any subdivision thereof, of the Government or the administration[, except. . .];²

(ii) (each State enacting this Model Law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(b) "goods" includes raw materials, products, equipment and other physical objects of every kind and description[, whether in solid, liquid or gaseous form, and electrical, nuclear and other energy];³

(c) "construction" means such physical work as site preparation, excavation, erection, [demolition,] building, installation of equipment or materials, decoration and finishing, in respect of a new structure or of an existing structure[, as well as drilling, mapping, satellite photography, seismic studies and similar activities in connection with such work];⁴

(d) "procurement proceedings" [includes] tendering proceedings, competitive negotiation proceedings and single source procurement;⁵

(e) "international tendering proceedings" means [tendering proceedings in which participation by contractors and suppliers whose places of business or habitual residences are located outside (this State) is encouraged and promoted through the use of particular procedures provided for by this Law];⁶

(f) "tender security" includes such arrangements as guarantees [issued by financial institutions],⁷ letters of credit, cheques on which a bank is primarily liable and cash deposits, provided by a contractor or supplier to secure obligations in respect of its tender;

(g) "currency" includes unit of account;

(g bis) "tendering proceedings" means procedures engaged in, in accordance with articles 11 through 33, with a view towards entering into a procurement contract;⁸

(h) "competitive negotiation proceedings" means [negotiations on a competitive basis between the procuring entity and contractors and suppliers, governed by article 34, with a view towards entering into a procurement contract];⁹

(i) "single source procurement" means procurement from a particular contractor or supplier without engaging in tendering proceedings or competitive negotiation proceedings;

(i bis) "contractor or supplier" means any party or potential party, according to the context, to a procurement contract with the procuring entity;³

(j) a tender is "responsive" if it conforms to the requirements set forth in the solicitation documents, including requirements concerning the characteristics of the goods, construction [or services] to be procured and the terms and conditions of the procurement contract.¹⁰

¹The definition of "procurement" has been added pursuant to the suggestion in A/CN.9/331, para. 27. It incorporates the suggestions and proposals in A/CN.9/331, paras. 17, 18 and 23. If this addition is not adopted, article 1(1) will be reformulated along the lines of the first draft. The Working Group may wish to consider whether it is desirable to list the various means of acquisition, or whether it would be preferable to refer simply to acquisition by any means except by gift.

²See A/CN.9/331, para. 23.

³See A/CN.9/331, para. 23. The phrase "physical objects" replaces the phrase "tangible objects" that appeared in the first draft.

⁴See A/CN.9/331, para. 24.

⁵The changes in this subparagraph, consisting of the addition of the word "includes" and the deletion of wording that appeared in the first draft, have been made on the initiative of the Secretariat.

⁶See A/CN.9/331, para. 23.

⁷See A/CN.9/331, para. 25.

⁸Added on the initiative of the Secretariat.

⁹See A/CN.9/331, para. 26.

¹⁰The definition of "responsive" tender has been relocated from article 28(4)(a) of the first draft, pursuant to A/CN.9/331, para. 156. The reference to services has been included within square brackets in the light of the possibility of including certain services in new subparagraph (a) of this article.

* * *

Article 3. Underlying [objectives]¹

[The [objectives] of this Law are, consistent with the efficient operation of the procurement system of (this State)].²

(a) to maximize economy in procurement;

(b) to foster and encourage participation in procurement proceedings by competent contractors and suppliers, including, where appropriate, [participation by contractors and suppliers whose places of business or habitual residences are located outside (this State)];³

(c) to promote competition among contractors and suppliers for the supply of the goods, construction [or services]⁴ to be procured;

(d) to provide for the fair and equitable treatment of all contractors and suppliers in connection with procurement covered by this Law;

(e) to promote the integrity of, and fairness and public confidence in, the procurement process; and

(f) to achieve transparency in the procedures relating to procurement.

¹Pursuant to the suggestion in A/CN.9/331, para. 30, the word "objectives" replaces the word "policies" that appeared in the first draft. Paragraph (2) of this article, which appeared in the first draft, has been moved to a separate article (article 3 bis) and reworded.

²The reference to "efficiency", which appeared in subparagraph (a) in the first draft, has been moved to the *chapeau* of the article, pursuant to the proposal in A/CN.9/331, para. 31. The Working Group may wish to consider whether the objectives in subparagraphs (a) through (f) should be subsidiary to the objective of efficiency, as they are under the present formulation, or whether the objective of efficiency should have the same status as the other objectives, as it did in the first draft.

³The wording of the first draft has been modified to align with the modification made to the definition of "international tendering proceedings" in article 2(e).

⁴See note 8 to article 2.

* * *

Article 3 bis. *International agreements or other international obligations of (this State) relating to procurement*

To the extent that this Law conflicts with an obligation of (this State) under any treaty or other form of agreement to which it is a party with one or more other States or under any agreement with an international financing institution, that has already been or is subsequently entered into by (this State), the requirements of such obligation shall be applied; but in all other respects, the procurement shall be governed by this Law.¹

¹The substance of this article originally appeared as paragraph (2) of article 3. It has been reworded in accordance with A/CN.9/331, para. 33, and placed in a separate article.

* * *

Article 4. *Procurement regulations*

The ... (each State enacting this Model Law specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to elaborate upon or supplement this Law.

Article 5. *Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement*

This Law and the procurement regulations, all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments of this Law and those regulations and administrative rulings and directives, shall be promptly made accessible to the public.

[Article 6. *Control and supervision of procurement*¹

(1) The approval function referred to in articles 7(2), 7(3), 12(2), 28(3), 29(1) and 31(1) shall be performed by ... (each State enacting this Model Law specifies the organ or authority authorized to perform the approval function).

(2) (Each State enacting this Model Law specifies in this paragraph and, if necessary, in subsequent paragraphs, any additional functions in connection with the control and supervision of procurement and the organ(s) or authority(ies) to perform those functions.)]

¹This article has been placed within square brackets because of a possible inconsistency in decisions of the Working Group at its eleventh session with respect to the approval function. The approval function was discussed initially in A/CN.9/331, paras. 36 to 38. In A/CN.9/331, paras. 176 and 194, the Working Group agreed that the approval function should be dealt with in the implementing regulations and not in the Model Law. That decision would seem to call for the deletion of article 6 and of all references in the Model Law to the necessity of the procuring entity to obtain approval of an act or decision. However, in connection with article 28(3), the prevailing view of the Working Group was that the requirement that the procuring entity had to obtain approval of a decision to reject a tender under that provision should be retained (A/CN.9/331, para. 152). The Working Group may wish to remedy the apparent inconsistency.

* * *

Article 7. *Methods of procurement and conditions for their use*

(1) Except as otherwise provided by this Law, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) [Subject to approval,¹ the procuring entity may engage in procurement by means of competitive negotiation proceedings:

(a) when the [estimated value]² of the procurement contract is less than the amount set forth in the procurement regulations; or

(b) when tendering proceedings have been engaged in but [no tenders were submitted, or]³ all tenders were rejected by the procuring entity pursuant to article 28(2) or (3) or article 29, [and when engaging in new tendering proceedings would be unlikely to result in a procurement contract].⁴

(3) [Subject to approval,¹ the procuring entity may engage in single source procurement when:

(a) the [estimated value]² of the procurement contract is less than the amount set forth in the procurement regulations;

(b) the goods, construction [or services] is available only from a particular contractor or supplier, [or a particular contractor or supplier has exclusive rights in respect of the goods, construction [or services], and] no reasonable alternative or substitute exists;⁵

(c) there is an urgent need for the goods, construction [or services] making it impossible or imprudent to use

tendering proceedings or competitive negotiation proceedings, as the case may be, because of the amount of time involved in using those proceedings;

(d) for reasons of standardization, or the need for compatibility with existing [goods,] equipment or technology, [additional supplies] must be procured from [the] contractor or supplier [that supplied the existing goods, equipment or technology];³

(e) the procuring entity seeks to enter into a contract with the contractor or supplier for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs;

(f) for [the protection] of national security [or for reasons of national defence] there is a need for secrecy in respect of the procuring entity's procurement needs;⁶

(g) [procurement from a particular contractor or supplier is necessary in order to promote socio-economic policies specified in the procurement regulations];^{3, 7}

(h) [procurement from a particular contractor or supplier is necessary in order to develop a particular source of supply for reasons of national security or national defence];³

(i) [the scope or volume of the goods, construction [or services] required by the procuring entity exceeds the normal capacity of the relevant industry and a particular contractor or supplier is willing to build or acquire special facilities or capacity in order to supply the goods, construction [or services].]³

(4) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (2)(a) or (3)(a).⁸

(5) A procuring entity that invokes the provisions of paragraph (2) or (3) shall include in the record required under article 34(4) or article 35, as the case may be,⁹ a statement of the circumstances on which it relied and, except in respect of paragraph (3)(f), shall specify the relevant facts.

¹See note 1 to article 6.

²See A/CN.9/331, para. 40.

³See A/CN.9/331, para. 42.

⁴See A/CN.9/331, para. 214. Subparagraph (b)(ii), which appeared in the first draft, has been deleted.

⁵See A/CN.9/331, para. 42. With respect to the references to services in paragraph (3)(b) and elsewhere in this article, see note 8 to article 2.

⁶See A/CN.9/331, para. 44.

⁷The Working Group may wish to consider whether, even with its scope limited to the promotion of specified socio-economic policies, subparagraph (g) would provide too much scope to a procuring entity to defeat the objectives of the Model Law.

⁸The words "of the goods or construction" that appeared in the first draft after the word "procurement" have been deleted.

⁹Pursuant to A/CN.9/331, para. 207, the word "record" replaces the word "minutes" that appeared in the first draft. The words "as the case may be" have been added to improve the clarity of the provision.

Article 8. Qualifications of contractors and suppliers¹

(new 1) This article applies to the ascertainment by the procuring entity of the qualifications of contractors and suppliers at any stage of the procurement proceedings.²

(1) Subject to the right of contractors and suppliers to protect their intellectual property or trade secrets, the procuring entity may:³

(a) require contractors and suppliers participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers:⁴

(i) have legal capacity [according to the law of the State of which a contractor or supplier is a national] to enter into the procurement contract;^{5, 6}

(ii) are not insolvent, [in receivership],⁵ bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iii) have fulfilled their obligations to pay taxes and social security contributions in (this State);

(iv) have not been convicted of any criminal offence concerning their professional conduct [or based on the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract],⁷ [and have not been held liable in civil proceedings for loss arising from the performance or failure to perform a procurement contract,] within a period of [5] years preceding the commencement of the procurement proceedings;⁸

(v) [deleted];⁹

(vi) possess sufficient technical competence, financial resources, equipment and other physical facilities, [managerial capability, reliability, experience, and reputation], and sufficient personnel, to perform the procurement contract;¹⁰

(b) investigate by any other appropriate means [, including by inspection of the books of the contractor or supplier,] the qualifications of the contractor or supplier pursuant to criteria set forth in subparagraph (a).¹¹

(2) Any requirement established pursuant to paragraph (1)(a) and any criterion established by the procuring entity for the evaluation of the qualifications of contractors and suppliers under paragraph (1)(a)(vi) shall be set forth in the prequalification documents, if any, and in the solicitation documents and shall apply equally to all contractors and suppliers. A procuring entity shall impose no requirement or qualification criterion other than those provided for in paragraph (1)(a).¹²

(2 bis) The procuring entity shall evaluate the qualifications of contractors and suppliers in accordance with the

*qualification criteria and procedures set forth in the pre-qualification documents and the solicitation documents.*¹³

(2 *ter*) *[In the case of international tendering proceedings, the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of contractors and suppliers [that discriminates against foreign contractors and suppliers or against categories thereof].*¹⁴

(3) *[Subject to the efficient operation of the procurement system,] a contractor or supplier shall not be precluded from participating in procurement proceedings for the reason that it has not demonstrated that it is qualified pursuant to paragraph (1) if the contractor or supplier undertakes to demonstrate that it is qualified during the course of the procurement proceedings and if it is reasonable to expect that the contractor or supplier will be able to do so.*¹⁵

¹³Pursuant to A/CN.9/331, para. 45, the substance of article 9 that appeared in the first draft has been merged with the present article; the article refers only to the "qualifications" of contractors and suppliers, and not to their "eligibility".

¹⁴See A/CN.9/331, para. 70. The words "at any stage of the procurement proceedings" are intended to include the postqualification proceedings provided for in article 28(8 *bis*). Although the agreement of the Working Group called for an express reference to postqualification proceedings, the more generalized formulation contained in this paragraph is presented for the consideration of the Working Group. It clarifies that not only postqualification proceedings, but also the evaluation of the qualifications of contractors and suppliers at any other stage of the procurement proceedings, are subject to the criteria, requirements and procedures provided for in article 8 (see A/CN.9/331, para. 78).

¹⁵See A/CN.9/331, para. 46; paragraph (1) has been restructured.

¹⁶Pursuant to the proposal in A/CN.9/331, para. 47, the reference to "written statements" has been deleted.

¹⁷See A/CN.9/331, para. 48.

¹⁸The Working Group may wish to note that in many legal systems the applicable law for determining the capacity of a party to enter into a contract would not necessarily be the law of the country of which the party is a national.

¹⁹See A/CN.9/331, para. 53.

²⁰Pursuant to A/CN.9/331, para. 49, the entire subparagraph has been placed within square brackets in the light of the differing opinions as to whether it should be retained. The subparagraph will be deleted if not affirmatively acted upon by the Working Group. The reference to civil liability has been added but placed within square brackets pending a decision by the Working Group as to whether or not it should be included. The Working Group may wish to note that, under that ground, a contractor or supplier would be disqualified for [5] years even where it acted generally in good faith in connection with the prior contract and its improper or non-performance of that contract was relatively minor. If the ground for exclusion is to be retained at all, it should perhaps be narrowed considerably.

²¹See A/CN.9/331, para. 50.

²²The foregoing provision has been moved to the present article from article 9 as it appeared in the first draft, pursuant to A/CN.9/331, para. 45. The references to managerial capability, reliability, experience and reputation have been added pursuant to proposals in A/CN.9/331, para. 53.

²³Pursuant to A/CN.9/331, para. 45, the word "eligibility" that appeared in this subparagraph and elsewhere in the article the first draft has been changed to "qualifications". The reference to inspection of the books of a contractor or supplier has been added pursuant to the proposal in A/CN.9/331, para. 51.

²⁴The indicated wording in the first sentence of paragraph (2) is a reformulation of the wording that originally appeared in the paragraph, as a consequence of the merger of article 15 with the present article (see A/CN.9/331, para. 66).

²⁵The substance of this provision originally appeared as paragraph (1) of article 15, which has been merged with the present article pursuant to

A/CN.9/331, para. 66. In the first sentence, the word "evaluate" replaces the word "assess", pursuant to A/CN.9/331, para. 67; the word "requirements" has been added; and the reference to "solicitation" documents replaces the reference to "procurement" documents pursuant to A/CN.9/331, para. 28.

²⁶The substance of the foregoing paragraph originally appeared as paragraph (3) of article 15, which has been merged with the present article pursuant to A/CN.9/331, para. 66. The reference to discrimination against foreign contractors and suppliers or categories thereof replaces the original formulation in paragraph (3) of article 15, pursuant to A/CN.9/331, paras. 67 and 69.

²⁷The square brackets surrounding this paragraph as it appeared in the first draft have been removed, pursuant to the decision of the Working Group to retain a provision along the lines of the paragraph (A/CN.9/331, para. 52). The opening words of the paragraph have been added pursuant to a proposal in A/CN.9/331, para. 52. The Working Group may wish to consider whether those words give too much scope for arbitrary exclusion of a contractor or supplier from participation in the procurement proceedings. The other indicated wording is a reformulation of wording that appeared in the original version of the paragraph.

* * *

Article 9. [Merged with article 8]¹

¹See A/CN.9/331, para. 45.

* * *

[Article 10. *Rules concerning documentary evidence provided by contractors and suppliers*¹

(1) This article applies to documentary evidence provided by contractors and suppliers to demonstrate their qualifications in procurement proceedings, *when the procuring entity requires that the documentary evidence be legalized.*²

(2) Documentary evidence other than that emanating from a governmental, judicial or administrative authority, shall be signed and sworn to or otherwise solemnized by the maker of the document before a notary or other authority competent under the law of the place where the authority serves to attest to the authenticity of the document and to its signature and solemnization, and the attestation of the notary or other competent authority shall be affixed or joined to the document. The attestation by a foreign notary or other competent authority shall be acceptable if it is legalized in accordance with the law applicable in (this State) relating to the legalization of foreign public documents;

(3)(a) Documentary evidence emanating from a governmental, judicial or administrative authority outside (this State) shall be acceptable if it is legalized in accordance with the law applicable in (this State) relating to the legalization of foreign public documents;

(b) Documentary evidence emanating from a governmental, judicial or administrative authority in (this State) shall conform to the law applicable in (this State) concerning the signature, solemnization and legalization of such documents.]

¹This article has been placed within square brackets pursuant to A/CN.9/331, para. 56, where it is questioned whether or not the article should be retained at all. The article will be deleted if not affirmatively

acted upon by the Working Group. References in the title and text of the article to "written statements" have been deleted pursuant to the proposal in A/CN.9/331, para. 47.

²Pursuant to A/CN.9/331, para. 45, the words "eligibility and" that appeared before the word "qualifications" in the first draft have been deleted. The final words of the paragraph have been added pursuant to A/CN.9/331, para. 56.

* * *

Chapter II. Tendering proceedings

Section I. International tendering proceedings

Article 11. International tendering proceedings

A procuring entity that is required under article 7 to engage in tendering proceedings may decide to engage in international tendering proceedings, taking into account the objectives of economy and efficiency in the procurement.¹

¹Paragraph (2) that appeared in the first draft of this article, and the reference to paragraph (2) that appeared in paragraph (1), have been deleted pursuant to A/CN.9/331, para. 58, which reflects the decision of the Working Group that international tendering proceedings should not be mandatory. The reference in A/CN.9/331, para. 58, to examples of cases where international tendering proceedings would be desirable has not been included, since it might be more appropriate for such examples to be given in the commentary, rather than in the article itself.

* * *

Section II. Solicitation of tenders and applications to prequalify

Article 12. Solicitation of tenders and applications to prequalify

(1) A procuring entity shall solicit tenders, and, where applicable, applications to prequalify, from all interested contractors and suppliers by causing a notice of proposed procurement to be published in . . . (each State enacting this Model Law specifies the official gazette or other official publication in which the notice of proposed procurement is to be published). In international tendering proceedings, the notice of proposed procurement shall also be published, *in a language customarily used in international trade, in a newspaper or relevant trade publication or technical journal of wide international circulation.* [The foregoing provisions do not preclude the use of additional means of bringing the notice of proposed procurement to the attention of contractors and suppliers.]¹

(2)(a) [Notwithstanding the provisions of paragraph (1),]²

[*alternative 1*] where restricted participation in the tendering proceedings is more conducive to economy and efficiency,]

[*alternative 2*] where the time and costs involved in soliciting, examining, evaluating and comparing tenders

from all interested contractors and suppliers is disproportionate to the estimated value of the procurement contract, where the goods or construction to be procured are available only from a small number of contractors and suppliers known to the procuring entity and it is more conducive to economy and efficiency in procurement to solicit tenders only from those contractors and suppliers, or where soliciting tenders from all interested contractors and suppliers could impede effective competition by deterring the submission of tenders by qualified contractors and suppliers.]³

the procuring entity may [, subject to approval,]⁴ solicit tenders by *communicating*⁵ the notice of proposed procurement only to particular contractors and suppliers selected by it. The procuring entity shall select a sufficient number of contractors and suppliers to ensure effective competition, consistent with the efficient conduct of the tendering proceedings.

[*(b) The notice of proposed procurement may be communicated to contractors and suppliers in writing or by any other means that provides a record of the contents of the notice. However, where there is an urgent need for the goods, construction [or services]⁶ to be procured or where the estimated value of the procurement contract is less than the amount set forth in the procurement regulations, tenders may be solicited from the selected contractors and suppliers by informing them of the contents of the notice of proposed procurement by telephone and communicating the notice of proposed procurement to them immediately thereafter in writing or by any other means that provides a record of the contents of the notice.*]⁷

¹The second sentence has been restructured to make it clear that the language requirement applies only where international tendering proceedings are used. The final sentence has been added pursuant to the proposal in A/CN.9/331, para. 60. The wording is intended to encompass any means of bringing the notice of proposed procurement to the attention of contractors and suppliers, including by electronically transmitted message or telephone.

²See A/CN.9/331, para. 61. Paragraph (2) has been restructured into two subparagraphs as a consequence of the addition of the provision set forth in paragraph (2)(b).

³The two alternative versions of paragraph (2)(a) are presented pursuant to the suggestion in A/CN.9/331, para. 61. The Working Group may wish to consider the possibility of retaining alternative 1 with the expectation that a more detailed rule, such as the one contained in alternative 2, could be included in the procurement regulations.

⁴See note 1 to article 6.

⁵The word "communicating" replaces the word "sending" that appeared in the first draft, so as to avoid an implication that the notice must be in the form of a written document.

⁶See note 8 to article 2.

⁷See A/CN.9/331, paras. 60 and 117.

* * *

Article 13. [Deleted]¹

¹See A/CN.9/331, para. 62.

* * *

Article 14. *Contents of notice of proposed procurement*

(1) The notice of proposed procurement shall contain at least¹ the following information:

- (a) the name and address of the procuring entity;
- (b) the nature and quantity of the goods *[or services]*² to be supplied or the nature and location of the construction to be effected;
- (c) the desired or required time for the supply of the goods *[or services]*² or for the completion of the construction;
- (d) the criteria to be used for evaluating the qualifications of contractors and suppliers, in conformity with article 8(1)(a);³
- (e) the means of obtaining the *solicitation* documents and the place from which they may be obtained;⁴
- (f) the price, if any, charged by the procuring entity for the *solicitation* documents and, in the case of international tendering proceedings, the currency and means of payment for those documents;
- (g) in the case of international tendering proceedings, the language or languages in which the *solicitation* documents are available;
- (h) the place and deadline for the submission of tenders;
- (i) if a tender security is required, the nature and amount of the security;⁵
- (j) the right under article 36 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings.⁵

(2) If prequalification proceedings are to be engaged in, the notice of proposed procurement shall so state. In such a case, the notice of proposed procurement need not contain the information referred to in paragraph (1)(e) or (g), but shall contain the following additional information:

- (a) the means of obtaining the prequalification documents and the place from which they may be obtained;
- (b) the price, if any, charged by the procuring entity for the prequalification documents and, in the case of international tendering proceedings, the currency and terms of payment for those documents;
- (c) in the case of international tendering proceedings, the language or languages in which the prequalification documents are available; and
- (d) the place and deadline for the submission of applications to prequalify.

right to review, especially if that information must be provided in the solicitation documents (see note 18 to article 18). Draft article 36 and other draft provisions concerning the right of review are contained in A/CN.9/WG.V/WP.27.

* * *

Article 15. [Merged with article 8]¹

¹Pursuant to the suggestion in A/CN.9/331, para. 66, the substance of this article has been merged with article 8 in the following manner: paragraphs (1) and (3) of article 15 have been slightly reformulated and have become, respectively, paragraphs (3) and (4) of article 8; paragraph (2) of article 15 has been deleted. The heading preceeding article 15 ("Section III. Qualifications of contractors and suppliers") has been changed and relocated to appear immediately preceding article 16.

* * *

Section III. *Prequalification of contractors and suppliers*¹

¹This heading has been changed and relocated as a consequence of the merger of article 15 with article 8.

* * *

Article 16. *Prequalification proceedings*

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, contractors and suppliers that are qualified. *[However, prequalification proceedings shall not be engaged in where participation in tendering proceedings is restricted pursuant to article 12(2).]* *[The provisions of article 8 shall apply to prequalification proceedings.]*¹

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each contractor and supplier that requests them in accordance with the procedures specified in the notice of proposed procurement and that pays the price, if any, charged for those documents.

(3) The prequalification documents shall contain all information necessary to enable contractors and suppliers to prepare and submit applications to prequalify, including, but not limited to, the information required to be included in the notice of proposed procurement pursuant to article 14(1), except subparagraph (e) thereof, plus the following information:

(a) instructions for preparing and submitting prequalification applications;

[(b) any additional information concerning the goods *[or services]* to be supplied or the construction to be effected that would be useful to contractors or suppliers in preparing their prequalification applications;]²

(c) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings;

¹See A/CN.9/331, para. 64.

²See note 8 to article 2.

³See A/CN.9/331, para. 45.

⁴Pursuant to the proposal in A/CN.9/331, para. 28, references to "procurement documents" in this subparagraph and elsewhere in the article have been changed to "solicitation documents".

⁵Subparagraphs (i) and (j) have been added pursuant to A/CN.9/331, para. 64. The Working Group may wish to consider whether it is necessary to require notice of proposed procurement to contain the information called for by those subparagraphs, particularly information concerning the

(d) any documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their qualifications;³

(e) the criteria and procedures to be used for *evaluating* the qualifications of contractors and suppliers;⁴

(f) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for contractors and suppliers to prepare and submit their applications, paying particular regard, in the case of international tendering proceedings, to the time *reasonably* needed by foreign contractors and suppliers and taking into account the reasonable needs of the *procuring entity*;⁵

(g) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings;

(h) [deleted]⁶

(3 bis) *The procuring entity shall respond promptly to any request by a contractor or supplier for clarification of the prequalification documents that is received by the procuring entity prior to the deadline for the submission of applications to prequalify. The response by the procuring entity, which shall not identify the source of the request, shall be communicated to all contractors and suppliers to which the procuring entity provides the prequalification documents.*⁷

(4) The procuring entity shall promptly notify all contractors and suppliers submitting applications to prequalify whether or not they have been prequalified and, *after a tender has been accepted*,⁸ shall make available to the general public the names of all contractors and suppliers that have been prequalified. *[Only]*⁹ contractors and suppliers that have been prequalified shall be entitled to submit tenders.

(5) The procuring entity shall upon request communicate to contractors and suppliers that have not been prequalified the grounds therefore, but the procuring entity shall not be required to give reasons to substantiate those grounds.

(6) A procuring entity that has engaged in prequalification proceedings is not precluded from *re-evaluating* at a later stage of the tendering proceedings the qualifications of contractors and suppliers that have been prequalified.¹⁰

³Pursuant to the proposal in A/CN.9/331, para. 45, the words "eligible and" that appeared in the first draft have been deleted. The opening words of the paragraph as it appeared in the first draft have been reformulated in accordance with the suggestion in A/CN.9/331, para. 73, and moved to the second sentence. The word "qualified" at the end of the first sentence and the entire third sentence replace the words "qualified to perform the procurement contract" that appeared in the first draft, in order to clarify the intention that the prequalification proceedings be directed to evaluating the qualifications of contractors and suppliers pursuant to the criteria, requirements and procedures provided for in article 8.

²This subparagraph has been placed within square brackets pursuant to the proposal in A/CN.9/331, para. 74, that the subparagraph be deleted. With respect to the reference to services, see note 8 to article 2.

³Pursuant to the proposal in A/CN.9/331, para. 45, the words "eligibility and" that appeared in the first draft have been deleted. The reference to "written statements" that appeared in the first draft has been deleted pursuant to the proposal in A/CN.9/331, para. 47.

⁴The word "evaluating" replaces the word "assessing" that appeared in the first draft, pursuant to the view reflected in A/CN.9/331, para. 67.

⁵The indicated words have been added in order to be consistent with the changes made to article 24(1) pursuant to A/CN.9/331, para. 120.

⁶This subparagraph has been reformulated pursuant to A/CN.9/331, para. 76, and relocated to paragraph (3 bis).

⁷This paragraph has been added pursuant to A/CN.9/331, para. 76. It is patterned after article 22(1). The paragraph includes requests for clarification of information contained in the prequalification documents relative to the prequalification practices and procedures.

⁸See A/CN.9/331, para. 77.

⁹The word "only" replaces the word "all" that appeared in the first draft, pursuant to the suggestion in A/CN.9/331, para. 72.

¹⁰Pursuant to the proposal in A/CN.9/331, para. 45, the words "eligibility and" that appeared in the first draft have been deleted. The word "re-evaluating" replaces the word "re-assessing" that appeared in the first draft, pursuant to the view reflected in A/CN.9/331, para. 67.

* * *

Section IV. Solicitation documents¹

¹Pursuant to A/CN.9/331, para. 28, references to "procurement documents" in this heading and throughout the text have been changed to "solicitation documents".

* * *

Article 17. *Provision of solicitation documents to contractors and suppliers*

The procuring entity shall provide a set of the *solicitation* documents to contractors and suppliers in accordance with the procedures and requirements specified in the notice of proposed procurement. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of the *solicitation* documents to each contractor and supplier that has been prequalified and that pays the price, if any, charged for those documents.

Article 18. *Contents of solicitation documents*

The *solicitation* documents shall contain [all]¹ information necessary to enable contractors and suppliers to prepare and submit responsive tenders, *[and information concerning the procedures for the opening, examination, comparison and evaluation of tenders]*,² including, but not limited to, the following information:

(a) instructions for preparing tenders;

(b) the *criteria and procedures* [, *conforming with the provisions of article 8,*] *relative to the evaluation of the qualifications of contractors and suppliers or relative to the reconfirmation of qualifications* [pursuant to article 28(8 bis)]³;

(c) [this subparagraph has been combined with subparagraph (b), above];

(d) any documentary evidence or other information that must be submitted by contractors and suppliers to

demonstrate their qualifications[, and any requirement imposed pursuant to article 10 that documentary evidence be legalized];⁴

(e) the nature and required technical and quality characteristics of the goods, construction [or services]⁵ to be procured, [in conformity with article 20,]⁶ including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected [or the services are to be rendered];⁷

(f) the required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings[, including, but not limited to, any required terms and conditions concerning the method of pricing to be used in the contract; the extent to which, if at all, taxes, customs duties and similar charges and levies are to be included in the contract price; the allocation between the parties of the risk of higher costs of performing the contract resulting from changes in laws relating to taxes, customs duties and similar charges and levies and from changes in other laws affecting the performance of the contract; the law applicable to the contract; and the means of settling disputes under the contract];⁸

(g) if alternatives to the characteristics of the goods, construction [or services] contractual terms and conditions or other requirements set forth in the solicitation⁹ documents are solicited, a statement to that effect;

(h) if contractors and suppliers are permitted to submit tenders for only a portion of the goods, construction [or services] to be procured, a designation of the portion or portions for which tenders may be submitted;

(i) the manner and, in international tendering proceedings, the currency or currencies in which the tender price is to be formulated and expressed;

(j) [deleted];¹⁰

(k) in international tendering proceedings, the language or languages in which tenders are to be prepared [, in conformity with article 23];⁶

(l) any requirements of the procuring entity with respect to the nature, amount and other principal terms and conditions of any tender security to be provided by contractors and suppliers submitting tenders and of any security for the performance of the procurement contract to be provided by the contractor or supplier that enters into the procurement contract, and with respect to the type of institutions or entities from which such securities will be acceptable, or any choice offered by the procuring entity with respect to the nature, amount or other terms and conditions of the tender security or with respect to the type of institutions or entities,¹¹ [in conformity with article 26];⁶

(m) the manner, place and deadline for the submission of tenders[, in conformity with article 24];⁶

(n) the means by which, pursuant to article 22,¹² contractors and suppliers may seek clarifications of the solicitation documents and the place and time of any meeting of contractors and suppliers [that may be]¹³ convened by the procuring entity;

(n bis) if the procuring entity reserves the right to modify the solicitation documents pursuant to article 22, a statement to that effect;¹⁴

(o) the period of time during which tenders shall be in effect[, in conformity with article 25];⁶

(p) the place, date and time for the opening of tenders[, in conformity with article 27]; the procedures to be followed for opening and examining tenders and the procedures and criteria for evaluating and comparing tenders and for ascertaining the most economic tender [as defined in article 28(7)(c)], including, but not limited to, such factors as how the criteria will be quantified or otherwise applied, the relative weight or other indication of the degree of importance that each criterion will have, the manner in which the criteria will be combined and in which the tenders will be compared in order to ascertain the most economic tender, and any margin of preference that will be applied, its amount and the manner of its application;¹⁵

(q) in international tendering proceedings, the currency that will be used for the purpose of evaluating and comparing tenders [pursuant to article 28(8)]⁶ and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate issued by a specified financial institution prevailing on a specified date will be used;

(r) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to the tendering proceedings;

(s) [references to:

(i) this Law, the procurement regulations and all other laws and regulations of (this State) directly pertinent to the tendering proceedings; and

(ii) the principal tax, social security, safety, environmental protection, health and labour laws and regulations of (this State) pertinent to the performance of the procurement contract, provided, however, that the omission of any such reference shall not of itself constitute grounds for review under article 36 or give rise to liability on the part of the procuring entity];¹⁶

(t) the name(s) and address(es) of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from contractors and suppliers in connection with the tendering proceedings, without the intervention of an intermediary;¹⁷

(u) any countertrade commitment to be made by the contractor or supplier;¹⁸

[(v) the acts and decisions of the procuring entity that are subject to approval and the organ or organs that are to give such approval];¹⁹

(w) the right under article 36 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;¹⁸

[(x) if the procuring entity reserves the right to reject all tenders pursuant to article 29, a statement to that effect];²⁰

(y) *any formalities that will be required in order for a tender that has been accepted to enter into force, including, where applicable, the signature of a written procurement contract pursuant to article 32.*²¹

²⁰See A/CN.9/331, para. 177.

²¹See A/CN.9/331, para. 201.

* * *

Article 19. *Charge for solicitation documents*

The procuring entity may charge contractors and suppliers a sum for *solicitation*¹ documents provided to them. The sum shall reflect only the cost of printing the *solicitation* documents and providing them to contractors and suppliers.

¹See note 1 to heading of section IV.

* * *

Article 20. *[Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents]*¹

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction *[or services]*² to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, shall not be included or used in the prequalification documents or in the *solicitation*³ documents with a view to creating *[unnecessary]*⁴ obstacles to participation by contractors or suppliers in tendering proceedings including, in the case of international procurement proceedings, foreign contractors and suppliers, nor shall such specifications, plans, drawings, designs, requirements, symbols or terminology be included or used which have the effect of creating unnecessary obstacles to such participation.

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods, construction *[or services]* to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3)(a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction *[or services]* to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the *solicitation* documents.

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other

¹The word "all" has been placed within square brackets pursuant to the proposal in A/CN.9/331, para. 82, that the word be deleted.

²See A/CN.9/331, para. 83.

³This subparagraph has been reformulated and incorporates subparagraph (c) which appeared in the first draft; the references to article 8 and article 28(8 *bis*) have been added pursuant to A/CN.9/331, para. 81.

⁴Pursuant to the proposal in A/CN.9/331, para. 45, the words "eligibility and" that appeared in the first draft have been deleted. The reference to "written statements" that appeared in the first draft has been deleted pursuant to the proposal in A/CN.9/331, para. 47. The reference to requirements that documentary evidence be legalized has been added to take account of the change made to article 10, whereby that article would apply only if a requirement of legalization were imposed by the procuring entity, and pursuant to A/CN.9/331, para. 81. It should be deleted if article 10 is not retained.

⁵With respect to the references to services in this subparagraph and elsewhere in the article, see note 8 to article 2.

⁶The reference has been added pursuant to A/CN.9/331, para. 81.

⁷The indicated wording at the end of the subparagraph changes wording used in the first draft in order to be consistent with similar wording in article 28(7)(d).

⁸See A/CN.9/331, paras. 86 and 88. The Working Group may wish to consider whether the added wording is necessary, or whether the reference to required contractual terms and conditions at the beginning of the subparagraph is sufficient.

⁹See note 1 to heading of section IV. This paragraph has been slightly reworded on the initiative of the Secretariat.

¹⁰See A/CN.9/331, para. 89.

¹¹See A/CN.9/331, para. 128. The Working Group may wish to consider whether the point addressed by the added wording is already covered by the subparagraph without that wording, and, therefore, whether the added wording is necessary.

¹²The reference to article 22 corrects a typographical error.

¹³See A/CN.9/331, para. 91.

¹⁴See A/CN.9/331, para. 115, and note 3 to article 22.

¹⁵Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft. The references to articles 27 and 28(7)(c) have been added pursuant to A/CN.9/331, para. 81. The words "and examining tenders and the procedures and criteria for" change wording in the first draft to achieve greater clarity.

¹⁶This subparagraph is a reformulation, pursuant to A/CN.9/331, para. 97, of the subparagraph that appeared in the first draft. It combines two proposals made in A/CN.9/331, para. 96, by requiring references only to the "principal" laws and regulations pertinent to the performance of the contract, instead of requiring exhaustive references, and by negating the possibility of a contractor or supplier claiming review of or compensation for an omission of such a law or regulation. The Working Group might wish to recall the approach agreed upon with respect to article 16(3)(h), the original version of which required the prequalification documents to set forth references to laws and regulations directly pertinent to the prequalification proceedings. In that case, the Working Group decided to delete the requirement and instead to require the procuring entity to be prepared on request to explain the relevant practices and procedures to contractors and suppliers (see A/CN.9/331, para. 76, and the reformulation of the provision in question in article 16(3 *bis*) of the present draft). The Working Group may wish to consider whether to adopt a similar approach with respect to the present subparagraph.

¹⁷See A/CN.9/331, para. 98.

¹⁸See A/CN.9/331, para. 99. The Working Group may wish to consider whether the point addressed by subparagraph (u) is already covered by subparagraph (f), and whether the requirement in subparagraph (w) is useful or desirable.

¹⁹See A/CN.9/331, paras. 99 and 176. The Working Group may wish to consider whether this requirement is useful or desirable. With respect to the requirement of approval, see note 1 to article 6.

relevant aspects of the prequalification documents and of the *solicitation* documents.

(c) [Deleted]⁵

(4) In the case of international procurement proceedings, the prequalification documents and the *solicitation* documents shall be formulated in . . . (each State enacting this Model Law specifies its official language or languages) (and in a language customarily used in international trade). (In the event of a variation or conflict between language versions, the version in the language customarily used in international trade shall prevail.)⁶

⁵See A/CN.9/331, para. 103.

²With respect to the references to services in this paragraph and elsewhere in the article, see note 8 to article 2.

³See note 1 to heading of section IV.

⁴See A/CN.9/331, para. 105.

⁵See A/CN.9/331, para. 108.

⁶As explained in paragraph 2 of the commentary to article 20 in the first draft, the reference to a language customarily used in international trade and the final sentence have been placed within round brackets because they need not be adopted by an implementing State whose official language is one customarily used in international trade. Pursuant to the suggestions in A/CN.9/331, para. 109, the formulation of this provision could be altered so as to call upon the implementing State to designate a particular language or languages customarily used in international trade by stating, "each State enacting this Model Law specifies its official language or languages and one or more additional languages customarily used in international trade".

* * *

Article 21. [Deleted]¹

¹See A/CN.9/331, para. 114.

* * *

Article 22. *Clarifications and modifications of solicitation¹ documents*

(1) A contractor or supplier requiring a clarification of the *solicitation* documents shall communicate a request for such clarification to the procuring entity. The procuring entity shall respond promptly to any request for clarification that is received by it prior to the deadline for submission of tenders. The response by the procuring entity, which shall not identify the source of the request, shall be communicated to all contractors and suppliers to which the procuring entity provides the *solicitation* documents.²

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own initiative or in response to a clarification requested by a contractor or supplier, modify the *solicitation* documents by issuing an addendum thereto, *provided that the right to do so has been specified in the solicitation documents*.³ The addendum shall be communicated promptly to all contractors and suppliers to which the procuring entity sends the *solicitation* documents and shall be binding on them.

(3) Any request for clarification and any response thereto by the procuring entity and any addendum to the *solicitation* documents shall be made in writing or in any other form that preserves a record of the request, response or addendum. *[However, a request for clarification or a response to such a request may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response, as the case may be, is communicated to the recipient of the request or response in writing or by any other means that provides a record of the confirmation.]*⁴

(4) If the procuring entity convenes a meeting of contractors and suppliers, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the *solicitation* documents, without identifying the sources of the requests, and its responses to those requests. The minutes shall be prepared in writing or in any other form that provides a record of the information contained therein and shall be *provided*⁵ to all contractors and suppliers to which the procuring entity provides the *solicitation* documents.

¹With respect to the reference to *solicitation* documents in this paragraph and elsewhere in the article, see note 1 to heading of section IV.

²The words "copies of", which appeared at the beginning of this sentence in the first draft, have been deleted so as to avoid an implication that the response must be in writing (see paragraph (3)).

³See A/CN.9/331, para. 115. The Working Group may wish to consider whether this condition is useful or desirable.

⁴See A/CN.9/331, para. 117.

⁵The word "provided" replaces the word "communicated" that appeared in the first draft.

* * *

Section V. Tenders

Article 23. *Language of tenders*

*Tenders may be formulated and submitted in any language in which the solicitation documents have been issued.*¹

¹See A/CN.9/331, para. 119. The effect of this wording is that the procuring entity may not preclude a contractor or supplier from submitting its tender in any language in which the solicitation documents have been issued; but the procuring entity may permit tenders to be submitted in languages other than those in which the solicitation documents have been issued.

* * *

Article 24. *Submission of tenders*

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders. The deadline shall allow sufficient time for contractors and suppliers to prepare and submit their tenders, paying particular regard, in the case of international tendering proceedings, to the time reasonably needed by foreign contractors and suppliers, *and shall take into account the reasonable needs of the procuring entity.*¹

(2) *If the procuring entity issues a clarification or modification of the solicitation documents pursuant to article 22, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford contractors and suppliers reasonable time to take the clarification or modification into account in their tenders.*²

(2 bis) *The procuring entity may, prior to the deadline for the submission of tenders, extend the deadline if, due to unforeseen circumstances, it is not possible for contractors or suppliers to submit their tenders by the deadline.*³

(2 ter) *Notice of any extension of the deadline shall be given promptly in writing or by any other means that provides a record of the information contained therein to each contractor and supplier to which the procuring entity provides the solicitation documents.*⁴ *[However, notice of an extension of the deadline may be communicated by telephone provided that, immediately thereafter, confirmation of the notice is communicated to the contractors and suppliers in writing or by any other means that provides a record of the confirmation.]*⁵

(3) *A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened or considered and shall be returned to the contractor or supplier that submitted it.*⁶

(4) *Tenders shall be submitted in writing and in sealed envelopes. [However, the procuring entity may give contractors and suppliers the option to submit tenders by any other means that provides a record of the information contained in the tender.]*⁷ *The procuring entity shall provide to the contractor or supplier a receipt showing the date and time when the tender was received.*

¹The word "reasonably" has been added at the initiative of the Secretariat in order to create parallelism between the obligation of the contractors and suppliers and that of the procuring entity. The wording at the end of the sentence has been added pursuant to A/CN.9/331, para. 120.

²See A/CN.9/331, paras. 115 and 121. The Working Group may wish to consider whether making an extension of the deadline mandatory in circumstances that are defined only generally ("if necessary to afford contractors and suppliers a reasonable time") would lead to disputes and litigation, and whether it is preferable to leave it to the judgement of the procuring entity as to whether to extend the deadline, as in the first draft. With respect to the reference to the solicitation documents in this paragraph and elsewhere in the article, see note 1 to heading of section IV.

³This sentence originally appeared as paragraph (2)(a)(ii) of the first draft. It has been placed in a separate paragraph as a consequence of the change made to paragraph (2)(a)(i) of the original draft (currently paragraph (2)).

⁴This sentence appeared as paragraph (2)(b) in the first draft. It has been slightly reworded and placed in a separate paragraph in consequence of the change made to paragraph (2)(a)(i) in the first draft (paragraph (2) in the present draft).

⁵See A/CN.9/331, para. 117.

⁶Pursuant to A/CN.9/331, para. 123, the sentence whereby a tender submitted after the deadline for submission of tenders could be considered if the contractor or supplier was not able to submit its tender on time has been deleted.

⁷As explained in paragraph 4 of the commentary to article 24 in the first draft this sentence has been placed within square brackets in order to invite the Working Group to consider whether or not it should be

included. The sentence will be deleted if not affirmatively acted upon by the Working Group. If the sentence is retained it may be desirable to specify that the availability of the option referred to must be set forth in the solicitation documents.

* * *

Article 25. *Period of effectiveness of tenders; modification and withdrawal of tenders*

(1) *Tenders shall be in effect during the period of time specified in the solicitation documents.*¹ *The period of time shall commence at the deadline for submission of tenders.*

(2)(a) *Prior to the expiry of the period of effectiveness of tenders, the procuring entity may, in exceptional circumstances,*² *request contractors or suppliers to extend the period for an additional specified period of time. A contractor or supplier may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness.*³ *The request and the responses thereto shall be made in writing or by any other means that provides a record of the information contained therein. [However, a request or a response may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response is communicated to the recipient in writing or by any other means that provides a record of the confirmation.]*⁴

(b) *The procuring entity shall*⁵ *require contractors and suppliers that agree to the extension to extend or to procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, to provide new tender securities, to cover the extended period of effectiveness of their tenders.*

(3) *[A contractor or supplier may modify or withdraw its tender prior to the deadline for the submission of tenders by communicating the modification or a notice of withdrawal to the procuring entity in writing or by any other means that provides a record of the information contained therein. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for submission of tenders.]*⁶

¹See note 1 to heading of section IV.

²See A/CN.9/331, para. 124. The Working Group may wish to consider whether the potential for disputes and litigation arising from the inclusion of this condition outweighs its usefulness.

³See A/CN.9/331, para. 124.

⁴See A/CN.9/331, para. 117.

⁵The word "shall" replaces the word "may" that appeared in the first draft, pursuant to A/CN.9/331, para. 125. The Working Group may wish to consider whether it is preferable to leave to the judgement of the procuring entity the question of whether or not tender securities are to be extended.

⁶This paragraph has been slightly reworded on the initiative of the Secretariat, and placed within square brackets in view of the differing views set forth in A/CN.9/331, para. 126. The paragraph will be retained in its present form unless the Working Group decides otherwise.

* * *

Section VI. Tender securities

Article 26. Tender securities

(1) If the procuring entity requires contractors and suppliers submitting tenders to provide a tender security:

(a) the requirement shall apply to all such contractors and suppliers;

(b) in international tendering proceedings, a contractor or supplier shall not be precluded from providing a tender security issued by a foreign institution or entity, if the tender security and the institution or entity otherwise conform to lawful requirements set forth in the solicitation documents, unless the issuance of the security by the institution or entity would be in violation of a law of (this State) relating to the issuance of securities of the type in question or relating to the transaction of business in (this State) by the institution or entity;¹

(c) the solicitation documents may stipulate that the institution or entity issuing the tender security must be acceptable to the procuring entity;²

[(d) the procuring entity shall require, in the solicitation documents, that the tender security include provisions entitling the procuring entity to claim the amount of the security if the contractor or supplier that supplied it:

- (i) withdraws or modifies its tender contrary to the provisions of article 25;
- (ii) does not accept a correction of an arithmetical error in its tender and its tender is rejected pursuant to article 28(2)(b); or
- (iii) fails to sign a procurement contract if required by the procuring entity to do so or fails to provide a required security for the performance of the contract, if its tender has been accepted.]³

(2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security to the contractor or supplier that supplied it, after the earliest to occur of:

- (a) the expiry of the tender security;
- (b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required;
- (c) the termination of the tendering proceedings without the entry into force of a procurement contract; or⁴
- (d) the permitted withdrawal of the tender in connection with which the tender security was supplied.⁵

¹See A/CN.9/331, paras. 129 and 131. Some changes in wording have been made in order to achieve greater clarity.

²See A/CN.9/331, para. 129. Although the Working Group stated that the substance of this provision should be incorporated into a reformulated subparagraph (b), it has been added as a separate subparagraph in order to enable the procuring entity in all cases (i.e., even in cases of wholly domestic procurement) to impose the condition that the issuer of the tender security must be acceptable to the procuring entity.

³See A/CN.9/331, para. 135. The Working Group may wish to consider whether it is preferable to leave to the judgement of the procuring entity what terms the tender security should contain with respect to the circumstances in which the security can be claimed.

⁴This provision replaces the provision that appeared in the first draft, which read, "the rejection by the procuring entity of all tenders pursuant to article 28(2) or (3) or article 29". The present formulation encompasses the formulation in the first draft, and also takes into account the proposal in A/CN.9/331, para. 133, that reference be made to the time when the tendering proceedings terminated.

⁵See A/CN.9/331, para. 133.

* * *

Section VII. Opening, examination, evaluation and comparison of tenders

Article 27. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.¹

(2) All contractors and suppliers that have submitted tenders or their representatives shall be permitted to be present at the opening of tenders.

(3) The name and address of each contractor or supplier whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders[, communicated to all contractors and suppliers that have submitted tenders but that are not present or represented at the opening of tenders.] [and recorded immediately in the record of the tendering proceedings required by article 33].²

¹See A/CN.9/331, para. 137, and note 1 to the heading of section IV.

²These additions have been made pursuant to the suggestion and proposal in A/CN.9/331, para. 142. The Working Group may wish to consider whether the requirement that the information be communicated to absent contractors and suppliers is useful or desirable.

* * *

Article 28. Examination, evaluation and comparison of tenders

(1)(a) To assist in the examination, evaluation and comparison of tenders, the procuring entity may ask contractors and suppliers for clarifications of their tenders. Any request for clarification and any response to such a request shall be in writing or in any other form that provides a record of the information contained therein. [However, a request or response may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response is communicated to the recipient in writing or by any other means that provides a record of the request or response.]¹ No change in the tender price or other matter of substance in the tender shall be sought, offered or permitted, except as provided in subparagraph (b).

[(b) The procuring entity shall correct purely arithmetical errors apparent on the face of a tender.]²

(2) The procuring entity shall reject a tender:

(a) if the contractor or supplier that submitted the tender is not qualified, subject to article 8(3);³

(b) if the contractor or supplier submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b);

(c) if the tender is not responsive;⁴

[(d) if the tender is received by the procuring entity after the deadline for the submission of tenders].⁵

(3) [Subject to approval,] the procuring entity may reject a tender if the contractor or supplier that submitted it offers, gives or agrees to give to any officer or employee or former officer or employee of the procuring entity a gratuity, whether or not in the form of money, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the tendering proceedings. The rejection of the tender and the reasons therefor shall be recorded in the record of the tendering proceedings.⁶

(4) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents. Those permitted deviations shall be quantified and appropriately taken account of in the evaluation and comparison of tenders.⁷

(5) [deleted]⁸

(6) [deleted]⁹

(7)(a) The procuring entity shall evaluate and compare tenders that have not been rejected pursuant to paragraph (2) or (3) in order to ascertain the most economic tender, as defined in subparagraph (c),¹⁰ in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents.¹¹

(b) [deleted]¹²

(c) The most economic tender shall be either:

- (i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, or
- (ii) the lowest evaluated tender,¹³ which shall be ascertained on the basis of objective and quantifiable criteria, to the extent possible, including, in addition to the tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, such criteria as: the costs of operating, maintaining and repairing the goods or construction over its expected useful life; the functional characteristics of the goods, construction [or services]; the efficiency and productivity of the goods, construction [or services]; the time for delivery of the goods, completion of the construction [or rendering of the services]; the terms of payment; and the terms and conditions of the quality guarantee in respect of the goods, construction [or services].¹⁴

[(d) In addition to criteria of the nature referred to in subparagraph (c)(ii) of this paragraph, the procuring entity may apply criteria concerning the effect of the tender on

the balance of payments or the foreign exchange reserves of (this State); the extent to which enterprises, personnel, industries, regions or economic sectors in (this State) would benefit economically as a result of the tender; or the extent to which technological, production, operational, managerial or similar information or skills would be acquired by enterprises or personnel in (this State). To the extent possible, such criteria shall be expressed in the solicitation documents in objective and quantifiable terms.]¹⁵

(e) In evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors and suppliers or for the benefit of tenders for domestically produced goods. The margin of preference shall be applied by deducting from the tender prices of all tenders, other than those that are to benefit from the margin of preference, import duties and taxes and sales and similar taxes levied in connection with the supply of the goods [or services] or with the construction, and adding to the resulting tender prices the amount of the margin of preference provided for in the procurement regulations or the actual import duty, whichever is less.¹⁶

(8) When tender prices are expressed in two or more currencies, the tender prices [of all tenders] shall be converted to [the same] currency for the purpose of evaluating and comparing tenders.¹⁷

(8 bis) Where the procuring entity has engaged in prequalification proceedings pursuant to article 16 it shall, and when it has not engaged in prequalification proceedings it may, require the contractor or supplier submitting the tender that has been found to be the most economic tender pursuant to article 28(7)(c) to reconfirm its qualifications in accordance with criteria and procedures conforming to the provisions of article 8. The criteria and procedures to be used for such reconfirmation shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.¹⁸

(9) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to contractors or suppliers or to any other person not officially involved in the examination, evaluation or comparison of tenders or involved¹⁹ in the decision of which tender should be accepted, except as provided in article 33(2).

(10) [deleted]²⁰

¹See A/CN.9/331, para. 117.

²See A/CN.9/331, para. 145. This subparagraph has been placed within square brackets in view of the discussion in A/CN.9/331, para. 146. The subparagraph will be retained in its present form unless the Working Group decides otherwise. The sentence in the first draft which read: "Any such correction shall be binding on the contractor or supplier that submitted the tender if accepted by that contractor or supplier" has been deleted on the initiative of the Secretariat as the point seemed to be covered by paragraph (2)(b).

³Pursuant to the proposal in A/CN.9/331, para. 45, the reference to eligibility that appeared in the first draft has been deleted. The reference to article 8(3) corrects a typographical error. The square brackets surrounding that reference in the first draft have been removed in view of the decision to retain article 8(3) (see note 14 to article 8).

¹The reference to paragraph (6) that appeared in the first draft has been deleted in view of the deletion of paragraph (6). The reference to article 29(1)(a) that appeared in the first draft was a typographical error and the reference should have been article 30(1)(a). The reference has been deleted in view of the deletion of article 30(1)(a).

²This subparagraph has been added pursuant to A/CN.9/331, para. 150. The Working Group may wish to consider whether it is preferable to require the procuring entity to return a late tender unopened, as currently provided in article 24(3), rather than to retain the tender and reject it under article 28(2). If so, the present subparagraph should be deleted.

³See A/CN.9/331, para. 152. With respect to the requirement of approval, see note 1 to article 6.

⁴Pursuant to A/CN.9/331, para. 156, the first sentence of this subparagraph has been relocated to article 2(j), the remainder of the subparagraph has been slightly reworded, and subparagraph (b) has been deleted.

⁵See A/CN.9/331, para. 159.

⁶See A/CN.9/331, para. 164.

⁷Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to subparagraph (c) has been added.

⁸See A/CN.9/331, para. 169.

⁹See A/CN.9/331, para. 167.

¹⁰The term "lowest evaluated tender" replaces the term "most economically advantageous tender" that appeared in the first draft, as a consequence of the change of the term "most advantageous tender" to "most economic tender".

¹¹The last clause of this subparagraph as it appeared in the first draft has been deleted pursuant to A/CN.9/331, para. 168. With respect to the references to services in this subparagraph and elsewhere in the article, see note 8 to article 2.

¹²See A/CN.9/331, para. 172.

¹³See A/CN.9/331, para. 173. The approach reflected in the indicated wording conforms with that followed by several international financing institutions. The Working Group may wish to consider whether the matters addressed by the wording would be better dealt with in the procurement regulations.

¹⁴See A/CN.9/331, para. 174.

¹⁵See A/CN.9/331, paras. 70, 73 and 78. With reference to the statement in A/CN.9/331, para. 78, that the provision should indicate what was to occur if the qualifications of the contractor or supplier were not reconfirmed, it seems clear that the tender would have to be rejected under article 28(2)(a), and that the provisions of article 7(2)(b) would apply. The Working Group may wish to consider whether it is necessary for that information to be added to the provision.

¹⁶Added on the initiative of the Secretariat to achieve greater clarity.

¹⁷See A/CN.9/331, para. 176.

* * *

Article 29. Rejection of all tenders

(1) [Subject to approval,] [and if so specified in the solicitation documents,] the procuring entity may, at any time prior to the acceptance of a tender, reject all tenders for any reason other than for the sole purpose of engaging in competitive negotiation proceedings and other than any fraudulent purpose.¹

(1 bis) If the procuring entity rejects all tenders for the reason that the tender prices of all tenders substantially exceed an estimated price established by the procuring entity prior to the commencement of the tendering proceedings, it may either engage in new tendering proceedings on the basis of modified specifications concerning the technical or quality characteristics of the goods, construction [or services] to be procured, or [, subject to approval,] engage in competitive negotiation proceedings

with the qualified contractor or supplier that submitted the most economic tender as defined in article 28(7)(c).²

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1), towards contractors and suppliers that have submitted tenders. *The procuring entity shall upon request communicate to any contractor or supplier that submitted a tender the grounds for its rejection of all tenders, but shall not be required to justify those grounds.*³

(3) Notice of the rejection of all tenders pursuant to this article shall be given promptly, in writing or by any other means that provides a record of the information contained therein, to all contractors and suppliers that submitted tenders. *[However, the notice may be communicated by telephone provided that, immediately thereafter, confirmation of the notice is communicated in writing or by any other means that provides a record of the confirmation.]*⁴

¹See A/CN.9/331, paras. 177, 180, and 182. With respect to the requirement of approval in this paragraph and elsewhere in the article, see note 1 to article 6. The intent of the word "sole" is to recognize that, pursuant to paragraph (1 bis) (added pursuant to A/CN.9/331, para. 182), the procuring entity may reject all tenders for the reason that they all exceed an estimated price, and that in such a case it may engage in competitive negotiation proceedings. The Working Group may wish to consider whether it is useful or desirable to require the right to reject all tenders to be reserved in the solicitation documents. Minor changes in drafting have been made on the initiative of the Secretariat in order to improve the clarity of the paragraph.

²See A/CN.9/331, para. 182. The Working Group may wish to note that the case where all tenders are rejected because they exceed an estimated price is the only case that is subject to the special provisions set forth in this paragraph. In all other cases where all tenders are rejected, the manner in which the procuring entity may proceed is governed by article 7; namely, it may commence new tendering proceedings (without necessarily having to modify the specifications) or, in the cases mentioned in article 7(2), it may engage in competitive negotiation proceedings. The Working Group may wish to consider whether the situation envisaged by this paragraph should also be left to be governed by the provisions of article 7. In addition, in connection with the issue of estimated prices, the Working Group may wish to recall its disapproval of maximum prices, minimum prices and a range of prices (A/CN.9/331, paras. 89 and 182), and consider whether reference in the Model Law to estimated prices is desirable.

³See A/CN.9/331, para. 181.

⁴See A/CN.9/331, para. 117.

* * *

Article 30. Negotiations with contractors and suppliers

No negotiations shall take place between the procuring entity and a contractor or supplier with respect to a tender submitted by the contractor or supplier, *except as provided in article 29(1 bis) and article 31(4).*¹

¹Paragraphs (1)(a) and (b) and paragraph (2) have been deleted pursuant to A/CN.9/331, paras. 182 and 183. The prevailing view of the Working Group, expressed in A/CN.9/331, para. 184, was that the *chapeau* of paragraph (1) should be retained but placed elsewhere in the Model Law. The *chapeau* has been retained in article 30 in the present draft as no other location was found to be appropriate. The final words have been added in view of the addition of paragraph (1 bis) in article 29 and of the reference in article 31(4) to negotiations.

* * *

Section VIII. Two-stage tendering proceedings¹

¹See A/CN.9/331, para. 186.

* * *

Article 31. Two-stage tendering proceedings

(1) [Subject to approval,]¹ the procuring entity may employ the procedures provided for in this article where:

(a) *instead of formulating detailed specifications for the goods, construction [or services], the procuring entity seeks proposals from contractors and suppliers in order to obtain the most advanced or the most appropriate technology or otherwise to obtain the most satisfactory solution to its procurement needs;*² or

(b) *due to the nature of the goods, construction [or services], the procuring entity is unable to formulate detailed technical specifications.*²

(2) The provisions of chapter II of this Law shall apply to tendering proceedings in which the procedures provided for in the present article are employed except to the extent those provisions are derogated from in the present article.

(3) *The solicitation documents, which shall be prepared in conformity with articles 18 and 20 of this Law, shall call upon contractors and suppliers to submit initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods, construction [or services] as well as to contractual terms and conditions of their supply.*³

(4) The procuring entity may engage in negotiations⁴ with any contractor or supplier whose tender has not been rejected pursuant to article 28(2) or (3) or article 29 concerning any aspect of its tender.

(5) The procuring entity shall invite contractors and suppliers whose tenders have not been rejected to submit final tenders with prices. *The procuring entity may delete or modify any aspect, set forth in the solicitation documents, of the technical or quality characteristics of the goods, construction [or services] to be procured, [and any criterion set forth in those documents for evaluating and comparing tenders and for ascertaining the most economic tender.] and may add new characteristics [or criteria] that conform with this Law. Any such deletion, modification or addition shall be communicated to contractors and suppliers in the invitation to submit final tenders.*⁵ A contractor or supplier not wishing to submit a final tender may withdraw from the tendering proceedings [without forfeiting its tender security].⁶ The final tenders shall be evaluated and compared in order to ascertain the most economic tender as defined in article 28(7)(c).⁷

(6) The procuring entity shall include in the record⁸ required under article 33 a statement of the circumstances on which it relied in invoking paragraph (1) of this article, specifying the relevant facts.

²See A/CN.9/331, paras. 185 and 188. With respect to the references to services in this paragraph and elsewhere in the article, see note 8 to article 2.

³The reference to articles 18 and 20 has been included pursuant to A/CN.9/331, para. 189. The second sentence of the paragraph has been added pursuant to A/CN.9/331, para. 188. With respect to the reference to solicitation documents, see note 1 to heading of section IV.

⁴See A/CN.9/331, para. 191. The word "article" has been added to achieve greater clarity.

⁵See A/CN.9/331, paras. 190 and 192.

⁶The reference to the tender security has been placed within square brackets pursuant to the proposal in A/CN.9/331, para. 192.

⁷Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to article 28(7)(c) has been added pursuant to A/CN.9/331, para. 189.

⁸Pursuant to A/CN.9/331, para. 207, the word "record" replaces the word "minutes" that appeared in the first draft.

* * *

Section IX. Acceptance of tender and entry into force of procurement contract; record of tendering proceedings¹

Article 32. Acceptance of tender and entry into force of procurement contract

(1) The tender that has been ascertained to be the most economic tender pursuant to article 28(7)(c) shall be accepted.² However, if the contractor or supplier submitting that tender is required to reconfirm its qualifications pursuant to article 28(8 bis), its tender shall not be accepted unless its qualifications are reconfirmed.³ Notice of acceptance of the tender shall be given promptly to the contractor or supplier submitting the tender.

[(2) *Except as provided in paragraph (3)(b),*⁴ a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) is dispatched to the contractor or supplier that submitted the tender, provided that it is dispatched while the tender is in force and effect.]⁵

[(3)(a) Notwithstanding the provisions of paragraph (2), the notice referred to in paragraph (1) may require the contractor or supplier whose tender has been accepted to sign a written procurement contract conforming to the tender. [When the notice, or the applicable law relative to the formation of contracts, requires the signature of a written contract,]⁶ the procuring entity and⁶ the contractor or supplier shall sign the procurement contract within a reasonable period of time after the notice is dispatched to the contractor or supplier.

(b) *Where a written procurement contract is required to be signed pursuant to paragraph (3)(a),*⁴ the procurement contract enters into force when the contract is signed by the contractor or supplier and by the procuring entity. Between the time when the notice referred to in paragraph (1) is dispatched to the contractor or supplier and the entry into force of the procurement contract:

(i) *neither the procuring entity nor the contractor or supplier shall take any action that would defeat the object or purpose of the contract or that would interfere*⁶ with the entry into force

¹See note 1 to article 6.

of the procurement contract or with its performance;

- (ii) *the procuring entity and the contractor or supplier shall inform each other of any circumstance of which they are aware that could interfere with the entry into force of the procurement contract or its performance;*⁶
- (iii) *the procuring entity and the contractor or supplier shall cooperate with each other as necessary in order for the procurement contract to enter into force.*⁵

[4] If the contractor or supplier whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the tender that is ascertained to be the next most *economic tender pursuant to article 28(7)(c)*⁷ and that is in force may be accepted.⁸ The notice provided for in paragraph (1) shall be given to the contractor or supplier that submitted that tender.⁹

(5) Upon the entry into force of the procurement contract and the provision by the contractor or supplier of a security for the performance of the contract, if required, notice of the procurement contract shall be given to other contractors and suppliers, specifying the name and address of the contractor or supplier that has entered into the contract and the price of the contract.

(6)(a) The notices referred to in this article may be given in writing or by any other means that provides a record of the information contained therein. *[However, the notices may be communicated by telephone provided that, immediately thereafter, confirmation of the notice is communicated in writing or by any other means that provides a record of the confirmation.]*¹⁰

(b) The notice under paragraph (1) is "dispatched" when it is properly addressed or otherwise directed and transmitted to the contractor or supplier, or conveyed to an appropriate authority for transmission to the contractor or supplier, by a mode authorized by paragraph (6)(a).¹¹

¹Pursuant to A/CN.9/331, para. 207, the term "minutes of tendering proceedings" has been changed to "record of tendering proceedings".

²Pursuant to A/CN.9/331, para. 194, the words "subject to approval" have been deleted from this paragraph and from paragraph (4) (see, also, note 1 to article 6). Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to article 28(7)(c) has been added.

³See A/CN.9/331, paras. 70 and 78.

⁴See A/CN.9/331, para. 196.

⁵Paragraphs (2) and (3) have been placed within square brackets in view of the differing views reflected in A/CN.9/331, paras. 197 to 200. They will be retained in their present form unless the Working Group decides otherwise. Pursuant to A/CN.9/331, para. 195, the references to receipt of the notice of acceptance of the tender have been deleted. It will be noted that the "dispatch" approach differs from the approach in the United Nations Convention on Contracts for the International Sale of Goods, art. 24. See the discussion of this point in the Working Group note following paragraph 1 of the commentary to article 32 in the first draft.

⁶See A/CN.9/331, paras. 202, 203 and 206.

⁷Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to article 28(7)(c) has been added.

⁸Pursuant to A/CN.9/331, para. 194, the words "subject to approval" have been deleted (see, also, note 1 to article 6.). The phrase "in force and effect" that appeared in the first draft has been changed to "in force".

⁹Paragraph (4) has been placed within square brackets in the light of the differing views reflected in A/CN.9/331, para. 205. The paragraph will be retained in its present form unless the Working Group decides otherwise.

¹⁰See A/CN.9/331, para. 117.

¹¹Pursuant to A/CN.9/331, para. 195, alternative 2 of paragraph 6(b) has been deleted.

* * *

Article 33. *Record of tendering proceedings*¹

(1) The procuring entity shall prepare a *record* of the tendering proceedings, including the opening, examination, evaluation and comparison of tenders. The *record* shall contain a brief description of the goods or construction to be procured, the names and addresses of contractors and suppliers that submitted tenders; information relative to the qualifications, or lack thereof, of those contractors and suppliers;² the price and a summary of the other principal terms and conditions of each tender and of the procurement contract; a summary of the evaluation and comparison of tenders; *the information required by article 28(3), if a tender was rejected pursuant to that provision,*³ if all tenders were rejected pursuant to article 29, a statement to that effect; and, where applicable, the statement required by article 31(6).

(2) The *record* of the tendering proceedings shall be made available for inspection by *any person*⁴ after [a procurement contract has entered into force and the contractor or supplier has supplied a security for the performance of the contract, if required,] *[a tender has been accepted]*⁵ or after tendering proceedings have been terminated without resulting in a procurement contract. However:

(a) information shall not be disclosed *if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition,*⁶

(b) *information relating to the examination, evaluation and comparison of tenders[, and tender prices,] shall not be disclosed.*⁷

¹Pursuant to A/CN.9/331, para. 207, the term "minutes of tendering proceedings" that appeared in the first draft has been changed to "record of tendering proceedings" in the title and text of article 33.

²Pursuant to A/CN.9/331, para. 45, the words "eligibility and" that appeared in the first draft have been deleted.

³See A/CN.9/331, para. 152.

⁴Pursuant to A/CN.9/331, para. 209, the words "any person" replace the words "the general public" that appeared in the first draft.

⁵Pursuant to the proposal in A/CN.9/331, para. 212, two alternatives are presented within square brackets for the consideration of the Working Group. The first alternative, which appeared in the first draft, is that the record of the tendering proceedings is to be disclosed after the procurement contract has entered into force and the contractor or supplier supplies a performance security. The second alternative is that disclosure must take place when a tender has been accepted. The time when a tender is accepted would seem to be the earliest time when disclosure of the record could be required, since prior to that time the tendering proceedings would still be in progress and the record would not necessarily have been prepared or completed. It will also be noted that, pursuant to article 32, the

acceptance of the tender and the entry into force of the procurement contract will occur simultaneously, except where the signature of a written contract is required. Unless the Working Group decides otherwise, the first alternative will be retained.

⁶See A/CN.9/331, para. 210.

⁷See A/CN.9/331, para. 211. The Working Group may wish to consider whether disclosure of this information, and in particular the tender prices (reference to which has been set forth within square brackets), is important in order to assure participants in the tendering proceedings, and the public in general, that the procurement law and the procurement regulations have been complied with, and in order to enable an aggrieved contractor or supplier to seek review of acts or decisions of, or procedures followed by, the procuring entity. Articles 33, 34(4) and 35 deal with analogous matters. Once the text of those provisions is settled, they might be consolidated into a single article.

* * *

Chapter III. Procurement other than by means of tendering proceedings

Article 34. *Competitive negotiation proceedings*

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of contractors and suppliers to ensure effective competition.¹

(2) Any requirements, guidelines, documents or other information relative to the negotiations that are communicated by the procuring entity to a contractor or supplier shall be communicated on an equal basis to all other contractors and suppliers engaging in negotiations with the procuring entity relative to the procurement.²

(3) Negotiations between the procuring entity and a contractor or supplier shall be confidential, and, except as provided in paragraph (4), one party to those negotiations shall not reveal or disclose to any third person any documentation or information relating to those negotiations without the consent of the other party.

(4)(a) The procuring entity shall prepare a record of the competitive negotiation proceedings. The record shall contain the names and addresses of contractors and suppliers with which the procuring entity has engaged in

negotiations; the price and a summary of the other principal terms and conditions of the procurement contract; if the proceedings did not result in a procurement contract, a statement of the reasons therefor; and the statement and facts required by article 7(5).³

(b) The record of the competitive negotiation proceedings shall be made available for inspection by any person after a procurement contract has entered into force, except that information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.³

¹The final phrase of this paragraph, which appeared in the first draft, has been deleted pursuant to A/CN.9/331, para. 216.

²The final phrase of this paragraph, which appeared in the first draft, has been deleted pursuant to A/CN.9/331, para. 217.

³See A/CN.9/331, para. 218.

* * *

Article 35. *Record of single source procurement*

(1) The procuring entity shall prepare a record of the single source procurement. The record shall contain the name and address of the contractor or supplier from which the procuring entity procured the goods or construction, the price and a summary of the other principal terms and conditions of the procurement contract and the statement and facts required by article 7(5).

(2) The record shall be made available for inspection by any person after the procurement contract has entered into force; provided, however, that information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.¹

¹See A/CN.9/331, para. 220.

* * *

III. GUARANTEES AND STAND-BY LETTERS OF CREDIT

A. Report of the Working Group on International Contract Practices on the work of its fourteenth session

(Vienna, 3-14 September 1990) (A/CN.9/342) [Original: English]

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INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session,¹ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit. The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

2. The Commission, at its twenty-second session, accepted the recommendation of the Working Group that work on a uniform law should be undertaken and entrusted this task to the Working Group.²

3. At its thirteenth session, the Working Group commenced its work by considering possible issues of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit. The Working Group requested the Secretariat to submit to its fourteenth session

¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 18.

²Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

a first draft set of articles, with possible variants, on the above issues as well as a note discussing other possible issues to be covered by the uniform law.

4. The Working Group, which was composed of all States members of the Commission, held its fourteenth session at Vienna, from 3 to 14 September 1990. The session was attended by representatives of the following States members of the Working Group: Argentina, Cameroon, Canada, Chile, China, Cuba, Czechoslovakia, Egypt, France, Germany, Federal Republic of, Hungary, India, Iran (Islamic Republic of), Japan, Mexico, Morocco, Netherlands, Nigeria, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America.

5. The session was attended by observers from the following States: Austria, Bolivia, Finland, German Democratic Republic, Pakistan, Panama, Poland, Saudi Arabia, Sweden, Switzerland, Thailand, Turkey and Venezuela.

6. The session was attended by observers from the following international organizations: Asian-African Legal Consultative Committee (AALCC), Commission of the European Communities (CEC), Hague Conference on Private International Law, European Banking Federation, International Chamber of Commerce (ICC).

7. The Working Group elected the following officers:

Chairman: Mr. J. Gauthier (Canada)

Rapporteur: Mr. J. C. Treviño (Mexico)

8. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.66), a note by the Secretariat containing a first draft of general provisions and an article on establishment (A/CN.9/WG.II/WP.67), and a note by the Secretariat discussing further issues of a uniform law: amendment, transfer, expiry, obligations of guarantor, liability and exemption (A/CN.9/WG.II/WP.68).

9. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a uniform law on guarantees and stand-by letters of credit.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

10. The Working Group examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67). The deliberations and conclusions of the Working Group are set forth below in chapter II. The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 1 to 7 of the uniform law.

11. The Working Group then considered the issues discussed in the note by the Secretariat relating to amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68). The deliberations and conclusions of

the Working Group are set forth below in chapter III. The Secretariat was requested to prepare, on the basis of those conclusions, a first draft of articles on the issues discussed.

12. It was noted that the Secretariat would submit to the Working Group at its next session a note on further issues to be covered by the uniform law, including fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction.

II. CONSIDERATION OF FIRST DRAFT OF GENERAL PROVISIONS AND ARTICLE ON ESTABLISHMENT

13. The Working Group considered draft articles 1 to 7 as set forth with explanatory remarks in a note by the Secretariat (A/CN.9/WG.II/WP.67).

Article 1. Scope of application

14. The text of draft article 1 as considered by the Working Group was as follows:

"This Law applies to an international guaranty letter [issued in this State]."

15. In connection with the discussion on the scope of application of the uniform law, general comments were made on the purpose of the uniform law and on the policies that should guide its preparation. It was pointed out, for example, that the operative rules of the uniform law should be based on actual and sound practice with due regard for modern technological developments. Since current practices differed, the uniform law should help to validate and provide a better link between the different practices. The uniform law should focus on those issues that could not effectively be dealt with at the contractual level, whether by individual stipulations of the parties or by uniform rules such as those prepared by the International Chamber of Commerce (ICC).

16. As regards the wording between square brackets, it was suggested that a more objective criterion should be found (e.g., place of business of guarantor) and that the parties' freedom to choose another law should be clearly stated. The Working Group was agreed that it would be premature at this stage to decide on the territorial scope of application of the uniform law. It was pointed out that the decision would in some respects depend on whether the uniform law would eventually be adopted in the form of a convention or in the form of a model law. In the latter case the question could be settled by rules on conflict of laws that would probably be included in the model law.

Article 2. Guaranty letter

17. The text of draft article 2 as considered by the Working Group was as follows:

"A guaranty letter, whether or not named guaranty letter, guarantee, bond, indemnity or stand-by letter of credit, is an independent undertaking, given by a bank or other institution or person ('guarantor') [at the

request of its customer ('principal') or on the instruction of another bank, institution or person ('instructing party') acting at the request of its customer ('principal') [, whether or not so requested or instructed by another institution or person], to pay to another person ('beneficiary') a certain or determinable amount of a specified currency [, unit of account or other item of value] in conformity with the terms of the undertaking."

18. The view was expressed that this article, despite the use of the term "guaranty letter" and the illustrative listing of guarantee undertakings, could be read as covering not only guarantees and stand-by letters of credit but also commercial letters of credit and even other credits and financial promises. As regards the substantive issue of whether traditional (commercial) letters of credit should be covered, the Working Group reaffirmed its decision taken at the twelfth session "that the uniform law should focus on independent guarantees, including stand-by letters of credit, and that it should be extended to traditional letters of credit where that was useful in view of their independent nature and the need for regulating equally relevant issues" (A/CN.9/316, para. 125).

19. A suggestion was made that the type of undertakings covered by the uniform law should be referred to as "independent documentary standby". Such independent documentary standby would be defined as an undertaking by a financial institution to a named beneficiary to answer for the payment or discharge of another's debt against documentary demand, whereby the undertaking is independent from any underlying transaction. Another suggestion, which received considerable support, was that the definition set forth in article 2 should be supplemented by a reference to the guaranteeing function or purpose of the undertakings covered. It was pointed out that such a reference should not be restricted to the principal's default, since that would not cover, for example, financial stand-by letters of credit payable against certification that the principal sum was due. It was also pointed out that such a reference might be unduly restrictive of developing practice and could raise doubts about the independent character of the undertaking.

20. Various comments were made on particular elements of the definition set forth in article 2. It was noted, for example, that it was not clear whether all of the undertakings listed in an illustrative manner were independent. Another comment was that the element of "demand" was missing and that that element might appropriately be added in connection with the reference to conformity. As regards the bracketed wordings relating to request and instruction, one view was in favour of the second alternative since it would recognize the practice of undertakings given by the guarantor on its own account or behalf; another view, however, was in favour of the first alternative. No comments were made on the words between square brackets referring to unit of account or other item of value.

21. Finally, a drafting suggestion was made that the definition should be presented in two parts, the first one dealing with the situation of an undertaking by the guarantor towards the beneficiary at the request of the principal,

and the second one dealing with situations where more than those three persons or institutions were involved.

Article 3. Independence of undertaking

22. The text of draft article 3 as considered by the Working Group was as follows:

"Variant A:

(1) An [international] undertaking is [deemed to be] independent, unless its terms show that the payment obligation depends on the existence or validity of an underlying transaction between the principal and the beneficiary or of any other relationship except that created by the undertaking, or that the guarantor may invoke defences arising from a relationship other than its relationship with the beneficiary.

Variant B:

(1) An undertaking is independent if it does not depend on any underlying transaction or other relationship except that created by the undertaking.

[(2) In determining whether or not a given undertaking is independent, any characterization or a single term found in the text of the undertaking shall not be deemed conclusive if the other terms and conditions clearly weigh in favour of the opposite result. In evaluating the terms and conditions in their totality, the following factors may be regarded as points weighing in favour of independence:

(a) Payment promised on 'simple demand', 'first demand', 'demand', 'receipt of written request' or words of similar import;

(b) Undertaking to pay qualified by expressions such as 'unconditional', 'irrespective of valid existence of X-Contract', 'waiving all rights of objection and defences arising from said contract' or 'without proof of default';

(c) Payment against documents, including statement by beneficiary, and not requiring verification of facts outside guarantor's purview;

(d) Reference to an underlying transaction only in a preamble or otherwise in a recital of what has gone before, and not in operative clauses;

(e) Undertaking stated to be subject to Uniform Customs and Practice for Documentary Credits or Uniform Rules for Guarantees.]"

Paragraph (1)

23. The Working Group was agreed that the principle of independence was sound and fundamental to the uniform law. However, divergent views were expressed as to how the principle should be defined.

24. It was noted that Variant A of paragraph (1) differed from Variant B essentially in two respects. The first one was that it included a rule of interpretation in favour of independence. A view was expressed that this rule was contained in the words "deemed to be". Support was expressed

for such a rule of interpretation since it would help to solve an impasse in case of otherwise insoluble ambiguity and since the suggested solution accorded with the dominant practice and expectations in international guarantee operations. The prevailing view, however, was that the rule of interpretation should not be retained since it might lead to a result not expected by the parties concerned.

25. The second respect in which Variant A differed from Variant B was its considerably more detailed and comprehensive formulation. Proponents of Variant A pointed in particular at those details that specified the various relationships and referred to defences arising from those relationships. However, the very reference to defences accentuated the concern that the exclusion of defences in the context of the definition of independence might be construed as providing a final answer to such questions as whether payment may be refused in case of fraud or manifest abuse, whether illegality of the underlying transaction may have an effect on the undertaking in the guaranty letter, or whether set-off was admissible. That concern was the main reason advanced by proponents of Variant B. Yet another view was that Variant B could be combined with Variant A, except for the above rule of interpretation.

26. It was noted in that connection that the questions raised by those concerned about a preclusive effect of the definition of independence were scheduled to be discussed by the Working Group at its fifteenth session, as indicated by the Secretariat in its note A/CN.9/WG.II/WP.68, para. 2. It was agreed that the definition of independence might have to be reviewed and possibly refined in the light of the future conclusions of the Working Group on those questions concerning possible objections to payment.

27. The Working Group, after deliberation, requested the Secretariat to prepare a revised draft of paragraph (1) based on Variant A, excluding the rule of interpretation in favour of independence, and possibly using some of the wording found in Variant B.

Paragraph (2)

28. Some doubts were expressed as to whether provisions of the kind set forth in paragraph (2) were truly needed and helpful. The prevailing view, however, was that it would be useful to provide some guidance in the interpretation of guaranty letters as regards their legal character. While there was wide support for the rules contained in the opening words of the paragraph, some reservations were expressed concerning the factors set forth in subparagraphs (a) through (e).

29. It was pointed out, for example, that the inclusion of certain specific expressions in subparagraphs (a) and (b) accorded them a particular weight and that difficult questions of interpretation might arise in the case of expressions that were similar or were identical only in part. As regards subparagraph (d), one concern was that the very mention of the underlying transaction might undermine the independent nature of the undertaking. Another concern relating to that subparagraph was that it introduced an inappropriate formalism by attaching legal consequences to the location of the reference to the underlying transaction within the text of the guaranty letter.

30. It was noted that the factors set forth in subparagraphs (a) through (e) were merely designed as factors weighing in favour of independence within the evaluation of the terms and conditions in their totality and were thus not conclusive in isolation. In the light of this, a suggestion was made that the uniform law might give one or more expressions such conclusive status that would put the independent characterization beyond doubt.

31. The Working Group, after deliberation, requested the Secretariat to redraft paragraph (2) in the light of the above views and suggestions.

Article 4. Internationality

32. The text of draft article 4 as considered by the Working Group was as follows:

"Variant A:

A guaranty letter is international if:

(a) any two of the following places specified in the guaranty letter are situated in different States:

- (i) [The place where the guaranty letter was issued][the place of business of the guarantor];
- (ii) The place of business of the beneficiary;
- (iii) The place of payment;
- (iv) The place of business of [a principal or an instructing party][the person at whose request the guaranty letter was issued];
- (v) The place of business of a confirming guarantor;

or

(b) if it expressly so states.

Variant B:

A guaranty letter is international if any two of the following [persons][parties] have their place of business in different States: guarantor, beneficiary, principal, instructing party, confirming guarantor.

Variant C:

A guaranty letter is international if:

(a) the guarantor and the beneficiary have their place of business in different States; or

(b) the place of issue and the place of business of a principal or an instructing party are situated in different States; or

(c) the place of issue and the place of payment are situated in different States;

or

(d) the guaranty letter relates in any other [significant] manner to more than one country.

Variant D:

A guaranty letter is international if it relates to an international operation, whether commercial or financial."

33. The view was expressed that the criteria of internationality set forth in article 4 should be made as broad as possible so as to encompass a maximum number of situations. One proposal to that effect was to define an international guaranty letter along the lines of subparagraph (d) of Variant C as one "relating in any significant manner to more than one country". Another proposal was to adopt the wording of Variant D.

34. It was stated in reply that, although a broad definition of the international guaranty letter was needed, it should not have the effect of covering domestic transactions with minimal international contact. The criteria of internationality should not only result in a broad applicability of the uniform law, but also be as objective as possible. The prevailing view was in favour of Variant B; some doubts were expressed as to the usefulness of the place of business of the confirming guarantor as a criterion of internationality.

35. There was wide support for the view that the criteria of internationality should be drafted so as to provide all parties with the highest possible degree of certainty as to the applicability or the non-applicability of the uniform law to a given transaction. With a view to enhancing certainty, it was proposed that the requirement for specification set out in the opening words of subparagraph (a) of Variant A should be adopted. However, since the requirement of specification might create an excessively rigid rule and a somewhat more flexible rule was more appropriate, another proposal was to add to Variant B a provision similar to article 1(2) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "United Nations Sales Convention"), which reads as follows:

"The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract."

36. After deliberation, the Working Group decided to reconsider both proposals at a later stage.

37. With a view towards further broadening the criteria of internationality, it was proposed that the text of subparagraph (b) of Variant A should be added to Variant B. In response, it was stated that such a reference to party autonomy might be unacceptable to many countries since it could enable parties to avoid the application of mandatory provisions of their domestic law. Another concern was that the provisions of article 4 should not conflict with rules on choice of law that would be discussed by the Working Group at its next session. It was noted that the proposed provision would have a different character and produce different results depending on whether the uniform law was eventually adopted in the form of a convention or in the form of a model law. After deliberation, the Working Group decided to adopt the wording of subparagraph (b) of Variant A but to place it between square brackets.

Article 5. Interpretation of this Law

38. The text of draft article 5 as considered by the Working Group was as follows:

"In the interpretation of this Law, regard is to be had to its international [character][origin] and to the need to promote uniformity in its application and the observance of good faith in international [transactions][guaranty or credit practice]."

39. The Working Group was agreed that this article was useful and appropriate if the uniform law would be adopted in the form of a convention. However, it was stated that such a provision would not be appropriate if the uniform law would be adopted in the form of a model law. For example, national courts could hardly be entrusted with the promotion of worldwide uniformity in the application of their own national statute.

40. In response, it was stated that, although article 5 might not be appropriate in its totality if the uniform law would be adopted in the form of a model law, it would still be useful to the extent that it created a standard of good faith. As regards the wording of the reference to good faith, the words "guaranty or credit practice" were preferred to the word "transactions".

41. The Working Group was agreed that article 5 should be placed between square brackets and reconsidered in the light of the future decision on the form of the uniform law and of future discussions relating to the concept of good faith.

Article 6. Construction of guaranty letter

42. The text of draft article 6 as considered by the Working Group was as follows:

"Variant A:

(1) Subject to the provisions of this Law [and of any other applicable law], the rights and obligations of the parties are determined by the terms and conditions set forth in the guaranty letter, including any rules, conditions or usages referred to therein [, and, unless otherwise stipulated, any international usage of which the parties knew or ought to have known and which is widely known to, and regularly observed by, parties to guaranty or credit transactions].

(2) The terms and conditions of the guaranty letter are to be interpreted according to the intent of the parties, taking into account the ordinary meaning in the understanding of a reasonable person with an appreciation of the commercial purpose of the transaction and with due consideration of any practices which the parties have established between themselves.

Variant B:

In determining the rights and obligations of the guarantor and the beneficiary, the terms and conditions set forth, or referred to, in the guaranty letter are to be interpreted according to the ordinary meaning given to them by a reasonable person."

43. The discussion of this article focused on Variant A. This Variant was preferred to Variant B because of its more detailed and comprehensive formulation. Various comments were made in respect of particular elements contained in paragraphs (1) and (2).

Paragraph (1) of Variant A

44. As regards the introductory proviso "Subject to the provisions of this Law", it was understood that it limited party autonomy only to the extent that the uniform law contained mandatory provisions; any non-mandatory provision would, by its nature, be applicable and affect the rights and obligations of the parties only if the matter regulated by that provision was not dealt with by the terms and conditions of the guaranty letter, including any rules, conditions and usages referred to therein. In the preparation of the uniform law, it would have to be decided for each provision whether or not parties may derogate therefrom.

45. As regards the bracketed words "and of any other applicable law", it was stated that those words were redundant, too general to be useful, and potentially misleading and even dangerous. The proposal not to retain them was accepted by the Working Group.

46. The Working Group adopted the central portion of paragraph (1) which reads "the rights and obligations of the parties are determined by the terms and conditions set forth in the guaranty letter, including any rules, conditions or usages referred to therein". It was noted that such rules or usages could, for example, be those prepared by the International Chamber of Commerce. In line with its agreement reached at the thirteenth session (A/CN.9/330, para. 61), the Working Group did not accept a proposal that the uniform law should explicitly refer to the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules on Demand Guarantees (URG).

47. Divergent views were expressed in respect of the bracketed reference to international usage at the end of paragraph (1). One view was that the wording should be retained since it would accommodate those jurisdictions that gave effect to the UCP or the Incoterms even if not referred to in the guaranty letter and since relevant international usages provided a useful or even necessary source for determining the rights and obligations of the parties and for interpreting the terms and conditions of the guaranty letter. The prevailing view, however, was that the reference to international usages should not be retained since it created uncertainty and might provide a trap to unwary parties.

48. The Working Group, after deliberation, adopted paragraph (1) except for the wordings placed between square brackets.

Paragraph (2) of Variant A

49. Divergent views were expressed as to the first criterion of interpretation mentioned in paragraph (2), namely "the intent of the parties". One view was that the criterion was usually the primary criterion for interpreting contracts or declarations and that it was particularly useful in the

area of guaranty letters since these were often drafted in an ambiguous or imprecise manner.

50. The prevailing view, however, was that the criterion was too subjective and was inappropriate for a guaranty letter that was more formal in character than, say, a sales contract. Additional uncertainty arose from the reference to "the parties" since it was unclear which parties were meant in the context of a given guaranty letter and whether it would, for example, be necessary to know or to inquire who the author of the terms of the guaranty letter was. A more limited proposal that the primary criterion should be the common and established intent of the guarantor and the beneficiary was not accepted by the Working Group.

51. Some support was expressed for retaining the criterion of "the ordinary meaning in the understanding of a reasonable person with an appreciation of the commercial purpose of the transaction". The prevailing view, however, was against its retention since it did not provide sufficient guidance in interpretation in that it was to some extent redundant and, in the typical situation of disputed terms, of little use. A suggestion was made that a more appropriate criterion would be the understanding of a knowledgeable and prudent document checker or the common sense of the banking industry as laid down in bankers' manuals or white papers. It was stated, in reply, that such a criterion was too subjective, uncertain and hardly acceptable to other parties involved in guarantee and credit operations.

52. Some support was expressed for giving due consideration to "any practices which the parties have established between themselves", since this would be in conformity with their intentions and expectations and accord with the principles of good faith or estoppel. The prevailing view, however, was that the interpretation should not be based on previous practices since reliance on extraneous facts was contrary to the principle of strict construction. In this connection, a question was raised whether the provisions of article 6 were rules of interpretation or dispute resolution clauses.

53. It was noted that the concept of strict compliance was dealt with separately in the note by the Secretariat contained in document A/CN.9/WG.II/WP.68. The separate treatment was based on the distinction between the interpretation of the terms and conditions, including the conditions of payment, of the guaranty letter according to article 6 and the verification of compliance of the payment claim with these conditions. A concern was expressed that the distinction was artificial in that bankers regarded the interpretation of the guaranty letter, which to them was relevant only to the submission of documents, and the verification of documentary compliance as one single process in which only one standard should apply.

54. The Working Group, after deliberation, decided not to retain paragraph (2). The decision was not meant to preclude any later proposal for a new rule of interpretation that might be made in the light of future deliberations of other provisions.

Article 7. Form and time of establishment

55. The text of draft article 7 as considered by the Working Group was as follows:

"(1) A guaranty letter may be established by any means of communication that provides a record thereof.

Variant A:

(2) A guaranty letter becomes binding and, unless it expressly states that it is revocable, irrevocable, when it is received by the beneficiary [, unless the beneficiary promptly rejects it]. The guaranty letter becomes effective at that time, unless [it states a different time of effectiveness or makes its effectiveness depend on the occurrence of a specified, uncertain future event, in which case the guarantor may require a declaration from the beneficiary or an appropriate third party stating the occurrence of the event, if verification of that occurrence is not within the control of the guarantor] [it expressly provides that its effectiveness is subject to a specified condition that is determinable by the guarantor].

Variant B:

(2) Unless otherwise stated, a guaranty letter is effective and irrevocable, when it is issued by the guarantor to the beneficiary or to the principal or instructing party."

Paragraph (1)

56. It was noted that paragraph (1) was modelled on article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration and that it was based on the view, widely supported at the thirteenth session (A/CN.9/330, para. 105), that the guaranty letter should be manifest or recorded in some tangible or material form, to the exclusion of purely oral undertakings. Various comments were made concerning the purpose of the provision and its formulation.

57. A question was raised as to whether paragraph (1) was designed to provide a rule of evidence, as might be inferred from the use of the word "record". It was stated in reply that the purpose of the provision was to establish the formal requirement of validity of the guaranty letter without taking a stand on the evidentiary value of any form of communication record covered by it. If there was any need for defining certain terms that had evidentiary implications (e.g. signature or authentication) or for including rules of evidence applicable in court or arbitral proceedings, it would be appropriate to consider those matters separately and at a later stage.

58. A proposal was made that the uniform law should merely require that the undertaking be made expressly so as to exclude tacit or implied undertakings. It was agreed that the uniform law should not give effect to tacit or implied undertakings, which were uncertain and undesirable, and that consideration might be given either to disregarding them or to excluding them from the scope of application of the uniform law. It was realized that

whatever decision was taken on that matter it would not address the question of formal validity. With a view to not invalidating purely oral undertakings, a proposal was made that the uniform law should not establish any requirement of form or that it should exclude such undertakings from its scope of application. The Working Group did not accept that proposal, on the ground that purely oral undertakings created uncertainty and did not conform to sound banking practice.

59. While there was wide support for the approach taken in paragraph (1), questions were raised as to whether the provision provided clear answers in all situations. One example was the establishment of a guaranty letter by telephone where the conversation was recorded on tape. The answer given was that this method of establishment would not meet the requirement of form under paragraph (1) since that provision covered only those records provided by the chosen means of communication, i.e. any output of the communication system itself. Another example was the establishment of a guaranty letter by electronic means where the message appeared on the recipient's screen and could still be altered before it was printed out. The answer given was that the form requirement of paragraph (1) was met once the message was either stored in a memory or printed out or otherwise left an audit trail. In this connection, a proposal was made that the record required by paragraph (1) should be one that could not be altered or tampered with. It was stated in reply that such a requirement, while commendable in its aim of creating security and certainty, would be too strict in practical terms.

60. Based on the above example of an electronic message that had not yet been printed out, a proposal was made that the uniform law should require that the guaranty letter be established "in writing or by any other means capable of providing [in an automatic manner] a written record thereof". Another proposal was to require a "writing" and to define that term as including "an authenticated teletransmission or tested electronic data interchange ('EDI') message equivalent thereto". It was noted that this wording was taken from article 2 URG where the term "writing" was used to delimit the scope of application and not to establish a rule of formal validity.³

61. The Working Group, after deliberation, requested the Secretariat to review and redraft the provision of paragraph (1), taking into account in particular the last proposal.

*Paragraph (2)**Statutory time of effectiveness*

62. Divergent views were expressed as to the point of time when the guaranty letter, unless otherwise stated therein, would be binding and effective. Under one view the determinant point of time should be the receipt by the beneficiary, as provided in Variant A. The main reason given was that the guaranty letter established a

³Articles of URG referred to in this report are those of the ICC Draft Uniform Rules for Demand Guarantees contained in ICC Document No. 460/470-1/Int.16 (7 June 1990).

relationship between the guarantor and the beneficiary and that it was only upon receipt that the beneficiary was in a position to rely on the guarantor's undertaking. Before that point of time, there was no need to bind the guarantor to its undertaking, even though an earlier point of time might be relevant for regulatory or accounting purposes. While no express acceptance of the guaranty letter should be required, receipt of the guaranty letter was a necessary condition for acceptance by silence and for a possible rejection.

63. The prevailing view, however, was that the determinant point of time should be the release or issue of the guaranty letter, as provided in Variant B (and in article 6 URG). It was stated in support that guarantors regarded themselves bound once the guaranty letter had left their sphere of control. The time of issue provided a certain and definite criterion, unlike the time of receipt, which could be difficult or cumbersome to ascertain. Certainty about the time of effectiveness was not only desirable for regulatory or accounting purposes but also of interest and benefit to all parties concerned, including any intermediary banks.

64. It was noted that guaranty letters were not always issued directly to the beneficiary as the ultimate addressee; they might be dispatched to the principal (e.g. in the case of tender guarantees) or an instructing party, as envisaged in Variant B, or even to an advising or confirming bank. In view of the variety of conceivable fact situations, it was agreed not to attempt to list all possible forwarding intermediaries but merely to refer to the time when the guaranty letter was "issued by the guarantor".

Possibility of prompt rejection by beneficiary

65. Some proponents of the time of issue and some proponents of the time of receipt expressed support for the proviso set forth in Variant A "unless the beneficiary promptly rejects it" (i.e. the guaranty letter). Since the guaranty letter created a relationship between the guarantor and the beneficiary, it should not be regarded as being effective where the beneficiary rejected it promptly upon receipt. While no express acceptance should be required, the guaranty letter should not be imposed on an unwilling beneficiary.

66. It was stated in reply that the possibility of rejecting the guaranty letter should be dealt with separately from the time of effectiveness since here certainty was paramount. The very notion of rejection *vis-à-vis* the guarantor was not easily reconciled with the factual situation that the guaranty letter was issued at the request of the principal and presumably in conformity with the terms of the instructions. If a given guaranty letter did not meet the expectations of the beneficiary, it was rarely for the guarantor alone to meet those expectations which, moreover, were more likely to aim at an amendment of the guaranty letter than a total rejection. To the extent that a need for rejection should be recognized by the uniform law, consideration could be given to including a rule on rejection, release or waiver by the beneficiary without however requiring that a rejection had to be made promptly upon receipt.

67. The Working Group, after deliberation, decided to maintain the proviso between square brackets and to reconsider the matter at a later stage.

Clauses in guaranty letters concerning time of effectiveness

68. The Working Group was agreed that the statutory time of effectiveness set by the uniform law should not be determinative when the guaranty letter stated a different time of effectiveness, as provided in Variant A. Such a clause could refer either to a fixed date or to a determinable period of time.

69. The Working Group considered whether the statutory time of effectiveness could be derogated from by a clause in the guaranty letter that would postpone the effectiveness to the time of fulfilment of a specified condition. No objections were raised against clauses under which the fulfilment of the condition was clearly determinable in that fulfilment had to be established by a document or by a written declaration of the beneficiary or another specified person or that its verification was within the purview of the guarantor.

70. However, divergent views were expressed as regards the remaining clauses, which contained so-called non-documentary conditions. Recalling its discussion at the thirteenth session (A/CN.9/330, paras. 68-75), the Working Group was agreed that the problem of non-documentary conditions of effectiveness was essentially the same as that of non-documentary conditions of payment. In fact, one could even regard any condition of effectiveness (e.g. advance payment under a repayment guaranty letter) as a condition of payment.

71. One view was that non-documentary conditions should be disallowed or disregarded, as provided at the end of Variant A in the bracketed wording that was modelled on article 6 URG. It was pointed out that conditions requiring investigation into extraneous facts were undesirable in that they fell outside the ordinary business of banks and tended to undermine the independent character of the undertaking. In fact, one could even regard undertakings with non-documentary conditions as accessory undertakings that were outside the scope of the uniform law. Moreover, non-documentary conditions were often included due to inadvertence; to the extent that they were included intentionally, practice showed that there existed a potential for fraud, abuse or misrepresentation.

72. Based on similar considerations, another view was that non-documentary conditions should be converted into documentary ones, as provided in the bracketed wording of Variant A that "the guarantor may require a declaration from the beneficiary or an appropriate third party stating the occurrence of the event". It was pointed out that this wording reflected the view that prevailed at the thirteenth session (A/CN.9/330, para. 75). A suggestion was made that the formulation of that wording might be refined by taking into account different kinds of conditions. Another suggestion was to recommend to the parties to agree on the means of verification or evidence and, failing agreement, to let a declaration by the beneficiary suffice.

73. Another view, based on different considerations, was that the uniform law should neither disregard non-documentary conditions nor convert them into documentary conditions, but should leave them intact, as provided in Variant B. While a given non-documentary condition might lead to the conclusion that the undertaking was not independent as defined in article 3, that was not always the case, and it would be contrary to the autonomy and expectations of the parties not to respect a condition that formed part of an independent undertaking. The current use of such clauses suggested a practical need therefor and, to the extent that banks regarded them as undesirable or contrary to sound banking practice, it was for them to refuse or discourage their inclusion in guaranty letters.

74. Yet another view, shared by some proponents of the above views, was that consideration might be given to excluding from the scope of application of the uniform law all undertakings that contained any non-documentary condition of effectiveness or payment. If the definition of guaranty letter in article 2 and the definition of independence in article 3 were revised so as to restrict the scope of application to what might be called "documentary guaranty letters", the uniform law would not regulate any undertakings with non-documentary conditions, i.e. neither give effect to such conditions nor invalidate them or convert them into documentary ones. It was stated in reply that non-documentary conditions created considerable problems in practice that called for legal answers. Instead of ignoring or discarding the problem, every effort should be made to finding an acceptable solution, based on further considerations of the kinds of conditions at issue and the precise meaning of independence.

75. The Working Group, after deliberation, decided to reconsider at a future session the problem of non-documentary conditions, including the possibility of limiting the scope of application of the uniform law to documentary undertakings. The Working Group later resumed its discussion on non-documentary conditions (see paragraphs 111-118 below).

III. DISCUSSION OF FURTHER ISSUES OF A UNIFORM LAW: AMENDMENT, TRANSFER, EXPIRY, AND OBLIGATIONS OF GUARANTOR

A. Amendment

76. The Working Group discussed questions relating to the amendment of the guaranty letter on the basis of the considerations and suggestions set forth in the note by the Secretariat (A/CN.9/WG.II/WP.68, paras. 3-17). It was agreed that the uniform law should contain provisions on the amendment of a guaranty letter.

Parties whose consent is required

77. As regards the parties whose consent was required for an amendment to be effective, it was agreed that the guaranty letter could not be modified without the consent

of the guarantor, whose obligations were at stake, and that of the beneficiary, whose rights were at stake. Divergent views were expressed on whether, in addition, the consent of the principal should be required. One view was that an amendment should not be given effect without the principal's consent since the original guaranty letter had been established on the instructions of the principal and the effect of an amendment would be to modify the original terms. The requirement of the principal's consent served also the interest of the guarantor in that it would remove a possible objection by the principal against a later claim for reimbursement.

78. The prevailing view, however, was that the consent of the principal should not be a requirement for the amendment to be effective since the amendment concerned the guaranty letter that created a relationship only between the guarantor and the beneficiary. Any considerations about the instructions or wishes of the principal as well as the guarantor's position in a later claim for reimbursement related exclusively to the separate relationship between the guarantor and the principal.

79. It was felt that these considerations could be addressed in the uniform law, but separately from the rule requiring the consent only of the guarantor and the beneficiary. One proposal was to add such wording as: "This provision does not excuse the failure to obtain the principal's consent, as it may be required by the agreement or instructions between the principal and the guarantor". Another proposal was to require the guarantor to inform the principal about any amendment or any request for an amendment. Yet another proposal was to provide that the guarantor could in its relationship with the principal invoke an amendment only if it had been consented to by the principal.

80. Divergent views were expressed as to whether the beneficiary's consent had to be express or whether silence imported acceptance. One view was that the consent had to be express or, possibly, confirmed by an act or conduct in compliance with the terms of the amendment. It was stated in support that the established relationship could be modified only by a clear agreement of the parties and that express acceptance was, in particular, required where the amendment was to the disadvantage of the beneficiary.

81. Another view was that acceptance could be imported from silence, i.e. where the beneficiary had not rejected the amendment promptly or within a specified period of time. It was pointed out that this view conformed to the approach taken by the Working Group in respect of the establishment of the guaranty letter (article 7(2)) and that it took into account the fact that the bulk of amendments (e.g. extension of validity periods) increased the rights of the beneficiary.

82. The Working Group did not accept a proposal to prepare a dual set of rules depending on whether a given amendment was beneficial or disadvantageous to the beneficiary. It was felt that rules that involved subjective judgments were not easy to administer.

83. The Working Group, after deliberation, was agreed that it would decide at a future session, on the basis of alternative draft provisions prepared by the Secretariat, whether the beneficiary's consent had to be express or whether silence imported consent.

Form of amendment

84. The Working Group was agreed that an amendment could be made in any form in which a guaranty letter could be established according to article 7(1), since there were no reasons for a stricter or for a more lenient requirement of form. Consistency was also appropriate in view of the fact that an amended guaranty letter might be regarded as a new guaranty letter.

85. It was agreed that the provision on the form of amendments should not be mandatory, so as to give effect to any different form of requirement stated in the guaranty letter or otherwise agreed upon by the guarantor and the beneficiary. A view was expressed that the non-mandatory nature of the provision might require further consideration. A proposal was made to add a rule along the lines of article 29 United Nations Sales Convention.

Time of effectiveness

86. The Working Group was agreed that the rule on the time of effectiveness of an amendment should follow the approach taken in respect of the time of effectiveness of the original guaranty letter. It was recalled that, in the context of article 7(2), the Working Group had favoured the time of issue as the determinant point of time and that the proviso referring to the beneficiary's prompt rejection of the guaranty letter had been maintained between square brackets for later reconsideration.

87. It was realized that the future rule on the time of effectiveness of an amendment would depend on which of the two above views (paragraphs 80 and 81) concerning the import of the beneficiary's silence would be adopted. If the decision would be in favour of acceptance by silence, the future rule on amendment could be closely modelled on the rule on establishment that included the proviso. If the decision would be in favour of express acceptance, the time of acceptance could determine the time of effectiveness or the acceptance could be given retroactive effect. The Working Group requested the Secretariat to prepare alternative draft provisions reflecting those views.

B. Transfer of rights and assignment of proceeds

88. The Working Group discussed questions relating to the transfer of rights and the assignment of proceeds on the basis of the considerations and suggestions set forth in the note by the Secretariat (A/CN.9/WG.II/WP.68, paras. 18-23). It was agreed that the distinction, drawn in that note as well as in UCP and URG, between the transfer of the beneficiary's right to claim payment under the guaranty letter and the mere assignment of the proceeds was valid and useful.

Transfer of rights

89. The Working Group was agreed that the beneficiary should not be allowed to transfer its rights without the guarantor's authorization, which could be stated in the guaranty letter or given separately. The requirement of authorization was said to accommodate the guarantor's possible wish as a debtor of not being faced with an unacceptable new creditor and, even more importantly, to accommodate indirectly the interest of the principal in having the rights under the guaranty letter rest with the person whose risk was to be covered by the guaranty letter. The latter consideration was of special importance where the beneficiary was the creditor of an underlying transaction with the principal.

90. A more restrictive proposal was to limit the right of transfer to those cases where the secured creditor under the underlying relationship changed, whether by assignment of the underlying contract or otherwise. In this context, the Working Group discussed the possible effect of such a change on the relationship between the beneficiary and the guarantor. It was noted that divergent conclusions could be drawn, for example, automatic termination of the guaranty letter, or automatic transfer of the beneficiary's rights, or no automatic effect at all, in which latter case any claim by the beneficiary, who was no longer the principal's creditor, might constitute an abuse of rights. The Working Group concluded that there was a need for further study of the problem.

Assignment of proceeds

91. The Working Group was agreed that the beneficiary was free to assign any proceeds that were forthcoming when the guarantor would honour its undertaking under the guaranty letter. While some doubts were expressed as to whether a rule to that effect was needed in the uniform law, the Working Group concluded that such a rule could be useful.

92. Divergent views were expressed as to whether additional rules should be envisaged dealing with notice of assignment to the guarantor and other details of implementation. One view was that it was not appropriate to attempt, in the context of the uniform law, to unify the disparate national laws on assignment and, for example, to regulate notice of assignment as a requirement of validity. Another view was that the uniform law should address those issues that had a direct bearing on the relationship between the beneficiary and the guarantor. One such issue was the requirement of notice, which was relevant for the guarantor's discharging properly its payment obligation. It was stated in reply that the issue of proper discharge embraced other questions as well, for example, bankruptcy of the beneficiary or payment to a collecting agent.

93. The Working Group, after deliberation, requested the Secretariat to prepare draft provisions covering notice and possibly other details of implementation as a basis for a later reconsideration of the matter.

C. Expiry

94. The Working Group discussed questions relating to the expiry of the guaranty letter on the basis of the considerations and suggestions set forth in the note by the Secretariat (A/CN.9/WG.II/WP.68, paras. 24-43). It was agreed that certainty about the expiry was of considerable practical importance and that the uniform law could enhance certainty in two respects, namely as regards the meaning and effect of expiry as stipulated in the guaranty letter and as regards possible requirements relating to expiry clauses.

Meaning and effect of expiry

95. The Working Group was agreed that the meaning of an expiry date stated in the guaranty letter was that a demand for payment, accompanied by any required documents, may be made only before or on that date and that, accordingly, the guarantor was not obliged to pay upon any demand made after that date. In view of the fact that courts of some jurisdictions had given a different interpretation, it was agreed to enshrine that meaning in the uniform law, by a provision along the lines of article 19 URG. Article 19 URG reads:

"A claim shall be made in accordance with the terms of the Guarantee on or before its expiry and, in particular, all documents specified in the Guarantee for the purpose of claiming shall be presented to the Guarantor on or before its expiry at its place of issue, otherwise the claim shall be refused."

96. It was agreed that the future provision should clarify whether the relevant time of making a demand was the time of dispatch by the beneficiary or the time of receipt by the guarantor. No comments were made as to whether the provision should be mandatory.

97. The Working Group was agreed that the effect of expiry was automatic in that it did not depend on any further act such as return of the guaranty letter or a declaration of release by the beneficiary. This understanding should be reflected in the uniform law, at least as regards the issue of return of the guaranty letter, along the lines of article 24 URG, which reads:

"Where a Guarantee has terminated by payment, expiry, cancellation or otherwise, retention of the Guarantee or of any amendments thereto shall not preserve any rights of the Beneficiary under the Guarantee."

98. Consideration might also be given to including a provision like article 23 URG dealing with return of the guaranty letter and release before expiry. It was pointed out that any provision that was taken from the URG would gain a different legal effect when it was incorporated into the uniform law and enacted in a given State in that it would, unlike any contractual provision, displace any provision of law such as one that would make expiry depend on the return of the guarantee instrument.

Possible requirements relating to expiry clauses

99. The Working Group was agreed that expiry clauses could validly refer to a specific date or to a specified period of time after the issue of the guaranty letter. As regards clauses that linked expiry to a certain act, event or other condition, a distinction had to be drawn depending on whether the determination of expiry required a verification or investigation into facts. If no such verification was required because expiry was based on the presentation of certain documents, no serious problems were envisaged, except that there might be a risk of an everlasting undertaking, at least if a document was to be furnished by the beneficiary.

100. However, serious misgivings were expressed as regards those other clauses that required an investigation into facts outside the purview of the guarantor. It was therefore suggested that any non-documentary condition of expiry be read as, or converted into, a documentary one. It was noted that the documentary approach was taken by article 22 URG, which appeared to qualify the presentation of documents itself as an expiry event. Article 22 URG reads:

"Expiry of a Guarantee for the presentation of claims shall be upon a specified calendar date ('Expiry Date') or upon presentation to the Guarantor of the document(s) specified for the purpose of expiry ('Expiry Event'). Claims received after the Expiry Date or Expiry Event shall be refused by the Guarantor."

101. Divergent views were expressed as to whether the uniform law should require guaranty letters to contain an expiry clause and, if so, what the sanction for failure should be. While some support was expressed for invalidating guaranty letters without an expiry clause, the prevailing view was not to require expiry clauses, since guaranty letters without such clauses were found in practice and there might be good reasons for that practice. However, consideration might be given to setting in the uniform law a cut-off period of, say, five years, which would determine the expiry of those guaranty letters that did not contain any expiry clause. In drafting a provision to that effect for later consideration by the Working Group, the Secretariat should take into account the possible interest of parties in extending the validity period beyond that cut-off point.

102. The Working Group, after deliberation, requested the Secretariat to prepare draft provisions on expiry on the basis of the above conclusions and suggestions.

D. Obligations of guarantor

103. The Working Group discussed questions relating to the obligation of the guarantor to pay upon conforming demand (including the issue of the standard of examination as to conformity), based on the considerations and

suggestions set forth in the note by the Secretariat (A/CN.9/WG.II/WP.68, paras. 44-57).⁴

104. As regards the proper form of a demand, the Working Group was agreed that purely oral demands should not be permitted.

105. A proposal was made that the uniform law should list, in the context of fulfilment of payment conditions or in article 3(2)(c), the four main types of guaranty letter commonly used in practice. These types were, briefly described, that payment was due (1) on simple demand, (2) against an additional declaration of the beneficiary about the principal's default, (3) against an additional specification of the obligations breached by the principal, or (4) against documentary evidence of the principal's default (e.g. certificate by third party, judicial or arbitral decision). The proposed listing, which should not be exhaustive, would serve an educational purpose and convey the message that all four types were being used and recognized in international practice. The proposal was opposed on the grounds that the listing of such particulars of ever-developing practice was inappropriate in a law, unless there was a clear regulatory purpose, and that it could be misunderstood as giving special recognition to the four types listed.

106. As regards the standard of examination of documents, wide support was expressed for including in the uniform law a provision along the lines of article 9 URG. Article 9 URG reads:

"All document(s) specified and presented under a Guarantee, including the claim, shall be examined by the Guarantor with reasonable care to ascertain whether or not they appear on their face to conform with the terms of the Guarantee. Where such document(s) do not appear so to conform or appear on their face to be inconsistent with one another, they shall be refused."

107. Particular support was expressed for the notion of facial conformity and the requirement of reasonable care. Various suggestions were made with a view to providing further guidance relating to the notion of facial conformity and the requirement of reasonable care. One suggestion was that the uniform law should enshrine the principle of strict compliance of the documents with the terms of the guaranty letter. It was pointed out, however, that this commonly accepted principle might not provide clear answers as to the tolerable degree of deviations and that there might be fewer occasions for its application in the context of guaranty letters than there were in the context of commercial letters of credit. Another suggestion was that the requirement of reasonable care should be interpreted in the light of established customs and practice. Yet another suggestion was that the reasonable care required of the guarantor should be determined according to the conduct of the most diligent issuers of guaranty letters. It was stated in reply that any standard of care had to be

judged with respect to the relevant group of persons and that, in a situation with potentially conflicting interests, no preference should be given to one such group of persons.

108. Based on the aforementioned discussion in the Working Group the following wording was proposed:

"When construing the terms and conditions of independent guarantees or stand-by letters of credit, the guarantor or issuer must do so strictly, that is by using reasonable care to establish facial conformity, to be judged in accordance with the best standards of independent guarantee and stand-by letter of credit practice."

109. While there was wide support for the approach taken in that proposal, concerns were expressed as regards its wording. One concern was that the standard to be applied to the guarantor's conduct was described in a somewhat circular manner. Another concern was that the reference to the best standards of independent guarantee and stand-by letter of credit practice might be too general to provide clear answers in specific cases where guidance was needed. Yet another concern was that the reference to the "best" standards, while commendable in its aim, might not be generally acceptable.

110. The Working Group, after deliberation, decided to continue its consideration of the proposal at a future session and requested the Secretariat to prepare alternative draft versions based on the proposal and on article 9 URG.

E. Treatment of non-documentary conditions

111. In response to a strongly expressed concern, the Working Group resumed its discussion on non-documentary conditions that it had engaged in when considering Variant A of draft article 7(2) (see above, paragraphs 70-75). The concern was that the problem of non-documentary conditions was a fundamental one that had implications on all issues to be discussed in the preparation of the uniform law. It was said that it called for a prompt and satisfactory solution, which would be to restrict the scope of application of the uniform law to those independent undertakings that were documentary in nature. Non-documentary conditions were highly undesirable since they created uncertainty and placed on banks a burden of examining extraneous facts that was outside their ordinary business (as described by the maxim: banks deal in documents and not in goods).

112. Non-documentary conditions were said to enter into the texts of guarantee undertakings in two different kinds of ways. The first one was described as negligence or inadvertence of the issuing bank that, for example, forgot to mention one of the various documents normally required for the type of undertaking at hand. The second one was described as intent or design by the guarantor and, presumably, the principal, for example, where in an apparently independent and documentary guarantee a non-documentary condition relating to the underlying transaction was included. It seemed appropriate to cover situations of the first type in the uniform law and either

⁴For lack of time, the Working Group did not consider the issues of the time allowed for examination, duties of notification, and liability and exemption discussed in document A/CN.9/WG.II/WP.68, paras. 58-72.

to ignore the non-documentary condition or to convert it into a documentary condition. However, situations of the second type should be excluded from the scope of application of the uniform law. Undertakings given in such situations should not be accorded credibility or an aura of certainty.

113. On the basis of the above concern the following proposal was made:

"1. *Scope:* This project encompasses only independent documentary undertakings.

2. Where an undertaking is so drafted as to be essentially an independent documentary undertaking but it includes a condition which is not required to be supported by a document and if that condition does not have the effect of rendering the undertaking to be essentially non-documentary, it will fall within the scope of the UNCITRAL law/convention. The non-documentary condition will either be ignored or converted into a documentary condition depending upon the decision of the Working Group in future sessions.

3. Where an undertaking is so drafted as to be essentially non-documentary even though it includes documentary conditions, it will not come within the scope of the UNCITRAL law/convention. Whether it is enforceable and under what terms will be solely a matter of municipal law.

4. The determination of whether an undertaking is essentially documentary or non-documentary must be made by examining the nature of the undertaking in light of guaranty/stand-by practice in order to determine whether it is of the type and format customarily issued as a non-documentary or as a documentary undertaking."

114. Various comments were made concerning the concept and purpose underlying the proposal, the appropriateness of the suggested solution and the distinction between an essentially documentary and an essentially non-documentary undertaking. As regards the underlying concept, it transpired during the discussion that the proposal was based on an approximation of the independent and the documentary character of the undertaking. The purpose of that approach was to restrict the scope of application of the uniform law more than was currently done by the requirement of an independent undertaking as defined in draft article 3, in that the proposal covered non-documentary conditions that did not render the undertaking accessory by providing the guarantor with a defence arising from the underlying transaction.

115. Divergent views were expressed as to the suggested solution of excluding such types of undertakings from the scope of application of the uniform law. One view was that the solution was acceptable since it would leave intact party autonomy but not encourage the use of such uncertain undertakings or give them credibility. Another view was that it was desirable, instead of leaving those undertakings to the disparate and uncertain national laws, to regulate them in the uniform law, in particular if

they created problems that could not be avoided or taken care of by the banks themselves. Yet another view was that, while the exclusion of such undertakings from the scope of application might appear to be desirable, acceptance of that solution would ultimately depend on whether one could draw a precise demarcation line between those types of undertakings that should be excluded and those that should be included in the scope of application of the uniform law.

116. Support was expressed for the distinction drawn in the above proposal between essentially documentary and essentially non-documentary undertakings. Doubts were expressed, however, in respect of the rule of interpretation suggested in the last part of the proposal (subparagraph 4). It was doubted, for example, whether it was appropriate and fair in situations involving three persons with potentially conflicting interests to refer to what is customarily issued. Another doubt was whether there in fact existed sufficiently precise types and formats of undertakings that could provide clear answers in the doubtful cases where guidance was needed. To the extent that the distinction was reflective of the distinction between inadvertent and intentional inclusion of non-documentary conditions, another doubt was whether that would not introduce an element of subjectivity and uncertainty. It was stated in reply that the notion of intent had to be understood in an objectivized manner, that sufficiently precise types and formats of undertakings had been evolving in practice and a synopsis description thereof could usefully be included in the definitional section of the uniform law. Furthermore, it was stated that in a situation of potential conflict between the principal and the beneficiary it was for the guarantor to play a neutral role as a trusted and reliable paymaster.

117. With a view to reducing the uncertainty surrounding the suggested distinction, a suggestion was made that an undertaking in which certain words such as "independent documentary standby" were used should be deemed to be essentially documentary. Another suggestion was to define clearly the term "non-documentary condition" and, in particular, to determine what kinds of condition should be treated as non-documentary.

118. The Working Group, after deliberation, was agreed that the problem of non-documentary conditions which had given rise to the above concern was a fundamental and complex one, and that the proposal to exclude essentially non-documentary undertakings from the scope of application of the uniform law provided a useful basis for further deliberations that were needed for finding a satisfactory solution.

IV. OTHER BUSINESS

119. The Working Group decided to hold its fifteenth session from 13 to 24 May 1991 in New York. Subject to approval by the Commission at its twenty-fourth session (Vienna, 10-28 June 1991), the Working Group would hold its sixteenth session from 4 to 15 November 1991 at Vienna.

B. Working papers submitted to the Working Group on International Contract Practices at its fourteenth session

1. Independent guarantees and stand-by letters of credit:
uniform law on international guaranty letters:
first draft of general provisions and article on establishment:
note by the Secretariat (A/CN.9/WG.II/WP.67) [Original: English]

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INTRODUCTION

1. At its thirteenth session, the Working Group on International Contract Practices considered, on the basis of a note by the Secretariat (A/CN.9/WG.II/WP.65), possible issues of a uniform law on independent guarantees and stand-by letters of credit (A/CN.9/330). Those issues concerned the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of a guaranty letter. It requested the Secretariat to submit at the next session a first draft set of articles, with possible variants, on the issues considered during the thirteenth session.

2. The present note has been prepared pursuant to that request. It presents a first draft of general provisions relating to substantive scope and to interpretation, as well as a first draft of an article on establishment.

3. The style of presentation aims at facilitating the deliberations and decisions of the Working Group on the various issues dealt with in the draft provisions. Alternative wordings or particularly tentative suggestions are usually placed between square brackets; some alternative wordings that are elaborate or present different approaches are labelled as Variants. A Variant may contain an element that is interchangeable in that it may be used in connection with another Variant, depending on the Working Group's decision on the issue dealt with in that element. Once the Working Group has decided on an alternative wording or part thereof, the selected wording will be reviewed by the Secretariat for comprehensiveness and style.

4. Each draft provision is followed by remarks providing brief explanations of the draft provision and its elements or Variants; individual paragraph numbers of the remarks are placed as indicators (between square brackets, e.g. [3]) at that portion of the draft provision to which the remark most closely relates. For the sake of brevity, the remarks do not normally repeat or refer to the relevant considerations and conclusions of the Working Group at its thirteenth session which may be easily gathered from the report of that session (A/CN.9/330).

I. GENERAL PROVISIONS

Article 1. *Scope of application* [1]

This Law [2] applies to an international guaranty letter [3] [issued in this State] [4].

Remarks

1. The draft provisions in this note are given article headings for ease of reference during the considerations of the Working Group. If it were later decided to maintain headings in the final version, consideration could be given to adding an explanatory footnote like the one found in the UNCITRAL Model Law on International Commercial Arbitration: "Article headings are for reference purposes only and are not to be used for purposes of interpretation".

2. As regards the suggested use of the term "Law", it should be recalled that the mandate of the Working Group is to undertake work on a uniform law, whether in the form of a model law or in the form of a convention, and

that the Working Group agreed to decide that question of form at a later stage. If the decision were to be in favour of the form of a convention, adjustments would have to be made in this and other draft provisions.

3. The term "international" is defined in draft article 4 and a definition of the term "guaranty letter" is provided in draft article 2.

4. The words between square brackets have been added primarily for the purpose of showing an appropriate location for any criterion of the territorial scope of application. While the suggested criterion might invite tentative consideration of the matter, a full discussion would probably be more appropriate at a later stage, in connection with possible rules on conflict of laws.

* * *

Article 2. *Guaranty letter* [1]

A guaranty letter, whether or not named guaranty letter, guarantee, bond, indemnity or stand-by letter of credit, [2] is an independent [3] undertaking, given by a bank or other institution or person ("guarantor") [at the request of its customer ("principal") or on the instruction of another bank, institution or person ("instructing party")] acting at the request of its customer ("principal") [4] [, whether or not so requested or instructed by another institution or person], [5] to pay to another person ("beneficiary") [6] a certain or determinable amount of a specified currency [, unit of account or other item of value] [7] in conformity with the terms of the undertaking.

Remarks

1. This draft provision presents a single definition of guaranty letter encompassing independent guarantees and stand-by letters of credit. This unitary approach seems justified in view of their functional equivalence and essentially similar legal character. If a dual approach with two separate definitions were deemed necessary or preferable, consideration could be given to modelling the definitions on those found in the draft ICC Uniform Rules for Guarantees (URG) and the Uniform Customs and Practice for Documentary Credits (UCP). However, as regards the definition of "credit" in article 2 UCP, it would probably be necessary to express the guarantee function of a stand-by letter of credit, in contrast to the secured payment function of a traditional commercial letter of credit, by adding wording such as "given for the purpose of securing the beneficiary against the default of the principal or against another specified risk".

2. This wording is inspired by the words in article 1 URG "however named or described". It serves the purpose of clarifying that an undertaking may qualify as a guaranty letter irrespective of its name and indeed even without bearing any name. The suggested wording may serve the further purpose of illustrating the more common types of independent undertakings likely to fall under the new

heading "guaranty letter". To further this aim of illustration and information, the list of types of undertakings should be carefully considered with a view to presenting the most appropriate names hitherto used in the various regions and languages.

3. The term "independent" is defined in draft article 3.

4. This wording is a shortened version of the corresponding element in article 2 (a) URG. It leaves out, in particular, the words "and under the liability" (of the principal or the instructing party), which do not seem appropriate in the definition of an independent undertaking. The wording does not provide an appropriate context for defining such terms as "counter-guaranty letter" or "confirmation of guaranty letter", even though it covers those types of guaranty letters. The need for such definitions depends on whether any special provisions for these types of guaranty letter will be included in the operative rules of the uniform law.

5. This wording, by not requiring a request (of the principal or instructing party), includes those undertakings given by the guarantor on its own account or behalf, that is where one party is both guarantor and principal. Since this wording does not provide a context for any definitions, they would have to be presented, if deemed necessary, in other provisions.

6. Consideration may be given to adding the words "or persons" so as clearly to cover a possible plurality of beneficiaries as found, in particular, in the practice of financial stand-by letters of credit, which are customarily issued to multiple beneficiaries or to fiduciary representatives of multiple beneficiaries or sub-beneficiaries. This clarification may help to overcome problems in those jurisdictions where the rules of statutory interpretation would not lead to the conclusion that the singular includes the plural.

7. The wording between square brackets would embrace more than the expression "payment of money" found in article 2 URG. It would include units of account, as provided for in greater detail in article 5(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (hereinafter referred to as "UNCITRAL Bills and Notes Convention"). Moreover, it would meet the concern expressed at the thirteenth session that a reference to the payment of money or currency might be too narrow in that it would exclude, for example, an undertaking to pay in gold (A/CN.9/330, para. 21).

* * *

Article 3. *Independence of undertaking* [1]

Variant A: [2]

(1) An [international] [3] undertaking is [deemed to be] [4] independent, unless its terms [5] show that the payment obligation depends on the existence or validity of an underlying transaction between the principal and the beneficiary or of any other relationship except that

created by the undertaking, or that the guarantor may invoke defences arising from a relationship other than its relationship with the beneficiary [6].

Variant B: [7]

(1) An undertaking is independent if it does not depend on any underlying transaction or other relationship except that created by the undertaking.

[(2)[8] In determining whether or not a given undertaking is independent, any characterization or a single term found in the text of the undertaking shall not be deemed conclusive if the other terms and conditions clearly weigh in favour of the opposite result. In evaluating the terms and conditions in their totality, the following factors may be regarded as points weighing in favour of independence:

(a) Payment promised on "simple demand", "first demand", "demand", "receipt of written request" or words of similar import;

(b) Undertaking to pay qualified by expressions such as "unconditional", "irrespective of valid existence of X-Contract", "waiving all rights of objection and defences arising from said contract" or "without proof of default";

(c) Payment against documents, including statement by beneficiary, and not requiring verification of facts outside guarantor's purview;

(d) Reference to an underlying transaction only in a preamble or otherwise in a recital of what has gone before, and not in operative clauses;

(e) Undertaking stated to be subject to Uniform Customs and Practice for Documentary Credits or Uniform Rules for Guarantees.]

Remarks

1. This draft provision attempts to define the term "independent" used as a qualifying criterion in draft article 2. It may be noted that the term "independent" is defined here not merely as the opposite of "accessory", i.e. dependent on the underlying transaction between the principal and the beneficiary. The principle of independence as embodied in this draft provision is wider in that it establishes the autonomous character also in respect of other relationships such as that of the guarantor with a principal or instructing party.

2. Variant A is considerably more detailed than Variant B; its details will be explained below (remarks 3 to 6). Another difference that may be less obvious is that it incorporates a suggestion which the Working Group agreed to reconsider on the basis of a Secretariat draft. The suggestion was to regard an international undertaking as independent if it could not be interpreted as either independent or accessory (A/CN.9/330, paras. 95-96). While Variant B would not help in such case of doubt, Variant A solves the impasse of interpretation by excluding from the scope of application only those undertakings that are to be characterized as accessory or otherwise dependent, based on whatever rules of interpretation the Working Group may agree on.

3. The word "international" is not necessary in view of draft article 1. However, it might usefully be repeated here so as to emphasize that the suggested rule of favouring, in case of doubt, the independent legal character is limited to international undertakings.

4. The words "deemed to be" may, strictly speaking, not be correct as regards clearly independent undertakings. However, they may help to emphasize the above rule of doubt that, for the purposes of the uniform law, an undertaking will be treated as independent if it cannot be characterized as dependent.

5. Consideration may be given to adding after the words "its terms" the words "as interpreted in accordance with article 6 and paragraph (2) of this article". If the referred rules of interpretation were to be included in the uniform law, the suggested addition might help to clarify that a serious process of interpretation is required before such a level of doubt is established as to trigger the operation of the above rule.

6. Variant A defines in substance the term "dependent" by spelling out the possible links that negate the independent or autonomous character of the undertaking. It is submitted that the suggested demarcation line between "dependent" and "independent" is correct in principle. However, it will have to be reviewed and possibly refined in the light of the Working Group's conclusions on such issues as non-documentary conditions of effectiveness or payment, possible effect of illegality of the underlying transaction on the guarantor's obligation, and the extent to which facts pertaining to the underlying transaction may be asserted in the context of invoking fraud or manifest abuse.

7. Variant B is presented for two reasons. First, it is to show the opening words of a straightforward definition that does not incorporate the above rule of favouring independence in case of insoluble doubt. Secondly, it is to invite consideration of another definition of "independent" that is considerably shorter than that presented in Variant A.

8. Paragraph (2) is presented between square brackets with a view to soliciting the views of the Working Group on whether the uniform law should contain special guidelines for determining the independent character of an undertaking and whether it should go into such details, embracing current practice and actual language, as found in the sample indicators of independence. The paragraph also incorporates the suggested rule that a label or characterization may be disregarded in the light of conflicting terms found in the guaranty letter.

* * *

Article 4. *Internationality* [1]

Variant A: [2]

A guaranty letter is international if:

(a) any two of the following places specified in the guaranty letter are situated in different States:

- (i) [The place where the guaranty letter was issued][the place of business of the guarantor];
- (ii) The place of business of the beneficiary;
- (iii) The place of payment;
- (iv) The place of business of [a principal or an instructing party][the person at whose request the guaranty letter was issued];
- (v) The place of business of a confirming guarantor;

or

- (b) if it expressly so states.

Variant B: [3]

A guaranty letter is international if any two of the following [persons][parties] have their place of business in different States: guarantor, beneficiary, principal, instructing party, confirming guarantor.

Variant C: [4]

A guaranty letter is international if:

- (a) the guarantor and the beneficiary have their place of business in different States; or
- (b) the place of issue and the place of business of a principal or an instructing party are situated in different States; or
- (c) the place of issue and the place of payment are situated in different States;

or

- (d) the guaranty letter relates in any other [significant] manner to more than one country.

Variant D: [5]

A guaranty letter is international if it relates to an international operation, whether commercial or financial.

Remarks

1. This draft provision defines the term "international" used in draft article 1 and might later be added to that article. It presents four variants pursuant to the Working Group's request that the Secretariat prepare alternative draft versions of a test of internationality, taking into account the views and suggestions expressed at the thirteenth session (A/CN.9/330, paras. 51-57).

2. Variant A, like Variant B, lists a number of places out of which two must be in different States for a guaranty letter to be international. However, it requires those places to be specified in the guaranty letter so that banking and other personnel handling it may easily ascertain whether it is international. While the list of places in subparagraph (a) already covers the bulk of possible international links, subparagraph (b) would widen the scope of application by giving effect to a statement in the guaranty letter that it be regarded as international—in effect an opting-in clause in disguise. Such an option, which might also be included in Variant B, seems more appropriate in the context of Variant A with its requirement of

specification. It could, for example, be used by the issuer of a financial stand-by letter of credit even though the place of business of the beneficiary or beneficiaries, likely to be foreign, is not specified or not even known.

3. Variant B differs from Variant A in two additional respects. It does not include the place of payment, which rarely differs from that of issue, and it lists the places of business of a principal and an instructing party as separate connecting factors, thus covering the case where a principal requests a bank in a different State to instruct another bank in that State to issue the guaranty letter. As regards the term "place of business", used also in Variants A and C, consideration may be given to supplementing the term by rules for those cases where a party has more than one place of business or does not have a place of business (along the lines of, e.g., article 10 United Nations Convention on Contracts for the International Sale of Goods, hereinafter referred to as "United Nations Sales Convention").

4. Variant C envisages only three defined links but embraces an uncertain number of other possible links by its subparagraph (d). This flexible formula introduces a degree of imprecision that may be undesirable at least if serious legal consequences would ensue.

5. Variant D is even more flexible and uncertain. While it may be appropriate in a given national law, where it is likely to have been developed by established case law, it seems less appropriate in a new uniform law of global origin and design.

* * *

Article 5. Interpretation of this Law

In the interpretation of this Law, regard is to be had to its international [character][origin][1] and to the need to promote uniformity in its application and the observance of good faith in international [transactions][guaranty or credit practice].[2]

Remarks

1. The term "character" has been used in various Conventions emanating from the Commission's work and would certainly be appropriate if the uniform law were to be adopted in the form of a convention. It might also be appropriate if the uniform law were to be promulgated in the form of a model law. In that case, it may, however, be technically more accurate to refer to its international origin.

2. The general term "transactions" has been used in the UNCITRAL Bills and Notes Convention and appears to be equally appropriate for the uniform law. However, if a more specific term were to be sought, the suggested alternative wording "guaranty or credit practice" might be the answer, particularly if the final uniform law would cover traditional commercial letters of credit.

* * *

Article 6. *Construction of guaranty letter* [1]

Variant A: [2]

(1) Subject to the provisions of this Law [and of any other applicable law][3], the rights and obligations of the parties are determined by the terms and conditions set forth in the guaranty letter, including any rules, conditions or usages referred to therein[4] [, and, unless otherwise stipulated, any international usage of which the parties knew or ought to have known and which is widely known to, and regularly observed by, parties to guaranty or credit transactions][5].

(2) The terms and conditions of the guaranty letter are to be interpreted according to the intent of the parties[6], taking into account the ordinary meaning in the understanding of a reasonable person with an appreciation of the commercial purpose of the transaction and with due consideration of any practices which the parties have established between themselves.[7]

Variant B: [8]

In determining the rights and obligations of the guarantor and the beneficiary, the terms and conditions set forth, or referred to, in the guaranty letter are to be interpreted according to the ordinary meaning given to them by a reasonable person.

Remarks

1. The article heading might be modified if Variant A is maintained. It could, for example, read: "Determination of rights and obligations".

2. Paragraph (1) of Variant A is designed to introduce the principle of strict construction and to address the issue of party autonomy and its limits. The combination of both matters serves to draw attention to the fact that the rights and obligations flow from the terms of the undertaking but may be affected by mandatory provisions of law. As regards provisions of the uniform law itself, it will have to be decided for each provision whether or not parties may derogate therefrom.

3. The bracketed reference to "any other applicable law" might serve as a useful reminder of the fact that the rights and obligations of the parties may be affected by various mandatory provisions of law dealing with issues not governed by the uniform law (e.g. exchange control, supervision of banks, capacity of parties or bankruptcy). However, such a reference has not normally been included in comparable legal texts and might be regarded as too general to be useful.

4. A reference in the guaranty letter to rules (e.g. uniform rules), conditions (e.g. general conditions) or usages does not affect the parties' rights and obligations if the reference is not valid under the applicable law. However, it does not seem necessary to express the requirement of validity in the draft provision.

5. The wording between square brackets is modelled on article 9(2) of the United Nations Sales Convention.

Despite the difference in subject matter, there may be a need in the uniform law for giving effect to an international usage by way of implied agreement. However, the need might be less felt if the Working Group were to retain the incorporation of rules and usages in the guaranty letter (see above, remark 4) and the reference to any other applicable law (see above, remark 3) which could, for example, be customary law on letters of credit. If a more straightforward formula were to be desired, an international usage could be recognized even without an implied agreement and the element of knowledge.

6. The reference to the parties' intent as primary criterion of interpretation is inspired by article 8(1) of the United Nations Sales Convention. However, it is there used in respect of an individual party and given effect only where the other party knew or could not have been unaware what the intent was. The uniform law could use that individualized formula if, focusing on the undertaking, it would restrict the rule of interpretation to the rights and obligations of the guarantor. If applied to both parties, the criterion of intent retains its importance but seems in need of qualification by some flexible wording.

7. The suggested rule of interpretation attempts to strike a balance between the need for strictness in giving full faith and credit to the letter of the undertaking and the need for flexibility in introducing factors not necessarily apparent from the guaranty letter. While the balance is not easily struck, the suggested rule is thought to further two important policy objectives, namely to meet the expectations of the parties and to ensure the commercial utility of independent undertakings.

8. Variant B introduces the rule of interpretation with opening words that state the purpose of the interpretation and thereby reflect the idea of strict construction less directly than does paragraph (1) of Variant A. In respect of both Variants, it may be noted that the related issue of the standard of compliance of the claim with the terms of the guaranty letter will be addressed in a separate draft provision, in a future chapter devoted to the demand for payment.

* * *

II. ESTABLISHMENT, AMENDMENT AND EXPIRY

Article 7. *Form and time of establishment* [1]

(1) A guaranty letter may be established by any means of communication that provides a record thereof.[2]

Variant A [3]:

(2) A guaranty letter becomes binding and, unless it expressly states that it is revocable, irrevocable, when it is received by the beneficiary [4][, unless the beneficiary promptly rejects it]. The guaranty letter

becomes effective at that time [5], unless [it states a different time of effectiveness or makes its effectiveness depend on the occurrence of a specified, uncertain future event, in which case the guarantor may require a declaration from the beneficiary or an appropriate third party stating the occurrence of the event, if verification of that occurrence is not within the control of the guarantor][6] [it expressly provides that its effectiveness is subject to a specified condition that is determinable by the guarantor][7].

Variant B: [8]

(2) Unless otherwise stated, a guaranty letter is effective and irrevocable, when it is issued by the guarantor to the beneficiary or to the principal or instructing party.[9]

Remarks

1. This draft provision on form and time applies to the establishment of a guaranty letter, that is, an undertaking meeting the essential requirements set forth in draft article 2. Whether the same rules on form and time should be applicable to later changes (e.g., amendment or cancellation) and to other communications (e.g. demand or notice) will be considered in a note by the Secretariat discussing further possible issues of the uniform law (A/CN.9/WG.II/WP.68).

2. Paragraph (1) is modelled on article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration. It is based on the view, widely supported at the thirteenth session (A/CN.9/330, para. 105), that the guaranty letter should be manifest or recorded in some tangible or material form, to the exclusion of purely oral undertakings.

3. Variant A of paragraph (2) is considerably more detailed than Variant B. While Variant B uses the expression "unless otherwise stated" for the entire paragraph, Variant A specifies what stipulations to the contrary would be admissible, in particular, as regards the time of effectiveness. Both Variants implement the Working Group's decision that the uniform law should provide for the irrevocability of all undertakings covered by it unless otherwise stated in the guaranty letter (A/CN.9/330, para. 102). That rule would override current article 7(c) UCP which, in case of silence, treats letters of credit as revocable.

4. Variant A uses as the determinant point of time the receipt of the guaranty letter by the beneficiary. That is based on the consideration that it is only at that time that the beneficiary is in a position to rely on the guarantor's undertaking. The suggested rule does not take a stand on whether the undertaking is to be characterized as a contract, be it bilateral or unilateral, or as a special creation of commercial law. Whichever characterization would be appropriate, there appears to be general agreement in law and practice that no express acceptance by the beneficiary is required. However, consideration may be given to

including a proviso on possible refusal of acceptance, as suggested at the end of the first sentence. If that proviso were maintained, consideration may be given to addressing such issues as qualified acceptance, legal effect of undertaking before rejection, or decisive point of time of rejection.

5. Variant A draws a distinction between "binding" and "effective". Without attempting here to define these terms, "binding" would indicate the existence of a promise made with the intention to be legally bound; such binding promise may, for example, establish the guarantor's right to charge a fee and it may be revoked, if revocable. "Effective" would indicate the operative character of the undertaking, entitling the beneficiary to demand payment in conformity with the payment conditions. For example, a repayment guarantee would be binding, but not effective, before the advance payment was made by the beneficiary or known to the guarantor.

6. The wording between square brackets presents two exceptions to the rule on the point of time of effectiveness. First, the guaranty letter may postpone the effectiveness to a later point of time, either a fixed date or a determinable time. Secondly, the guaranty letter may make its effectiveness subject to a condition; the suggested wording would not invalidate non-documentary conditions of effectiveness but would convert them into documentary ones. While conditions of effectiveness might be treated differently from payment conditions, as discussed during the thirteenth session (A/CN.9/330, para. 69), consideration may later be given to dealing with both types of conditions in one draft provision.

7. The alternative wording between square brackets is modelled on article 6 URG. It does not include the first exception, i.e. different time of effectiveness, and would invalidate or disregard any condition of effectiveness that was not determinable by the guarantor.

8. As indicated above (remark 3), Variant B would permit the parties to derogate from the entire draft provision. If it were adopted, the issue of non-documentary conditions of effectiveness would have to be dealt with in a separate provision, possibly in connection with non-documentary conditions of payment.

9. Variant B uses as the determinant point of time the issuance of the guaranty letter. That is based on the consideration that the guaranty letter, when issued or sent, leaves the sphere of control of the guarantor. In this respect, it might be regarded as irrelevant whether the guaranty letter is released towards the beneficiary or towards the principal or instructing party. While the rule would place the risk of transmission on the beneficiary, consideration may be given to distinguishing between the point of time of effectiveness and the risk of transmission.

**2. Independent guarantees and stand-by letters of credit:
discussion of further issues of a uniform law:
amendment, transfer, expiry, obligations of guarantor,
liability and exemption: note by the Secretariat
(A/CN.9/WG.II/WP.68) [Original: English]**

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INTRODUCTION

1. At its thirteenth session, the Working Group on International Contract Practices considered, on the basis of a note by the Secretariat (A/CN.9/WG.II/WP.65), possible issues of a uniform law on independent guarantees and stand-by letters of credit (A/CN.9/330). Those issues concerned the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of a guaranty letter. It requested the Secretariat to submit to the next session a note discussing further possible issues to be covered by the uniform law (A/CN.9/330, para. 110).

2. The present note has been prepared pursuant to that request. It presents a discussion of issues relating to amendment, transfer and expiry of the guaranty letter, to obligations of the guarantor as well as liability and exemption. The Secretariat intends to submit at the fifteenth session of the Working Group a further note discussing the remaining issues: fraud and other objections to payment,

injunctions and other court measures, conflict of laws and jurisdiction.

I. AMENDMENT

3. The Working Group may wish to consider whether the uniform law should contain provisions on the amendment of a guaranty letter. Such provisions could address questions such as the form and time of effectiveness of an amendment and whose consent is necessary for an amendment to be effective.

4. It may be noted that the ICC Draft Uniform Rules for Demand Guarantees (URG)¹ do not contain any special

¹ICC Document No. 460/470-1/Int. 16, 470/622 and 460/382 (7 June 1990). This latest draft, which was not available to the Secretariat when preparing document A/CN.9/WG.II/WP.67, incorporates changes in the title, the introduction, articles 1, 2, 4 and 20. It seems particularly noteworthy that according to article 2 the rules now cover stand-by letters of credit. The introduction states: "Although for the time being UCP 400 also applies to stand-by letters of credit, it is envisaged that the present rules will be those adopted by parties to stand-by letters of credit".

provision on amendment, even though amendments are mentioned in some of its provisions (e.g. articles 1, 3, 16, 23 and 24). Presumably, the provisions on form and time of effectiveness of the original guarantee (articles 2(a) and 6) are meant to apply by analogy to a later amendment.

5. The Uniform Customs and Practice for Documentary Credits (UCP)² contain a number of provisions dealing with amendments to credits. For example, article 12 UCP sets forth the circumstances under which an instruction by any teletransmission to advise an amendment to a credit constitutes the operative amendment. According to article 10 (d) UCP irrevocable "undertakings can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank (if any), and the beneficiary. Partial acceptance of amendments contained in one advice of amendment is not effective without the agreement of all the above named parties." The Working Group may wish to use this list of parties as a basis for its discussion on whose consent is needed for an amendment of the guaranty letter to be effective.

A. Parties whose consent is required

6. It is obvious that an amendment cannot be effective without the consent of the guarantor, whether it issued or confirmed the original guaranty letter. While the consent of the beneficiary may be viewed as an equally obvious requirement, doubts might arise with respect to amendments that increase the beneficiary's rights (e.g. extension of validity period). However, a particular increase in the beneficiary's rights may not necessarily be acceptable to the beneficiary since, for example, it may have requested an even longer extension of the validity period. Moreover, it would not be easy to administer a rule that would depend on whether the amendment in question was to the beneficiary's advantage.

7. As in the context of the establishment of the original guaranty letter, consent need not necessarily mean express acceptance. Along the lines of Variant A of draft article 7(2) (A/CN.9/WG.II/WP.67), an amendment could become effective upon receipt by the beneficiary, unless the beneficiary rejected it promptly or within a specified period of time (e.g. 14 days). An alternative solution could be to treat silence and, possibly, partial or qualified acceptance as a rejection. For example, an amendment could be deemed to be rejected 21 days after its notification to the beneficiary unless the guarantor has received an unqualified acceptance from the beneficiary or has become aware of an act or conduct by the beneficiary in compliance with the terms of the amendment (e.g. submission of a required statement).

8. Another point in need of clarification is who exactly is covered by the term "beneficiary". As indicated in remark 6 to draft article 2 (A/CN.9/WG.II/WP.67), the original guaranty letter may have a number of beneficiaries, in particular in the practice of financial stand-by

letters of credit. As regards amendments that come into play at a later stage yet other beneficiaries may have to be recognized, namely substitute beneficiaries and beneficiaries by operation of law. The substitute beneficiary is found in stand-by letters of credit as a replacement of the original beneficiary when the latter resigns or is removed by the represented beneficiaries, usually the holders of debt or equity securities. This substitution must meet the terms and conditions of the stand-by letter of credit, and compliance with those terms must be ascertained by documentary means. The transferee by operation of law is associated with transfers decreed by statutory, administrative or decisional law in instances where the original beneficiary is insolvent or incapable of acting as a beneficiary. The Working Group may wish to decide whether in any rule requiring the beneficiary's consent those special categories of substitutes or transferees should be expressly mentioned or whether general rules of interpretation would lead to the conclusion that they were covered as well.

9. The above list of parties in UCP whose consent is required does not include the principal or, as the UCP calls it, the applicant for the credit. In contrast, section 5-106 (2) of the Uniform Commercial Code (UCC) provides: "Unless otherwise agreed once an irrevocable credit is established as regards the customer it can be modified or revoked only with the consent of the customer and once it is established as regards the beneficiary it can be modified or revoked only with his consent." It may be noted that the Task Force on the Study of UCC Article 5 recommended that the provision should be changed so as not to require the principal's consent.

10. Support for requiring the principal's consent may stem from a concern about the principal's interest in protecting its relationship with the guarantor against interference by third persons as well as the principal's possible desire not to have its name connected with the amended guaranty letter.

11. The main reason for excluding the principal from the list of parties whose consent is required is the independence of the guarantor's undertaking, i.e., the guarantor's undertaking creates a legal relationship only between it and the beneficiary. The consent of the principal to the amendment is relevant to a separate legal relationship, namely that between guarantor and the principal. Accordingly, the guarantor is free to modify its undertaking to the beneficiary without the principal's consent and is bound by the amended undertaking, but it does so at the risk of prejudicing its claim for reimbursement from the principal, depending on the instructions or the terms of the reimbursement agreement between the principal and the guarantor. Consideration might be given to drawing attention to the fact that the principal's consent may well be required under the legal relationship between the principal and the guarantor, by adding to the rule requiring the consent only of the guarantor and the beneficiary such wording as: "This provision does not excuse the failure to obtain the principal's consent, as it may be required by the agreement or instructions between the principal and the guarantor".

²ICC Publication No. 400, reproduced in A/CN.9/251.

B. Form of amendment

12. As regards requirements of form for an amendment to be effective, one approach would be to require the same form as provided for in draft article 7(1) for the establishment of the original guaranty letter (A/CN.9/WG.II/WP.67), subject to any special stipulation in the guaranty letter concerning the form of amendments (see paragraph 15 below). This approach could be based on the view that an amendment constitutes a part of the guaranty letter and as such shares the legal nature and characteristics, including evidentiary value, of the guaranty letter.

13. However, one may also point out that an amendment constitutes but a small part of the terms and conditions of the guaranty letter and that current amendment practice tends to be less formal. It was reported at the thirteenth session that there existed a practice under which an amendment of a written guaranty letter might be made orally and authenticated in that form; while the amendment would then be confirmed by a message that provided a record of the agreement, the oral communication was in practice regarded as determining the point of time of effectiveness of the amendment (A/CN.9/330, para. 106).

14. If the Working Group wished to accommodate this and similar informal practices, it might consider not requiring any particular form but requiring authentication of the source of an amendment. The same requirement of authentication of source, which would include signature, would seem appropriate if the Working Group were to decide in respect of draft article 7(1) not to require any particular form for the establishment of the guaranty letter. If such a provision requiring merely authentication were to be adopted for the establishment or amendment of the guaranty letter and the uniform law was eventually incorporated into a convention, consideration might be given to adding a provision along the lines of article 12 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; hereinafter referred to as "United Nations Sales Convention").

15. While it is conceivable that prior to the establishment of the guaranty letter the guarantor and the beneficiary would have agreed on the required form of the guaranty letter, a stipulation on the required form for later amendments is more likely to exist. Thus, any general rule on form as discussed above would have to be made subject to contrary stipulation. For the sake of clarification, one might include a provision to the effect that the guaranty letter may not be amended other than in the stipulated form (along the lines of article 29(2) United Nations Sales Convention). Consideration might be given to adopting also the last sentence of that paragraph, which reads: "However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct." The underlying principle appears to be equally appropriate in the context of guarantee and credit practice, even though in the context of a sales transaction there may be more instances of conduct on which reliance is placed that deserves to be protected.

C. Time of effectiveness

16. The point of time when an amendment becomes effective could be the same as that provided in draft article 7(2) for the establishment of the guaranty letter. However, in view of the required consent of the beneficiary, that result would be less appropriate if Variant B of draft article 7(2), using the time of issue as the time of effectiveness, were to be chosen (A/CN.9/WG.II/WP.67). Even Variant A, using the time of receipt by the beneficiary, might need some qualification.

17. For example, if an amendment would be deemed to be rejected unless accepted in full within a specified period of time, the determining point of time of effectiveness could be the time when the guarantor receives notice of the acceptance. If the opposite solution were to be adopted, namely that there was a presumption in favour of acceptance, the receipt of the amendment by the beneficiary might be appropriate as the determining time, even though its effectiveness might be subject to a rejection or qualified acceptance within the specified period of time. The use of the beneficiary's receipt of the amendment as the determining point of time could also accommodate the practice reported at paragraph 13 above that an oral amendment with authentication as to source would be effective even though a formal confirmation may be required or, at least, suggested by sound banking practice.

II. TRANSFER OF RIGHTS AND ASSIGNMENT OF PROCEEDS

18. The Working Group may wish to consider whether the uniform law should address the issue of the beneficiary's transfer of rights and assignment of proceeds. The use of the terms "transfer" and "assignment" is drawn from the UCP, which establish in article 54 a special legal regime for the transferable letter of credit and permit in article 55 the assignment of the proceeds of a credit. The term "assignment", which is used in the broader legal context to refer to a transfer of rights and obligations under a contract, is used in the UCP in the restricted sense of assignment of the proceeds. A change of the holder of the right to claim payment is referred to as "transfer". The UCP provisions on transferability require that the credit be expressly designated as "transferable" by the issuing bank, they require the consent of the bank requested to effect the transfer, whether or not it has confirmed the credit, and they permit only a single transfer of the credit.

19. The URG depart from the terminology and substance of the UCP provisions. Article 4 URG reads as follows: "The Beneficiary's right to claim under a Guarantee is not assignable unless expressly stated in the Guarantee wording itself or in an amendment thereto. This article shall not, however, affect the Beneficiary's right to assign any proceeds to which he may be, or may become, entitled under the Guarantee." Only the term "assignment" is used and, while the UCP distinction between the claim and the proceeds is maintained, no mention is made of a limit on the number of possible transfers.

20. If the Working Group were to decide that the uniform law should contain provisions on transfer of rights and on assignment of proceeds, it might wish to consider the following points concerning the mechanics and consequences of a transfer and of an assignment. As regards assignment of proceeds, it might be useful to clarify that the object of an assignment is merely the proceeds, i.e. any funds that will be forthcoming when the guarantor honours its payment obligation. Accordingly, the assignee is not entitled to claim payment or to present any statement or document that may be required in order to claim payment, since that may change the risk to which the principal and the guarantor have agreed to be exposed. The position of an assignee is thus weaker than that of a transferee in that a beneficiary, having obtained funds from the assignee in exchange for the assignment, would be able to block payment to the assignee by not submitting a claim for payment. Another clarification could be to require a notice of assignment from the beneficiary to the guarantor, or possibly even a notice of acknowledgement by the guarantor, so as to create certainty as to whom the guarantor is supposed to pay and thereby discharge its payment obligation under the guaranty letter. Yet another issue that might be addressed is whether only one assignment of the proceeds should be allowed and whether such an assignment should have to be of 100 per cent of the proceeds.

21. As regards the possible transfer of the beneficiary's right to claim payment, two special features of independent guarantees and stand-by letters of credit need to be taken into account when formulating appropriate rules in view of the different interests involved. Firstly, where a guaranty letter is given in support of an underlying obligation of the principal, the true beneficiary should be the one to whom performance of that underlying obligation is owed and who is in a position to declare, or submit documents establishing, default. While the guarantor does not usually judge the reliability of the beneficiary before issuing its guaranty letter, it is expected to bear in mind the interest of the principal, who usually has judged the reliability of the beneficiary before establishing its relationship with the beneficiary. In this vein, a transfer of the beneficiary's right to demand payment makes sense where the creditor to the underlying obligation has changed.

22. A second special feature becomes apparent in comparison with a traditional commercial letter of credit. There "only the original beneficiary, if it is a non-transferable credit, or the second beneficiary if the credit is transferable, is entitled to tender the documents that will prompt the issuing bank's payment. Yet, where a bank issues a financial standby promising to pay the beneficiary and the holder of the unpaid promissory note, draft or demand for payment, the bank also extends the promise to receive the tender of documents to whomever the original beneficiary transfers the note, draft or demand for payment and accompanying documents, if any. This differs from the promise in the circular-negotiation type of commercial letter of credit (whose language of negotiation, incidentally, is none the less usually incorporated in the text of the financial standby) because the negotiation contemplated in the circular commercial letter of credit is of the draft only. It does not presuppose the transfer of the

right to tender the documents that comply with the text of the credit, a right which, most often, is exercised by the beneficiary prior to negotiating the draft."³

23. These two special features may be taken as suggesting the following conclusions. The beneficiary should not be free to transfer its right to payment whenever it so wishes; it may do so only if permitted under the guaranty letter and thus presumably with the principal's consent. The above description of a financial stand-by letter of credit suggests, however, that a requirement such as express statement or express designation as "transferable" would be too narrow. One might even view the transfers envisaged in such an undertaking as expected changes of the individuals covered by the original undertaking and not as transfers in the technical sense of the term. Yet another conclusion might be that more than a single transfer should be permitted if so stipulated in the guaranty letter. Finally, consideration may be given to clarifying, in the absence of a clear answer in the guaranty letter, whether only the transferee is entitled to claim payment and present any required statement or document or whether the transferor, i.e., the original beneficiary, is supposed to do so on the transferee's account.

III. EXPIRY

24. Certainty about the expiry of the guaranty letter is at least as important as certainty about the time when the guaranty letter becomes effective (see draft article 7(2), A/CN.9/WG.II/WP.67). The uniform law might help to enhance certainty in two respects. It could clarify the meaning and effect of expiry as stipulated in the guaranty letter, and it could address various issues relating to party autonomy in stipulating expiry terms.

A. Meaning and effect

25. A stipulation that the guarantee or stand-by letter of credit expires on a given date is widely understood to mean that a demand for payment, accompanied by any required documents, may be made only before or on that date and that, accordingly, the guarantor is not obliged to pay upon any demand made after that date. However, courts of some jurisdictions have given a different interpretation, namely that merely the contingency for which the guarantee had been given must have occurred before or on the expiry date, and have recognized a demand for payment made after that date, either within a reasonable time thereafter or even during a period of limitation or prescription, which may extend long after the expiry date.

26. The uniform law might usefully clarify matters by prescribing the first interpretation, as is done in a number of national laws. For example, the 1963 International Trade Code of Czechoslovakia provides in section 671:

³Kozolchyk, *The Emerging Law of Standby Letters of Credit and Bank Guarantees*, 24 Arizona L.R. (1982), 319, 356.

"If the validity of the banking guaranty is limited in time, the entitled person shall notify the bank of his claims not later than within such time; otherwise his claims under the banking guaranty shall be extinguished."⁴

27. Very similar provisions are found in the laws of Bahrain,⁵ Iraq⁶ and Kuwait. For example, the 1980 Commercial Law of Kuwait provides in article 386:

"The bank shall be discharged of liability *vis-à-vis* the beneficiary if within the validity period of the letter of guarantee no request for payment is received from the beneficiary, unless it had been expressly agreed to renew said term prior to its expiry."⁷

28. As regards uniform rules, the same interpretation of expiry appears in the last sentence of article 22 URG ("Claims received after the Expiry Date or Expiry Event shall be refused by the Guarantor") and in article 19 URG:

"A claim shall be made in accordance with the terms of the Guarantee on or before its expiry and, in particular, all documents specified in the Guarantee for the purpose of claiming shall be presented to the Guarantor on or before its expiry at its place of issue, otherwise the claim shall be refused."

29. If the Working Group were to adopt a provision in support of the first interpretation, i.e., that the claim for payment must be made within the validity period, an exception might have to be made where the expiry clause in the guaranty letter provides otherwise (e.g., undertaking to pay in the event of the principal's default within a definite period of time). A possible solution for that exception might be to grant additional time, either a fixed or a reasonable period, for submitting the demand and the required documents. The same should probably apply where a counter-guarantor promises to indemnify the guarantor for any payment made before the expiry of its guaranty letter, provided the counter-guaranty letter contains no other expiry clause, such as a specific expiry date. Here, as in any other case, each guaranty letter stands on its own as regards its time of effectiveness and expiry.

30. The effect of expiry that payment may no longer be demanded has been described in the above sample provisions (paragraphs 26-28) by such expressions as "claims shall be extinguished", "bank shall be discharged of liability *vis-à-vis* the beneficiary", and "claim shall be refused". A provision to that effect in the uniform law could enhance certainty by making it clear that the effect of expiry does not depend on any further act such as return of the guaranty letter or a declaration of release by the beneficiary. It is submitted that such an automatic effect should obtain even where a clause in the guaranty letter requires the return of the instrument or a declaration of

release. As regards the issue of the return of the instrument, article 24 URG provides:

"Where a Guarantee has terminated by payment, expiry, cancellation or otherwise, retention of the Guarantee or of any amendments thereto shall not preserve any rights of the Beneficiary under the Guarantee."

31. Such a rule is useful in that it prevents uncertainty and the risk of everlasting enforceability. It takes into account that there are various possible reasons for retaining the guaranty letter and that the very idea of return or retention is becoming less applicable in the context of modern means of communication. Above all, it helps to dispel the misconception that the guaranty letter would be an instrument that, as a negotiable instrument does, carried in it the right to payment so as to require possession and presentment of the instrument for the enforcement of that right. The advantage of having in the uniform law a provision along the lines of article 24 URG would be that the uniform law, unlike uniform rules that become effective by agreement, would make inapplicable any contrary provision of law in the State enacting the uniform law.

32. It is doubtful whether the same need exists for incorporating in the uniform law a provision along the lines of article 23 URG, which also touches on the issue of return or retention in dealing with pre-expiry events that free the guarantor from liability and thus make expiry obsolete:

"Irrespective of any expiry provision contained therein, a Guarantee shall be cancelled prior to the Expiry Date or Expiry Event on presentation to the Guarantor of the Guarantee itself or the Beneficiary's authenticated statement of release from liability under the Guarantee, whether or not the Guarantee or any amendments thereto are returned."

33. If a provision along those lines were to be included in the uniform law, the Working Group may wish to consider the following two points. Firstly, the expression "shall be cancelled" might be reworded so as to make clear that the effect is automatic and does not depend on any further act or declaration. Secondly, it might be too rigid to attach the effect of cancellation to the "presentation to the Guarantor of the Guarantee itself" in that it could be construed as extending beyond those cases where the presentation constitutes an implied release or waiver and, for example, covering the case of an erroneous return.

B. Party autonomy and possible limits

34. The preceding discussion of the meaning and effect of expiry assumed the existence of a valid expiry clause. An expiry clause may be found in the guaranty letter or, in particular where the validity period has been extended, in an amendment to the guaranty letter (as discussed above, paragraphs 3-17; it may be noted that the Secretariat intends to discuss the problems surrounding so-called "extend or pay" demands in a future note). To be discussed now are two issues relating to party autonomy

⁴Act No. 101 (of 4 December, 1963) on Legal Relations arising in International Business Transactions, see Introduction and Commentary by Kopac (Prague 1967), p. 201.

⁵Art. 335(1) of the Commercial Code of Bahrain, Law No. 7 of 1987.

⁶Art. 291(1) of the Commercial Code of Iraq, Law No. 30 of 1984.

⁷Decree No. 68 of 1980 Enacting the Law of Commerce of Kuwait.

in stipulating expiry clauses. The first issue concerns the modalities of determining the time of expiry, in particular the reference to an expiry event rather than an expiry date. The second issue is whether a guaranty letter must contain an expiry clause and, if so, what the sanction for failure should be. In this context it will be asked whether the uniform law should provide for a cut-off period and, if so, what its legal character should be.

(1) Modalities of determining the time of expiry

35. The time of expiry may be fixed in a number of ways. The most certain way is to fix a calendar date. Another way is to state a definite period of time (e.g. six months). Since some uncertainty might exist as to the exact starting point of that period of time, the uniform law might help by referring to the time of effectiveness (according to draft article 7(2); A/CN.9/WG.II/WP.67). Yet another way is to specify a certain act or event (e.g. completion of principal's performance, acceptance of works by beneficiary, award of contract to another tenderer). Expiry clauses of that kind may create problems in two respects.

36. Firstly, where expiry is linked to an event, the guarantor would have to engage in an undesirable examination of facts and might become entangled in a dispute between the beneficiary and the principal. Since the deliberations of the Working Group on the so-called non-documentary payment conditions (A/CN.9/330, paras. 68-75) seem applicable here, consideration may be given to converting any non-documentary expiry that is not readily determinable by the guarantor into a documentary one. The documentary approach is taken by article 22 URG (first sentence) which appears to qualify the presentation of documents itself as expiry event:

"Expiry of a Guarantee for the presentation of claims shall be upon a specified calendar date ('Expiry Date') or upon presentation to the Guarantor of the document(s) specified for the purpose of expiry ('Expiry Event')."

37. Secondly, expiry that is linked to an event may never occur or at least not for a long time. Even where presentation of a document is required, there may be a risk of an everlasting undertaking, at least if the document is to be furnished by the beneficiary. The most effective cure would be not to recognize expiry clauses based on an event and thus to allow only the specification of a calendar date or a definite period of time. However, that cure might be regarded as too rigid. Another cure might be provided by the cut-off period discussed below (paragraphs 42-43) or, for certain extreme cases, by provisions dealing with fraud or manifest abuse (to be discussed in a future Secretariat note).

(2) Possible requirement of an expiry clause and possible cut-off period

38. The Working Group may wish to consider whether the uniform law should require guaranty letters to contain an expiry clause and, if so, what the consequence of a lack

of such a clause should be. It may be noted that the URG appear not to require an expiry clause and do not provide for any sanction in case of failure to contain such a clause. While article 22 URG (quoted above, paragraph 36, in its essential part) might be read as requiring an expiry date or expiry event, article 3(f) URG takes a hortatory approach by stating that "all guarantees should stipulate the expiry date and/or expiry event of the Guarantee".

39. Expiry clauses might be missing in guaranty letters due to omission or oversight. Even where they are intentionally left out, the result is at least uncertainty and possibly an undertaking of indeterminate effectiveness or perpetual enforceability. As was noted at the thirteenth session (A/CN.9/330, paras. 24 and 44), perpetual undertakings may be regarded as unsettling and commercially undesirable. They may raise regulatory concerns in view of the continuing risk exposure, and they may lead to increased costs under the capital adequacy rules of the Basel Agreement. Finally, they create uncertainty in that they might be affected by a period of limitation or prescription of an applicable law which in itself might be difficult to determine. It may be added that this uncertainty is aggravated by the following disparities between national laws of limitation or prescription: limitation periods vary considerably and may be as long as 30 years; limitation periods may commence to run at the establishment of the guaranty letter, the occurrence of the secured contingency or the time of the demand; limitation periods may or may not be shortened by the parties; foreign guaranty letters may or may not be subjected to domestic limitation periods.

40. The following reasons may be advanced against requiring an expiry clause. Since undertakings that do not specify a period of effectiveness are found in practice, the uniform law should not attempt to change that practice. Concerns relating to undertakings of indeterminate validity are not primarily due to the lack of an expiry clause since the same objections could be raised against clauses providing for perpetual or very long validity.

41. If the Working Group were to decide in favour of requiring an expiry clause, it would have to decide what the consequence of a lack of expiry clause should be. One possible sanction would be to treat the guaranty letter as invalid or ineffective. However, that sanction would probably be too extreme.

42. A more acceptable solution, as suggested during the thirteenth session of the Working Group (A/CN.9/330, paras. 25 and 46), would be to provide for a cut-off period of, say, five years. The cut-off period would apply only if the guaranty letter or an amendment thereto were not to contain an expiry clause. Due to its supplementary character, it would not prevent the stipulation of a longer period of effectiveness.

43. However, that solution would not meet the above concerns relating to undertakings of perpetual or excessively long validity. Consideration might thus be given to providing that the cut-off period may not be derogated from. If the cut-off period were to be mandatory, it should probably be longer than if it were to be supplementary

(e.g. 10 years). Whether mandatory or not, the cut-off period should be given the meaning and effect discussed above (paragraphs 25-33).

IV. OBLIGATIONS OF GUARANTOR

44. The following discussion deals with the most crucial situation in a guaranty letter transaction, i.e., when the beneficiary demands payment. It focuses on various issues relating to the obligations of the guarantor and is meant to include the counter-guarantor and the confirming guarantor. In considering those issues, a recurrent question will be whether they should be addressed in provisions of the uniform law and, if so, whether the provisions should be of mandatory or supplementary character. The question seems particularly pertinent in respect of issues on which rules are provided in the URG.

A. Obligation to pay upon conforming demand

45. As suggested in draft article 2 (A/CN.9/WG.II/WP.67), the guarantor is obliged to pay "in conformity with the terms of the undertaking". Upon receipt of a demand for payment, the guarantor would thus examine its conformity with the terms of the guaranty letter. It may be noted that a future Secretariat note will discuss possible grounds for refusing payment that are not instances of non-conformity (e.g. fraud, manifest abuse).

46. The points that the recipient of a claim would have to verify in order to decide whether it is obliged to pay under the guaranty letter may be illustrated by the following list:

Timeliness, i.e., the claim is not made after expiry

Proper claimant, i.e., the person demanding payment is the beneficiary designated in the guaranty letter

Proper form, i.e., the claim meets any requirement of form laid down in the guaranty letter or in the applicable law

Proper addressee and place of presentment, i.e., payment is demanded from the obliged party (e.g. guarantor, but not the advising bank) and the claim is presented at the right place in respect of that party (e.g. issuing bank or confirming bank)

Appropriate amount, i.e., the amount claimed does not exceed the maximum amount as stated in the guaranty letter or as reduced either by a previous payment or according to an express reduction clause

Fulfilment of payment conditions, i.e. presentment of specified documents or fulfilment of other requirements upon which payment is predicated

47. As regards the proper form of the demand, the Working Group may wish to consider whether the uniform law itself should contain any requirement as to form and, for example, whether it should exclude purely oral demands.

48. The Working Group may wish to consider whether the uniform law should contain a provision on the proper place. The rule in article 19 URG that a claim under the guarantee shall be made "at the place of its issue" might be refined so as clearly to link presentment to the particular addressee, e.g. confirming instead of issuing bank, and to give effect to any stipulation of a different place of presentment.

(1) Standard of examination as to conformity

49. Article 9 URG provides:

"All document(s) specified and presented under a Guarantee, including the claim, shall be examined by the Guarantor with reasonable care to ascertain whether or not they appear on their face to conform with the terms of the Guarantee. Where such document(s) do not appear so to conform or appear on their face to be inconsistent with one another, they shall be refused."

50. It is primarily in the context of verifying payment conditions that the standard of examination for facial conformity comes into play. Even where payment depends on the occurrence of an event and that occurrence is not within the guarantor's purview, an examination of documents would be required if the uniform law would incorporate the prevailing view at the thirteenth session (A/CN.9/330, para. 75) that non-documentary payment conditions should be converted into documentary ones obliging the beneficiary to submit a statement affirming the occurrence of the event in question or a certificate of an appropriate third person.

51. The standard of facial compliance may also play a role in the examination of other points included in the above illustrative list (paragraph 46). For example, where expiry is linked to an event, verification of timeliness may involve examination of documents, in particular if the uniform law were to adopt the documentary approach suggested above (paragraph 36). Similarly, where a reduction clause refers to an event, determination of the appropriate amount may involve examination of documents, in particular if the uniform law were to require that, as suggested at the thirteenth session (A/CN.9/330, para. 22), the available amount be readily determinable by the guarantor, for example, on the basis of clearly specified documents.

52. The Working Group may wish to consider whether a rule such as the one in article 9 URG would be appropriate for the uniform law and whether it should be refined or supplemented. In doing so, the Working Group may build on its discussion of the thirteenth session relating to the doctrine of strict compliance and to the possible use of the understanding and established practices of bankers as a criterion of the standard of construction and care (A/CN.9/330, paras. 86-91).

53. As was noted at the thirteenth session, the term "strict compliance", as distinguished from "substantial

compliance", could be understood as meaning true strictness down to the comma or it could be understood as allowing a marginal latitude to correct typographical errors or similar minimal deviations. In fact, there exists no uniform understanding, and the handling of discrepant documents in letter of credit practice appears to be a primary source of disputes and litigation.

54. In considering whether a rigid or a more flexible standard of compliance would be appropriate, account should be taken of certain differences between the commercial letter of credit and the guaranty letter. Firstly, the commercial letter of credit provides a secured payment mechanism likely to be utilized in the ordinary course of the transaction, while the guaranty letter is designed to indemnify the beneficiary for the consequences of a contingency that is unlikely to occur. Secondly, the documents tendered under a commercial letter of credit (e.g. bill of lading) are likely to be merchantable, while the statements or documents required under a guaranty letter are rarely of such type. Thirdly, the documents required under a commercial letter of credit tend to be more standardized than those required under a guaranty letter, and they are explained and regulated in detail by the UCP.

55. The following three examples might help to assess the possible role of the standard of facial compliance in guaranty letter practice:

(A) A financial stand-by letter of credit contains in its annex the text of three statements describing the possible contingencies for which the undertaking is given and leaving blanks for the amount to be filled in by the beneficiary.

(In such case, the well-known maxim of the doctrine of strict compliance is clearly applicable: There is no room for documents that are almost the same, or that will do just as well.)

(B) A tender guarantee is payable on first demand accompanied by a written statement of the beneficiary certifying that the tenderer did not honour its commitment. The beneficiary sends the following facsimile message to the guarantor: "We hereby demand payment of 125.000 USD, confirming Company X did not sign awarded contract. Signed B." The guarantor refuses to pay because the beneficiary's statement contained neither the word "certify" nor the words "did not honour its commitment".

(However one may judge the reasons given for rejecting the claim, it is submitted that this case illustrates the limitations of the doctrine of strict compliance, whether or not interpreted in its literal, rigid sense.)

(C) A performance guarantee states that it is payable on simple demand and that it is subject to the URG. The beneficiary supports its demand by a declaration to the effect that the principal defaulted on its obligations, in particular, its main obligations under the contract. The principal instructs the guarantor not to pay because the beneficiary did not state, as required under

article 20 (a)(ii) URG, "the respect in which the Principal was in breach".⁸

(This latter wording, which may equally be found in an individually drafted text of a guaranty letter, exemplifies the frequent vagueness of the description of the required contents of a statement by the beneficiary and, in turn, of the limited utility of a standard based on strict compliance. In determining the conformity of a statement with the requirements contained in the guaranty letter, construed in accordance with draft article 6 of the uniform law, a process of interpretation and judgment is needed that cannot be appropriately covered by a single term such as "strict compliance", and probably also not "substantial compliance".)

56. One conclusion would be that it is primarily for the parties to provide greater certainty by formulating precise requirements, illustrated in the first example. As regards the uniform law, a standard of facial compliance, however strict or flexible it may be, might have less significance than the standard of reasonable care in examining the conformity of the claim, including any required documents, with the terms of the guaranty letter.

57. In this connection consideration may be given to refining the standard of care, for example, by referring to the understanding of a reasonable and experienced documents checker. Such refinement might help to prevent an overly rigid attitude towards conformity where a process of interpretation and judgement is needed. However, one might regard such refinement as unnecessary in view of the fact that any legal standard of care tends to be judged with regard to the relevant group of persons and that the uniform law may be expected to include the mandatory requirement that guarantors act in good faith and with reasonable care (as provided in the new version of article 15 URG; see paragraphs 67-68 below).

(2) Time allowed for examination

58. Article 10(a) URG provides:

"A Guarantor shall have reasonable time in which to examine a claim under a Guarantee and to decide whether to pay or to refuse the claim."

59. Except for minor drafting changes, this provision corresponds with the previous version which the Working Group reviewed at its twelfth session (A/CN.9/316,

⁸Article 20 (a) URG reads: "Any claim for payment under the Guarantee shall be supported by a written statement (whether in the claim itself or in a separate document or documents accompanying the claim and referred to in it) stating:

- (i) that the Principal is in breach of his obligation(s) under the underlying contract(s);
- and
- (ii) the respect in which the Principal is in breach."

(Article 20 (c) URG reads: "This Article applies except to the extent that it is expressly excluded by the terms of the Guarantee or Counter-Guarantee.")

paras. 50-51). As was then noted in favour of retaining the notion of "reasonable time", the notion is well known, in particular from article 16(c) UCP, and takes into account differences in circumstances found in individual cases as well as regional and national variations in practice.

60. However, such flexibility is necessarily coupled with uncertainty that might not be desirable in international practice. With a view to achieving certainty, various proposals were made concerning inclusion of a definite period, e.g. five days or, as provided by section 5-112(1)(a) UCC, three days. One compromise suggestion was to use a rebuttable presumption of a certain fixed length of time as appropriate, unless agreed or proven otherwise, with the burden being on the party alleging its reasonableness.

B. Duties of notification

61. The Working Group may wish to consider whether the uniform law should oblige the guarantor, upon receipt of a claim, to inform the principal or instructing party thereof.⁹ It may also wish to consider the time and modalities of the notice to the beneficiary that the guarantor would be obliged to give if it rejected the claim. Both duties are laid down in provisions of the URG (which in an earlier, somewhat different version were reviewed by the Working Group at its twelfth session, A/CN.9/316, paras. 50, 52, 72-75):

Article 10(b)

"If the Guarantor decides to refuse a claim, it shall immediately give notice thereof to the Beneficiary by teletransmission or, if that is not possible, by other expeditious means. Any documents shall be held at the disposal of the Beneficiary."

Article 17

"Without prejudice to the terms of Article 10, in the event of a claim the Guarantor shall without delay so inform the Principal or where applicable its Instructing Party and in that case the Instructing Party shall so inform the Principal."

62. With respect to the provision on notice of rejection, the Working Group suggested at its twelfth session that the notice should include a statement of the reasons for the rejection since a beneficiary, if informed of the nature of a documentary discrepancy, might be in a position to cure the discrepancy and resubmit the document in question. A consequential proposal was that the provision might include a rule of preclusion, perhaps similar to the one contained in article 16 UCP, thereby limiting the right of a guarantor to reject a submission of documents on the basis of discrepancies that could or should have been notified to a beneficiary during an earlier submission (A/CN.9/316, para. 52). It may be added

that a rule of preclusion that was closely modelled on article 16(e) UCP would have the further consequence of precluding a guarantor who failed to examine the documents within the required period of time from claiming that they were not in accordance with the terms and conditions of the guaranty letter. The rule of preclusion would thus provide the sanction for failure to comply with the rule on the time for examination discussed above (paragraphs 58-60).

63. As regards the guarantor's duty to inform the principal or instructing party in the event of a claim, it is likely to be controversial in principle and to create difficulties in its implementation, in particular with respect to the guarantor's duty to pay upon a conforming demand. For example, questions were raised at the twelfth session as to whether notice should be given prior to payment, or whether payment could validly be made without notice and whether the notification, if made prior to payment, should contain information concerning the guarantor's intention to honour or dishonour the claim. In considering these and other questions relating to this duty, the Working Group may wish to take into account the opening words that were added to the new version of article 17 URG: "Without prejudice to the terms of Article 10", i.e. the provisions on the time for examination and on the duty to give notice of rejection.

64. Finally, the Working Group may wish to consider whether the uniform law should deal with further duties of notification. For example, consideration might be given to requiring financial institutions that receive a request for issuing a counter-guaranty letter or for confirming or advising a guaranty letter and that elect for any reason not to comply with such request to so inform the requesting party within a specified time, e.g. five days, after the receipt of the request.

V. LIABILITY AND EXEMPTION

65. The Working Group may wish to consider whether the uniform law should contain provisions on the liability of guarantors and, possibly, instructing parties. It may use as a basis of its discussion the pertinent URG provisions, an earlier version of which it reviewed at its twelfth session (A/CN.9/316, paras. 53-69). The relevant provisions of URG are:

Article 11

"Guarantors and Instructing Parties assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification, or legal effect of any document presented to them or for the general and/or particular statements made therein, or for the good faith or acts and/or omissions of any person whomsoever."

Article 12

"Guarantors and Instructing Parties assume no liability or responsibility for the consequences arising out of

⁹As to the term "instructing party", see draft article 2, A/CN.9/WG.II/WP.67.

delay and/or loss in transit of any messages, letters, claims or documents, or for delay, mutilation or other errors arising in the transmission of any telecommunication. Guarantors and Instructing Parties assume no liability for errors in translation or interpretation of technical terms and reserve the right to transmit Guarantee texts or any parts thereof without translating them."

Article 13

"Guarantors and Instructing Parties assume no liability or responsibility for consequences arising out of the interruption of their business by acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control or by strikes, lock-outs or industrial action of whatever nature."

Article 14

(a) "Guarantors and Instructing Parties utilizing the services of another party for the purpose of giving effect to the instructions of a Principal do so for the account and at the risk of that Principal."

(b) "Guarantors and Instructing Parties assume no liability or responsibility should the instructions they transmit not be carried out even if they have themselves taken the initiative in the choice of such other party."

(c) "The Principal shall be liable to indemnify the Guarantor or the Instructing Party, as the case may be, against all obligations and responsibilities imposed by foreign laws and usages."

Article 15

"Guarantors and Instructing Parties shall not be excluded from liability or responsibility under the terms of Articles 11, 12, and 14 above for their failure to act in good faith and with reasonable care."

66. The discussion may conveniently be divided into two parts, dealing first with issues addressed in article 15 URG, the only provision imposing liability, and then with issues raised by articles 11 to 14 URG, which, while presented in the URG under the heading "Liabilities and responsibilities", contain in substance exemption clauses.

A. Liability and standard of care

67. It may be recalled that the previous version of article 15 URG imposed liability on guarantors and instructing parties "for their grossly negligent or willful acts". The new basis of liability, "failure to act in good faith and with reasonable care", reflects the view widely supported in the Working Group that guarantors and instructing parties should exercise reasonable care in performing their obligations (A/CN.9/316, para. 69).

68. A provision in the uniform law along the lines of article 15 URG would have a different legal character and possibly a different scope. Article 15 URG limits the effect of exemption clauses contained in the same set of rules, all of which, including article 15, become effective by agreement of the parties and may thus be excluded or varied. The uniform law, however, would be in a position to impose liability in a mandatory fashion. Thus it could effectively limit any exemptions from such liability, whether they be found in individually drafted clauses of guaranty letters or in general conditions or uniform rules referred to in guaranty letters.

B. Exemptions from liability

69. As regards articles 11 to 14 URG, the current provisions are essentially the same as those reviewed by the Working Group at its twelfth session. It may be recalled that serious objections were raised, in particular, in respect of articles 12 to 14 URG which were regarded as unduly favouring guarantors and instructing parties. Suggestions were made that those exempting provisions should be deleted or drafted in a more balanced manner.

70. It was pointed out in response that the provisions were closely modelled on articles 17 to 20 UCP which had not given rise to difficulties. As regards the exemption for *force majeure* it was stated that guarantee texts often contained *force majeure* clauses and that even without any contractual exemption a similar result would obtain from the applicable national law. However, since national laws differed as to the scope of exempting impediments, it might be desirable to strive for a greater degree of harmony.

71. In discussing whether the uniform law should include any of the exemptions contained in articles 11 to 14 URG, the Working Group may wish to take into account the following considerations based on differences between the URG and the uniform law. While the future acceptability of the text to bankers as the primarily concerned persons will be an important factor in a State's decision about the acceptance of the uniform law, that may be less so in respect of exemption clauses since these are more commonly promulgated by the interested circles, for example, in general conditions.

72. Moreover, the need for including in the uniform law provisions on exemption appears to be reduced by the very fact that the URG contains exemption clauses. Finally, exemption clauses seem to be more appropriate in a text that itself spells out the various obligations, the breach of which raises the question of liability and exemption therefrom. There may thus be less need for including exemption clauses in the uniform law, which, whatever its final coverage will be, is certain to contain fewer "rules of traffic" and provisions imposing duties than the URG.

**C. Report of the Working Group on International Contract
Practices on the work of its fifteenth session**

(New York, 13-24 May 1991) (A/CN.9/345) [Original: English]

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INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session,¹ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce (ICC) and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of

credit (A/CN.9/316). The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

2. The Commission, at its twenty-second session, accepted the recommendation of the Working Group that work on a uniform law should be undertaken and entrusted this task to the Working Group.²

3. At its thirteenth session (A/CN.9/330), the Working Group commenced its work by considering possible issues

¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 22.

²Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit. The Working Group requested the Secretariat to submit to its fourteenth session a first draft set of articles, with possible variants, on the above issues as well as a note discussing other possible issues to be covered by the uniform law.

4. At its fourteenth session (A/CN.9/342), the Working Group examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft of articles 1 to 7 of the uniform law. The Working Group also considered the issues discussed in a note by the Secretariat relating to amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a first draft of articles on the issues discussed. It was noted that the Secretariat would submit to the Working Group, at its fifteenth session, a note on further issues to be covered by the uniform law, including fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction.

5. The Working Group, which was composed of all States members of the Commission, held its fifteenth session in New York, from 13 to 24 May 1991. The session was attended by representatives of the following States members of the Working Group: Canada, Chile, China, Cyprus, Czechoslovakia, Egypt, France, Germany, India, Iran (Islamic Republic of), Iraq, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Nigeria, Singapore, Spain, Togo, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

6. The session was attended by observers from the following States: Algeria, Australia, Austria, Bahamas, Brazil, Cape Verde, Colombia, Congo, Ecuador, Finland, Haiti, Honduras, Indonesia, Oman, Pakistan, Peru, Philippines, Poland, Romania, Rwanda, Saudi Arabia, Sweden, Switzerland, Thailand, Tunisia, Uganda, United Republic of Tanzania, Vanuatu, Venezuela, Viet Nam and Yemen.

7. The session was attended by observers from the following international organizations: Asian-African Legal Consultative Committee (AALCC), Hague Conference on Private International Law, International Monetary Fund (IMF), Banking Federation of the European Community, Cairo Regional Centre for International Commercial Arbitration, International Chamber of Commerce.

8. The Working Group elected the following officers:

Chairman: Mr. J. Gauthier (Canada)

Rapporteur: Mr. R. Sandoval (Chile).

9. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.69) and two notes by the Secretariat discussing further issues of a uniform law: fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70); conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71).

10. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a uniform law on international guaranty letters.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

11. The Working Group considered certain issues concerning the obligations of the guarantor. Those issues had been discussed in the note by the Secretariat relating to amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68) that had been submitted to the Working Group at its fourteenth session but had not then been considered, for lack of time. The deliberations and conclusions of the Working Group are set forth below in chapter II. The Secretariat was requested to prepare, on the basis of those conclusions, a first draft set of articles on the issues discussed.

12. The Working Group then considered the issues discussed in the note by the Secretariat relating to fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70). The deliberations and conclusions of the Working Group are set forth below in chapters III, IV and V. The Secretariat was requested to prepare, on the basis of those conclusions, a first draft set of articles, with possible variants, on the issues discussed.

13. The Working Group also considered the issues discussed in the note by the Secretariat relating to conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71). The deliberations and conclusions of the Working Group are set forth below in chapter VI. The Secretariat was requested to prepare, on the basis of those conclusions, a first draft set of articles on the issues discussed.

II. DISCUSSION OF CERTAIN ISSUES CONCERNING THE OBLIGATIONS OF THE GUARANTOR

14. The Working Group continued its deliberations on the obligations of the guarantor and considered the following issues which, for lack of time, it had not considered at its fourteenth session: time allowed for examination, duties of notification, and liability and exemption (as discussed in document A/CN.9/WG.II/WP.68, paras. 58-72).

A. Time allowed for examination

15. The Working Group noted that, under article 10(a) of the revised text of the ICC Draft Uniform Rules for Demand Guarantees³ (URDG), "a Guarantor shall have reasonable time in which to examine a claim under a Guarantee and to decide whether to pay or to refuse the claim". It was understood that, as expressed in that provision, the time accorded to the guarantor was for both related purposes, namely that of examining the claim and of deciding whether or not to pay.

16. There was considerable support for using in the uniform law the formula "reasonable time" as adopted in the above provision. It was stated that this formula was well known in banking practice and that it was sufficiently flexible to accommodate the varied circumstances of individual cases as well as regional or national variations in practice. However, there was some support for providing uniformity and certainty by fixing a number of working or banking days (e.g., three, five or seven). Yet another view was to combine both approaches by according the guarantor reasonable time up to a limit of seven days, as appears to be the currently suggested rule for the future revision of the ICC Uniform Customs and Practice for Documentary Credits (UCP). It was stated in reply that such an upper limit might eventually be regarded as the regular time period and that it might thus extend the time period beyond what is currently the practice, i.e., about three days.

17. The Working Group was agreed that the future provision in the uniform law on the time allowed for examination should not be mandatory. That would permit derogation either by incorporation of rules such as those contained in URDG or UCP or by stipulating a different period of time in the particular guaranty letter.

B. Duties of notification

18. The Working Group considered, on the basis of the discussion set forth in document A/CN.9/WG.II/WP.68 (paras. 61-64), whether the uniform law should contain provisions concerning notice to the principal of a claim, notice to the beneficiary of the rejection of its claim and possible further notifications by financial institutions.

Notice to the principal of a claim

19. It was noted that the issue of notice to the principal was dealt with in draft article 17 URDG in the following way:

"Without prejudice to the terms of article 10,⁴ in the event of a claim the Guarantor shall without delay so inform the Principal or where applicable its Instructing Party and in that case the Instructing Party shall so inform the Principal."

³ICC document No. 460/470-1/19 Rev. and 460/470-10/1 Rev. of 8 February 1991.

⁴The provisions of draft article 10 URDG are reproduced in paragraphs 15 and 25 of this report.

20. It was further noted that draft article 17 URDG was apparently not designed to address the problem of "extend or pay" requests since these were dealt with elsewhere, namely, in draft article 26 URDG. It was stated that a rule such as the one contained in draft article 17 URDG would be inconsistent with the practice of stand-by letters of credit as reflected in article 16 UCP.⁵

21. The Working Group was divided on whether the uniform law should impose an obligation on the guarantor to inform the principal of a demand made by the beneficiary. The reasons advanced by those opposing such a legal obligation included the following: notice to the principal, while customarily given as a matter of courtesy, would, if based on a statutory duty, undermine the independence and integrity of the guarantor's undertaking and would be contrary to the expectation of certain and expeditious payment; it would constitute an open invitation to the principal to try to obstruct payment on capricious grounds, in view of the fact that the bulk of demands were not fraudulent or abusive; compliance with any such duty to notify was not easily proved; notification to the principal could readily be made a documentary condition of the guaranty letter; and an appropriate sanction for non-compliance could not easily be found.

22. The proponents of a statutory duty to notify the principal advanced the following reasons: a provision in the uniform law that was not mandatory would not prompt a dramatic change of what apparently was a widespread current practice; it would leave intact the independent assessment and decision of the guarantor whether or not to honour the claim; notice to the principal was a matter of fairness since the principal was the person most likely to know, and to provide information to the guarantor, about any possible fraud or abuse and since it was ultimately the principal whose funds were at stake.

23. Divergent views were expressed on whether notice would have to be given before payment. Under one view, notice was neither useful nor necessary if made after payment. The prevailing view, however, was that the duty of notification should not be linked in terms of time to the duty of examining the claim and deciding about payment. According to that view, payment could be made (within the time allowed for examination of the claim) before notice was given (within the time period provided therefor), and non-compliance with the duty of notification would not affect the validity or effectiveness of payment but might under certain circumstances lead to a claim for damages. It was noted that the question of damages was still to be considered by the Working Group for this and other possible instances of breach of obligations.

24. With a view to providing the principal with knowledge about a claim without imposing the burden of notification on the guarantor, a suggestion was made to require the beneficiary, either on an opting-in or (for bank guarantees only) an opting-out basis, to present to the guarantor with its claim a (certified) statement that either

⁵References to articles of UCP are to the text of the 1983 revision, ICC Publication No. 400, reproduced in document A/CN.9/251.

the original or a copy of the claim had been sent directly to the principal so that the guarantor had documentary proof of the notice before its payment. While attracting some interest, the suggestion was not accepted for the following reasons: it would necessitate a considerable change of current notification practice; it would create unnecessary technical difficulties; the envisaged sanction of prompt dishonour was too rigid; and it created a dichotomy between stand-by letters of credit and bank guarantees that was unwarranted at least in the context of notice to the principal.

Notice of rejection to beneficiary

25. It was noted that draft article 10(b) URDG dealt with the issue of notice of rejection as follows:

"If the Guarantor decides to refuse a claim, he shall immediately give notice thereof to the Beneficiary by teletransmission or, if that is not possible, by other expeditious means. Any documents presented under the Guarantee shall be held at the disposal of the Beneficiary."

26. It was stated that a more extensive rule of notification, coupled with sanctions, was found in the practice of stand-by letters of credit as reflected in article 16 UCP.

27. The Working Group was agreed that the uniform law should contain a provision obliging the guarantor to give notice of rejection to the beneficiary. There was wide support for requiring that the notice indicate why the guarantor had decided to refuse payment. However, it was felt that the requirement of giving reasons should be sufficiently flexible to take into account the variety of payment conditions found in guaranty letters. It was suggested that the requirement should be sufficiently general to relieve the guarantor from specifying particular details, as would be appropriate in the different context of commercial letters of credit; it was pointed out, however, that such a rule would be inappropriate for stand-by letters of credit which sometimes required detailed documentation.

28. Divergent views were expressed on whether the uniform law should contain a rule of preclusion along the lines of article 16(d) and (e) UCP. Under one view, such a rule was inappropriate for guaranty letters since, compared with commercial letters of credit, there tended to be considerably fewer documents and a considerably lesser potential for discrepancies, and the documents did not become "stale" 21 days after the date of the bill of lading (as under article 47(a) UCP). The prevailing view, however, was that the idea of preclusion might be appropriate in the context of guaranty letters but that the precise conditions and consequences needed further study, taking into account the characteristics and practices concerning stand-by letters of credit and independent guarantees.

Further duties of notification

29. The Working Group considered whether the uniform law should deal with further duties of notification that

might form part of the international "rules of traffic", for example, the duty of any financial institution that had received a request for issuing, confirming or advising a guaranty letter to inform the requesting party within a given time about its decision not to comply with that request. The Working Group was agreed that the uniform law should not deal with such duties.

C. Liability and exemption

30. The Working Group considered, on the basis of the discussion set forth in document A/CN.9/WG.II/WP.68, paragraphs 65-72, whether the uniform law should contain provisions on the liability of guarantors and on possible exemptions from liability. It was noted that draft articles 11 to 14 URDG⁶ contained detailed provisions exempting guarantors and instructing parties from liability or responsibility in respect of a great variety of acts or omissions and that draft article 15 URDG limited the effect of these exemptions by imposing liability on guarantors and instructing parties "for their failure to act in good faith and with reasonable care".

Provisions on exemption

31. The Working Group was agreed that the uniform law should not contain any exemption provisions of the kind included in URDG. It was felt that it would not be appropriate to deal with exemption from liability at the statutory level; the issue should be left to the contractual level and settled in uniform rules such as URDG, in general conditions or in individually negotiated agreements. Moreover, an elaborate set of exemption clauses was neither needed nor appropriate in the uniform law, which was certain to contain considerably fewer operational rules or similar provisions on obligations than URDG or UCP.

Rule on liability and its elements

32. Some doubts were expressed concerning the need for including in the uniform law a rule on liability. It was pointed out that questions of liability rarely gave rise to court litigation; that the issue could be left to the general law in a given legal system; that no generally acceptable standard that would also deal with the controversial issue of liability for the conduct of employees could be found; and that the provision of draft article 5 of the uniform law sufficed.⁷ After deliberation, it was agreed, however, that the uniform law should contain a rule of liability along the lines of draft article 15 URDG.

33. As regards the elements of the standard of liability, it was agreed that the concept of "good faith" should be

⁶Draft articles 11 to 14 URDG are set forth in document A/CN.9/WG.II/WP.68, para. 65.

⁷Draft article 5, which the Working Group decided to place between square brackets (A/CN.9/342, para. 41), reads as follows:

"In the interpretation of this Law, regard is to be had to its international [character] [origin] and to the need to promote uniformity in its application and the observance of good faith in international guaranty or credit practice."

retained. As regards the concept of "reasonable care", divergent views were expressed, often depending on whether a mandatory or a non-mandatory rule of liability was envisaged. As regards a mandatory rule from which parties may not derogate by means of exemption clauses, one view was that the standard of reasonable care was appropriate since guarantors were justifiedly expected to exercise professional diligence. As regards a mandatory rule, the prevailing view, however, was that the standard of reasonable care, possibly qualified by a reference to banking practices, was too strict as an unbreakable limit; a mandatory rule of liability should be more restricted, for example, to grossly negligent or reckless conduct.

34. Further suggestions for modifying or supplementing the element of "reasonable care" aimed primarily at an additional liability rule that, according to a widely supported proposal, would not be mandatory and would supplement the draft provision on the standard of care in examining documents that had been discussed at the fourteenth session (see A/CN.9/342, paras. 106-110). The suggestions included references to best banking practices; to good banking practices as generally recognized; to professional diligence; and to banking practices as laid down, for example, in UCP, bankers' manuals and local, national or regional white papers. In response to suggestions referring to banking practices, it was pointed out that the setting of standards could not exclusively and ultimately be left to the persons subjected to the standard; that such banking practices were not everywhere established and often uncertain; and that the reference to the category of persons affected was unnecessary since any standard of care had to be judged in the professional context involved.

Possible extension of liability rule beyond guarantors

35. It was suggested that the future liability rule in the uniform law should be extended beyond guarantors and cover all participants in the guaranty letter transaction, in particular the beneficiary and the principal. It was pointed out that the requirement of good faith was fundamental and should govern the conduct of all parties involved. Moreover, a mandatory liability rule that was limited to guarantors would lead to the wrong conclusion that the uniform law condoned unlimited exemption from liability in respect of the other parties mentioned in the uniform law. A more limited suggestion was that, in view of the fact that the uniform law focused on the guarantor-beneficiary relationship, only the beneficiary should be covered in addition to the guarantor.

36. The prevailing view, however, was to limit the liability rule to guarantors and, possibly, instructing parties. It was felt that an extension of the liability rule beyond those parties would require defining different standards for the respective commercial contexts and addressing the issues of sanctions or remedies; all that would unduly encroach on current national laws that were able to deal with such questions without the help of the uniform law.

III. FRAUD, ABUSE AND SIMILAR CONCEPTS

37. The Working Group considered questions relating to fraud, abuse and similar concepts in the context of guaranty letter transactions. It had before it a note by the Secretariat discussing those concepts and their application in various jurisdictions of common law or civil law tradition (A/CN.9/WG.II/WP.70, paras. 7-75).

38. As suggested in paragraph 9 of that note, the Working Group first considered whether the uniform law should address instances of fraud or abuse that might be relevant otherwise than as an objection to payment. It was agreed that the uniform law should not address such instances of misconduct by persons other than the beneficiary. However, during the subsequent discussion on the fraud exception, a suggestion was made to consider at a later stage the advisability of addressing any possibly fraudulent or abusive conduct of the principal in seeking to prevent payment on capricious grounds.

A. Scope and possible definition of fraud or abuse

39. The Working Group recalled its general agreement at the twelfth session that, while an effort to harmonize the divergent approaches to the problem of fraud would be difficult, there should be greater uniformity in the treatment of the problem and that the formulation of provisions in the uniform law would be a particularly useful contribution (A/CN.9/316, paras. 147-162). The Working Group commenced its harmonization effort with a preliminary exchange of information on currently used concepts and their interpretation in particular jurisdictions.

Exchange of information on currently used concepts

40. As regards the concept of fraud, it was pointed out that its interpretation was often influenced by criminal law notions. The definitions of fraud stated to be applied in particular jurisdictions included the following: causing by illegitimate means a misunderstanding on the part of another person; presenting documents that contain expressly or by implication material representations of fact that the presenter knows to be untrue; disloyal conduct with the intention to do harm or seek an illicit gain or unjust enrichment. It was stated that in other jurisdictions the term "fraud" had a much less strict meaning encompassing situations in which there was no element of intent; with respect to stand-by letters of credit, fraud meant the absence of a colourable basis for drawing on the credit.

41. As regards the concept of abuse, it was pointed out that it was often applied in the same way as in respect of any other right exercised by a person. Such general definitions of abuse stated to be applied in particular jurisdictions included the following: exceeding the limits of the normal exercise of a right by a reasonable person; exercising a right for a purpose other than that for which it was granted. Other definitions of abuse that were geared to the context of guaranty letters included the following:

demand by a beneficiary that had received full satisfaction; demand for payment despite the obvious non-occurrence of any contingency or risk covered expressly or impliedly by the purpose of the guaranty letter.

42. It was noted that the concept of fraud as well as that of abuse were not only defined in different ways as indicated above but also gave rise to considerable disparity and uncertainty in their application to individual cases. It was further noted that both concepts were often used interchangeably and that no clear distinction could be drawn between them.

43. Accordingly, it was suggested that an attempt should be made not to use in the uniform law the terms "fraud" and "abuse". It was further suggested that, with a view to finding the necessary precise demarcation line of the limited area warranting an exception to the independent payment undertaking, it was desirable to determine the parameters of that area by discussing borderline cases of a possibly controversial nature.

Discussion of cases to delimit scope of fraud exception

44. A question was raised whether a guaranty letter could be established at such a level of abstraction that would make it "fraud-proof". The Working Group, noting that no jurisdiction allowing such a type of stand-by letter of credit or guarantee could be identified, was agreed that it should certainly be inadmissible under the uniform law. It was recognized, however, that in certain jurisdictions the application of the fraud exception might to some extent be limited by inserting contractual clauses such as conclusive evidence or confession of judgement clauses.

45. Few examples were given of situations that fell squarely within the fraud exception, for instance, forgery of documents or other criminal offences. A suggestion was made that another situation falling within the scope of the fraud exception would be the invalidity or non-existence of an underlying transaction to be secured by the guaranty letter.

46. The Working Group considered the following case that, based on the controversy it aroused, might be qualified as a borderline case: the beneficiary of a performance guarantee without a reduction clause demands payment of the full amount, while having suffered damages of a considerably lower amount resulting from the principal's failure to complete the last phase of a construction project. Under one view, the demand should be regarded as abusive (in respect of the balance between the damages and the guarantee amount) because the amount claimed was grossly disproportionate to the loss suffered and thus excessive as measured by the guarantee purpose or by the level of satisfaction received by the beneficiary. Under another view, the demand should not be regarded as abusive since the fraud exception was limited to total failure of consideration, i.e., total absence of any plausible basis for the demand. If a link between the amount payable under the guaranty letter and the specific loss suffered within the underlying transaction was desired, that should be made clear in the guaranty letter itself. For

example, the guaranty letter might contain a reduction clause referring to documented progress of works, or separate guaranty letters for the individual phases of the project might be issued.

47. Another case mentioned with a view to exploring the limits of the fraud exception was that of a performance guarantee relating to a contract for the establishment of a telephone system where the malfunctioning of some telephones led to a dispute between the contracting parties that required the engagement of an expert. One comment made on this case was that, irrespective of whether the malfunctioning of some telephones might be regarded as lack of complete performance, the very need of engaging an expert excluded the application of the fraud exception since the requirement of manifest or obvious abuse without the need for further investigation was not met.

48. The Working Group was agreed that the fraud exception should not apply in circumstances where there was an honest dispute between the parties to an underlying transaction about factual or legal questions concerning performance. It was realized, however, that it was not easy to formulate a precise demarcation line between such contractual disputes and those instances that should fall within the scope of the fraud exception.

Possible criteria and approaches for defining scope of fraud exception

49. The Working Group considered the question, raised in the note by the Secretariat (*ibid.*, para. 75, subpara. 1(a)), whether a general definition of the fraud exception should be restricted by a subjective criterion (e.g., evil intent, dishonesty, bad faith) or whether it should, following the prevailing judicial attitude, be based on objective criteria that might be more easily established (e.g., lack of plausible basis, purpose of demand falling outside the covered risk). While some support was expressed for a subjective restriction, it was widely felt that such a restriction would not be appropriate.

50. It was noted, for example, that any subjective requirement such as dishonesty or intent to harm was difficult to establish and that it would often be concluded from objective criteria. It was further pointed out that, while objective criteria appeared more appropriate, subjective elements should nevertheless be added as alternative elements that would become relevant, for example, where the beneficiary presented a true statement with a forged signature. It was realized that the distinction between subjective and objective criteria was unclear and of limited use. The Working Group concluded that any further definition might contain subjective as well as objective criteria.

51. Various suggestions were made concerning a possible definition of the fraud exception in the uniform law. One suggestion was to devise a general definition that might be inspired by any of the definitions referred to during the discussions of the Working Group or in the note by the Secretariat. Another suggestion was that an attempt should be made to describe the scope of the fraud exception by a non-exclusive listing of situations, taking into

account the cases discussed by the Working Group and the instances of possible abuse referred to in the note by the Secretariat. Yet another suggestion was to combine both approaches and to prepare a general definition accompanied by an illustrative list of instances covered. A last suggestion was not to attempt to formulate any kind of definition but merely to provide a guideline that might refer to various concepts, emphasize the character of the guarantor's undertaking and clarify that the exception covered fraud in the transaction and that the facts constituting the basis for the exception had to be established clearly and convincingly without any investigation.

52. The Working Group requested the Secretariat to prepare alternative draft proposals based on the above suggestions, taking into account the tentative deliberations and conclusions of the Working Group.

B. Degree of awareness or standard of proof

53. The Working Group considered the question of the substantive standard of proof or the degree of awareness entitling the guarantor to refuse payment in case of alleged fraud or abuse. It was agreed that the standard had to be strict in view of the exceptional character of that objection to the independent obligation of prompt payment, taking into account the position and reputation of the guarantor and its need for certainty. The view was expressed that, where a guarantor paid in good faith based on conforming documents, it should be entitled to reimbursement even if there was fraud.

54. As regards the possible terms for expressing the strict standard of proof, support was expressed for any of the similar terms mentioned in the note by the Secretariat (*ibid.*, para. 75, subpara. 2(a)), namely "evident", "certain", "obvious to everyone", "manifest", "established by liquid proof". It was pointed out that "manifest" should be understood as "piercing the eyes". Further suggested terms along the same lines included the following: "without any doubt"; "the only reasonable inference"; or "the only realistic inference".

55. As suggested in the note by the Secretariat (*ibid.*, para. 75, subpara. 2(b)), the Working Group considered whether the above standard should be limited to the issue of the guarantor's refusal on its own motion or whether it should apply equally to court orders enjoining payment by the guarantor or restraining the beneficiary from demanding or receiving payment. It was widely felt that, as a rule, the same standard of proof should apply to both situations, i.e., the decision of the guarantor and the decision of the court. It was realized, however, that the difference between the two situations might lead to certain differences in the application of the standard.

56. It was pointed out, for example, that the guarantor had to take a prompt decision within the time allowed for examination of the claim, while a court might have more time or take its decision at a later time, depending on its particular procedures and functioning. Another difference was that the guarantor usually had to base its decision solely on what had been presented by the principal, while

a court might, again depending on its procedures, hear the beneficiary and possibly other parties. Yet another difference was that the guarantor had essentially to rely on documentary proof, while a court might in its summary proceedings admit other means of evidence as well. Moreover, the ordinary standard of proof required in preliminary proceedings was often less than certainty or obviousness by requiring merely the establishment, for example, of a *prima facie* case or of probable success on the merits.

57. In discussing the possible differences between the decision of the guarantor and that of a court, it was realized that the application of the standard of proof in court proceedings could not be viewed in isolation but had to be seen within the procedural framework that tended to differ from one jurisdiction to another. The Working Group therefore decided at that point of its deliberations to take up the subject-matter of injunctions and other court measures, as discussed in the note by the Secretariat (*ibid.*, paras. 90-114). The Working Group later completed its discussion of fraud, abuse and similar concepts (see paragraphs 67 to 77 below).

V. INJUNCTIONS AND OTHER COURT MEASURES

58. The Working Group engaged in an exchange of information on the availability and the particular features of injunctive relief in a given jurisdiction, often supplementing the information provided by the note of the Secretariat. It was noted, for example, that not all jurisdictions appeared to provide procedures for injunctive relief to enforce the fraud exception; in one jurisdiction referred to, a court order enjoining the guarantor from paying was available only if the guarantor or the principal had brought a substantive claim against the beneficiary and the court order aimed at securing that substantive claim.

59. It was further noted that there existed considerable disparity as regards the particular stages and the usual timing of procedures for injunctive relief. For example, in one country temporary restraining orders in *ex parte* proceedings without service of process might be obtained within hours, followed by preliminary proceedings, with stricter procedural requirements, that might last some months, while in another country a preliminary injunction, based on a hearing, could be obtained within a few days. In respect of the different length of the proceedings, it was noted that, while applications for injunctions were reportedly very rarely successful in most jurisdictions, longer proceedings lent themselves to being abused by principals for dilatory purposes.

60. With a view to reducing the risk of such obstruction, some jurisdictions required applicants to place a bond or security deposit. It was pointed out that this device might usefully be introduced in other jurisdictions as well.

61. A less favourable reception was given to another suggested device which was to order the guarantor, where there was uncertainty about the question of fraud, to put the amount of the guaranty letter into escrow or to pay it

into court until the question was finally settled in main proceedings. It was felt that such an order would not accord with the integrity of the guaranty letter and with the restriction of the fraud exception to obvious or manifest cases.

62. The Working Group noted that there existed disparities concerning the specific types of injunctive relief available in various jurisdictions and in respect of the actual use and rate of success of these types. In various jurisdictions, the type of relief most likely to be sought was a stop-payment order against the guarantor. Another type of injunction against the guarantor, available in various jurisdictions, was an order to prevent the guarantor from debiting the account of the principal. The most promising measure in relative terms appeared to be in certain jurisdictions an attachment of the funds that either were still in the hands of the guarantor or formed part of the beneficiary's assets within the jurisdiction concerned. It was pointed out that the least effective measure was to restrain the beneficiary from either demanding or receiving payment, particularly in view of the fact that its place of business was likely to be in a foreign country.

63. Various references were made to particular features of injunctive relief that not only differed from one jurisdiction to another but were also often uncertain or controversial within a given jurisdiction. One such feature was the relationship between preliminary proceedings and main proceedings and any time requirements for initiating any such linked proceedings. A related feature was whether both kinds of proceedings had to be between the same parties. Yet another feature was the possible requirement of a cause of action for the specific type of relief sought and the important question whether the guarantor was not only entitled to refuse payment of a fraudulent call but was under a duty to do so, whether that duty was based on contract or on tort.

64. In the light of the above disparities and uncertainties, it was widely felt that it would be desirable to achieve a greater degree of certainty and uniformity. However, divergent views were expressed as to whether and, if so, what the uniform law could contribute towards that goal. One view was that the uniform law should limit itself to issues of substantive law and not touch upon procedural law matters. The prevailing view, however, was that uniform provisions of substantive law on the fraud exception would be of limited value unless accompanied by harmonized and certain procedural measures and that, therefore, an attempt should be made at furthering that goal without encroaching on the organization of national courts and their traditional procedures.

65. One suggestion was to consider the advisability of a provision that would in general terms deal with the access of all parties to the courts and call for expeditious proceedings, provided that the courts of the given jurisdiction had appropriate rules and procedures. Another suggestion was to make an attempt to lay down guidelines concerning the standard of proof and other features of special relevance in guaranty letter transactions, without thereby dramatically changing the current procedures and functioning of national courts.

66. As regards any jurisdiction that did not currently provide for injunctive relief at all, a hope was expressed for a possible change in the future. It was agreed, however, that it was unrealistic to try to impose such change by the uniform law. Therefore, the alternative draft provisions that the Working Group requested the Secretariat to prepare on the basis of the above suggestions should be formulated in a manner not mandating any such change.

III. FRAUD, ABUSE AND SIMILAR CONCEPTS (*continued*)

C. Fraud exception available to counter-guarantor

67. The Working Group resumed its deliberations on fraud, abuse and similar concepts by considering the question, raised in the note by the Secretariat (*ibid.*, para. 75, subpara. 3), what special considerations applied to the fraud exception available to a counter-guarantor (first bank) in cases involving fraud or abuse by the ultimate beneficiary. The situation envisaged was that of a payment demand by the counter-guarantor's beneficiary (second bank) that had received from the ultimate beneficiary a demand for payment under its indirect guaranty letter. The specific questions raised in the note by the Secretariat were whether any fraud or abuse by the ultimate beneficiary should be relevant where there was no collusion between the ultimate beneficiary and the second bank, and, if so, what the requirements should be for recognizing the ultimate beneficiary's conduct as a basis for the fraud exception available to the counter-guarantor/first bank.

68. In discussing those questions, it was agreed that the guaranty letters issued by the first and the second bank were separate and independent undertakings that often differed as regards their terms and conditions for payment. As indicated in paragraph 66 of the note by the Secretariat, the issue of fraud or abuse as an objection to payment under the counter-guaranty letter would be determined exclusively within the relationship between the two banks, taking into account the purpose of the counter-guaranty letter to indemnify the second bank according to the terms and conditions of that guaranty letter. Accordingly, any fraud or abuse by the ultimate beneficiary could not as such be imputed to the second bank but could become relevant only in the context of a fraudulent or abusive demand by that bank against the first bank.

69. Divergent views were expressed as to the conditions under which a demand by the second bank would be abusive so as to entitle the first bank to refuse payment. One view was that the fraud exception should be limited to the case of collusion between the ultimate beneficiary and the second bank. Another view was that the second bank's demand was abusive if it knew before payment of the fraud by the ultimate beneficiary. Yet another view was that the second bank was not entitled to reimbursement if it had acted negligently, i.e., failed to exercise professional care. A further view was that the second bank was entitled to reimbursement if it had acted in good faith.

Additional requirements suggested were that the misconduct of the ultimate beneficiary constituted an objection to payment under the law applicable to the second bank's undertaking or that it led to a recognized duty of the second bank to refuse payment.

70. In view of the fact that these additional requirements referred to legal issues possibly to be determined under foreign, uncertain laws, concerns were expressed that the question of the fraud exception available to the counter-guarantor might be too complicated to be dealt with appropriately in the uniform law. Another reason advanced against addressing that question was that, for lack of specificity, the situation was appropriately covered by the general provisions on the fraud exception, as discussed earlier by the Working Group. It was stated in reply that the very issues showed a need for provisions covering that special situation.

71. After deliberation, the Working Group decided to reconsider at its next session, on the basis of draft provisions prepared by the Secretariat in the light of the above suggestions, whether the uniform law should contain a special provision on the fraud exception available to the counter-guarantor.

D. Persons against whom the fraud defence may not be invoked

72. The Working Group, responding to a question raised in the note by the Secretariat (*ibid.*, para. 75, subpara. 4), was agreed that there was no need for indicating in the uniform law the kind of persons against whom the fraud defence might not be invoked.

E. Possible provision on "extend or pay" requests

73. The Working Group noted that "extend or pay" requests had been listed in the note by the Secretariat as a possible source of abuse under certain circumstances (*ibid.*, paras. 51-54) and that, apart from that context, consideration by the Working Group was invited on whether the uniform law should contain a provision dealing with such requests, possibly along the lines of draft article 26 URDG, which read as follows:

"If the Beneficiary requests an extension of the validity of the Guarantee as an alternative to a claim for payment submitted in accordance with the terms and conditions of the Guarantee, the Guarantor shall without delay so inform the party which gave the Guarantor his instructions. The Guarantor shall then suspend payment of the claim for such time as is reasonable to permit the Principal and the Beneficiary to reach agreement on the granting of such extension and for the Principal to arrange for such extension to be issued.

"Unless an extension is granted within the time provided by the preceding paragraph, the Guarantor is obliged to pay the Beneficiary's conforming claim

without requiring any further action on the Beneficiary's part. The Guarantor shall incur no liability (for interest or otherwise) should any payment to the Beneficiary be delayed as a result of the above-mentioned procedure.

"Even if the Principal agrees to or requests such extension, it shall not be granted unless the Guarantor and the Instructing Party(ies) also agree thereto."

74. It was noted that "extend or pay" requests were frequently encountered in guarantee practice. It was pointed out that no such practice existed regarding stand-by letters of credit and that an "extend or pay" request in the context of stand-by letters of credit would be regarded as a request to amend. As indicated in the note by the Secretariat (*ibid.*, para. 52), there existed a variety of possible motives for "extend or pay" requests; whether a given request was made in good faith or in bad faith was usually difficult to judge, especially by the guarantor. Notice to the principal was therefore deemed necessary, in addition to the reason that a guarantor wanted the principal's consent to any extension of the validity period of the guaranty letter.

75. While recognizing the potential problems created by "extend or pay" requests, divergent views were expressed as to whether the uniform law should deal with that problem otherwise than as a possible source of abuse. One view was that the problem should not be addressed at the statutory level but should be left to the agreement of the parties, including any general conditions or uniform rules such as URDG. Another view was that the problem was sufficiently vexing and crucial to warrant its treatment in the uniform law; however, it might be dealt with less elaborately than in draft article 26 URDG and might be confined to the following principles: requirement of notice to principal; requirement of principal's consent to extension; principal's consent or request not binding on guarantor; suspension of payment and obligation to pay in case of non-extension only if the payment demand was in conformity with the terms and conditions of the guaranty letter.

76. It was noted that these principles were adopted by draft article 26 URDG. Concerns were expressed, however, in connection with the time of suspension provided for in that draft article and its implications as regards the time allowed for examining the demand and on the expiry date. It was suggested that consideration should be given to replacing the uncertain formula of "reasonable time" by a fixed time period and to clarifying the implications of the suspension in any future provision of the uniform law. The view was expressed that the guarantor (or counter-guarantor) should in no circumstances be required to extend the guaranty letter (or counter-guaranty letter) without having consented to the extension and that the running of the validity period should not be suspended by a request for extension.

77. After deliberation, the Working Group decided to reconsider the matter on the basis of draft provisions by the Secretariat.

IV. OTHER OBJECTIONS TO PAYMENT

78. The Working Group considered whether the uniform law should contain provisions on other objections to payment, as discussed in the note by the Secretariat (*ibid.*, paras. 76-89).

A. Invalidity, voidability or unenforceability of payment obligation

79. The Working Group discussed some cases of invalid, voidable or unenforceable payment obligations. Reference was made, for example, to national or international prohibitions of funds transfers and to the problem of a payment obligation in a non-convertible currency unavailable at the place of payment.

80. While recognizing the importance of such issues and problems, the Working Group was agreed that the uniform law should not contain any special provisions dealing with instances of invalidity, voidability or unenforceability of payment obligations under guaranty letters.

B. Set-off with claims of guarantor

81. Divergent views were expressed as to whether the uniform law should deal with the question of set-off against a demand for payment under a guaranty letter. One view was that the matter should be left to the agreement of the parties within the framework of the applicable national law. It was felt that the uniform law could not appropriately address all the complex issues, including the substantive and procedural requirements of set-off that varied from country to country. Another view was that the uniform law should contain provisions that would help to overcome the existing disparities and uncertainties, while giving full autonomy to the parties and not encroaching on laws governing bankruptcy or insolvency.

82. As regards the possible contents of any future provision in the uniform law, it was widely felt that the guarantor should not be entitled to a set-off with claims assigned to it by the principal. As regards the guarantor's own claims, divergent views were expressed (along the lines of the different views reported in paragraphs 83 to 85 of the note by the Secretariat). One view was to disallow set-off since the guarantor should not be guided by its own interest and the beneficiary justifiably expected actual payment. Another view was to allow set-off since it was not contrary to the independent nature of the undertaking and there was no reason for treating a guaranty letter differently from a bill of exchange. An intermediate view was to allow set-off in certain circumstances.

83. After deliberation, the Working Group decided to reconsider the matter on the basis of draft provisions prepared by the Secretariat in the light of the above views.

VI. CONFLICT OF LAWS AND JURISDICTION

84. The Working Group had before it a note by the Secretariat discussing conflict of laws and jurisdiction as

possible further issues of the uniform law (A/CN.9/WG.II/WP.71).

A. Preliminary discussion on appropriateness of including in the uniform law provisions on conflict of laws and jurisdiction

85. The view was expressed that it would be inappropriate to consider the inclusion of provisions on conflict of laws and jurisdiction in the uniform law that was devoted to substantive law matters. Provisions of that kind would be particularly inappropriate if the uniform law were to be adopted in the form of a convention since such a convention would establish the requirements for its own application. Only a separate convention on the law applicable to international guaranty letters could regulate in sufficient detail the many complicated questions concerning, for example, the modalities of choice-of-law clauses and the clear delimitation of the scope of the applicable law. In view of the complexity and difficulty of the subject-matter, appropriate provisions could be formulated only in a different forum (e.g., another UNCITRAL working group) or by a specialized organization such as the Hague Conference on Private International Law. Yet another reason advanced against the inclusion of provisions on conflict of laws and jurisdiction in the uniform law was that there was no need for such provisions in view of the fact that issues of conflict of laws or jurisdiction rarely gave rise to problems in practice, as evidenced by the dearth of relevant court decisions.

86. It was stated in reply that it was appropriate to consider the possibility of including in the uniform law provisions on conflict of laws and jurisdiction. There existed an inner link between those matters and the previously discussed substantive law issues, including possible court measures. There was also an element of timing involved, in view of the various ongoing unification efforts in the field of guarantees and letters of credit. It was deemed useful at least to discuss the issues raised in the note by the Secretariat with a view towards identifying problems and pondering possible solutions. After that discussion, an informed decision could be taken on whether the uniform law should contain some provisions on conflict of laws and jurisdiction or whether the matter should, for example, be recommended to be taken up by the Hague Conference on Private International Law. A view was expressed that, following the approach adopted by the 1930 Geneva Conventions on Bills of Exchange and Promissory Notes, a separate convention on conflict of laws could be prepared, in addition to the substantive uniform law currently under preparation, and that this task could well be accomplished by UNCITRAL itself, using some form of cooperation with the Hague Conference on Private International Law.

87. After deliberation, the Working Group decided to discuss the issues relating to conflict of laws and jurisdiction, in the expectation that such a discussion, which would in itself be of use, would be of help to the later decision of the Working Group on any future course of action concerning the regulation of those issues.

B. Relationships to be covered by possible conflict-of-laws rules

88. The Working Group considered which relationships should be covered by conflict-of-laws rules if it was later decided that such rules were to be included in the uniform law. The Working Group agreed with the suggestion in the above note by the Secretariat (*ibid.*, para. 10) that the focus should be on the relationship between guarantor and beneficiary, covering the relationship between any kind of guarantor (e.g. indirect guarantor, counter-guarantor, confirming guarantor) and its beneficiary.

89. In response to the question raised in paragraph 11 of the note by the Secretariat, the Working Group was agreed that no other relationship than that between a guarantor and its beneficiary should be covered.

C. Designation of applicable law

90. The Working Group reaffirmed its agreement at the twelfth session (A/CN.9/316, para. 164) that any possible provisions on conflict of laws should be composed of two elements: recognition of party autonomy to choose the applicable law, and determination of the applicable law failing agreement by the parties.

1. Freedom of parties to choose applicable law

91. The Working Group considered whether the parties' freedom of choice should be unlimited or whether the law chosen by the parties should have a certain connection with the guaranty letter transaction. While there was some support for requiring a certain connection or precluding an unreasonable choice, it was widely felt that the freedom of the parties should be unlimited since any kind of limitation would create undesirable uncertainty and because there was a practical need to allow parties to choose a law that bore no connection with the transaction, for example, because it was perceived as neutral or particularly refined.

92. As suggested in paragraphs 18 to 21 of the note by the Secretariat, the Working Group considered the form and modalities of the choice by the parties. It was noted that in respect of those issues account should be taken of the characteristics of the guaranty letter, including its independent and formalistic nature and the fact that, at least from a practical point of view, the choice of the law was not always effected by a genuine agreement of both parties.

93. While a suggestion was made to recognize only an express choice, it was widely felt that that requirement would be too strict. Various suggestions were made as to which non-express modalities of choice should be allowed. One suggestion was to use the formula of article 3(1) of the Convention on the Law Applicable to Contractual Obligations (Rome, 1980): "The choice must be expressed or demonstrated by the terms of the contract or the circumstances of the case." Other suggestions that were made with reference to the above characteristics of the guaranty letter included the following: to use the

formula of the 1980 Rome Convention but without the words "or the circumstances of the case"; to adopt the formula of article 2 of the 1955 Hague Convention on the Law Applicable to International Sales of Goods and require that the choice be by "an express clause or result without doubt from the terms of the contract"; to provide that the choice of law "may be implied from the terms of the guaranty letter".

94. In response to the question raised in paragraph 21 of the note by the Secretariat, the Working Group was agreed that there was obviously no need to include in the uniform law a statement to the effect that any choice-of-law clause found in another relationship had no bearing on the issue of the law applicable to the guarantor-beneficiary relationship.

2. Determination of applicable law failing choice by the parties

95. As regards the possible content of a provision determining the applicable law in the absence of a choice by the parties, it was noted that the solution prevailing in most jurisdictions was the law of the guarantor's country. The Working Group adopted that solution as the basic rule, with a qualification for those cases where the guarantor (or counter-guarantor) had more than one place of business, as suggested in paragraph 27 of the note by the Secretariat.

96. On the basis of the discussion in paragraphs 28 to 35 of that note, the Working Group considered whether the above basic rule might be refined for those cases where, in addition to one guarantor, another bank was involved either as another guarantor or as an advising bank or paying agent. The primary question considered was whether in such cases the obligations of the various banks involved should, in the absence of choice-of-law clauses, be governed by a single law.

97. The first situation considered was that of an indirect guaranty letter that was counter-guaranteed by the instructing party. A view was expressed that it might be desirable for the sake of consistency and certainty to apply to both guaranty letters a single law which, according to one suggestion, should be that of the counter-guarantor as the last link in the guarantee chain and, according to another suggestion, that of the other guarantor as the one from whom the ultimate beneficiary would demand payment. However, it was widely felt that it was neither practical nor justified to accord statutory priority to one of two possibly differing laws and impose the law of one guarantor on another one. Such an imposition would undermine the independent character of the two, or possibly more, separate undertakings, while parties, if they wished a single law to govern, could achieve that result by appropriate choice-of-law clauses.

98. The next situation considered was that of a guaranty letter that was confirmed by a bank in another country. It was noted that in that situation, found less frequently in respect of bank guarantees than stand-by letters of credit, the beneficiary could demand payment from the

confirming or the issuing guarantor, unlike in the counter-guarantee situation where the ultimate beneficiary could not demand payment from the counter-guarantor. While recognizing that special feature of the case of confirmation, the Working Group was agreed that the uniform law should not impose a single law on both the issuing and the confirming guarantor.

99. The next situation considered was that of the involvement of an advising bank. It was noted that the types of involvement differed considerably in practice, ranging from the mere function of notification or of forwarding documents to greater responsibilities such as examining the claim and effecting payment on behalf of the guarantor. The Working Group was agreed that, even in cases of such greater responsibilities, the above basic rule pointing to the guarantor's (or counter-guarantor's) place of business should be retained. It was stated, in that connection, that "the place of payment" was not an appropriate connecting factor since it constituted an uncertain legal concept and might create practical difficulties, particularly if the place of payment was not clearly stated in the guaranty letter. As regards the function of examining claims, a suggestion was made to explore possible methods of achieving the application of local standards of examination.

100. Finally, the Working Group considered whether a single law should govern the whole socio-economic network of contracts related to guarantee transactions, including not only the various guarantor-beneficiary relationships but also the relationships between the principal and the issuing guarantor and between the principal and the beneficiary. The Working Group was agreed not to impose a single law on such a global network of contractual relationships.

101. A suggestion was made, in that connection, that any future conflict-of-laws rule in the uniform law should introduce a degree of flexibility as done by article 4(5) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations according to which the presumption in favour of the place of business of the party that was to effect the characteristic performance would be disregarded if it appeared from the circumstances as a whole that the contract was more closely connected with another country. It was stated in reply that such an escape clause, apart from forming part of an elaborate scheme of presumption, would not be appropriate for guaranty letters in view of their special characteristics, namely their independent and formal nature as well as their mode of establishment. It was realized that it might be difficult for a State that adhered to the 1980 Rome Convention to accept a different conflict-of-laws rule and that that difficulty might shape its position on the general question of whether the uniform law should include conflict-of-laws provisions at all. It was also realized that the 1980 Rome Convention dealt generally with contractual obligations and, as indicated by the fact that it excluded bills of exchange, might not appropriately address the specifics of guaranty letters; that there existed within that Convention a mechanism for later changes; and, above all, that the universal composition of the Working Group necessitated due regard to the interests of States not adhering to that

Convention. A concern was expressed that, if the discussion of a particular region's laws were to continue, other countries might wish to discuss other regional bilateral or multilateral conventions or limitations.

3. *Scope of applicable law*

102. The Working Group took note of the discussion on the scope of the applicable law set forth in paragraphs 36 to 41 of the note by the Secretariat. It was understood that the issues mentioned therein were meant to be illustrative of the kind of questions governed by the law determined according to the possible conflict-of-laws rule in the uniform law and were primarily designed to assist the Working Group in finding an appropriate formula for indicating the scope of the applicable law.

103. As regards such a possible future formula, the Working Group favoured the approach suggested in paragraph 43 of the note by the Secretariat, i.e., to refer to "the rights and obligations arising out of a guaranty letter", with possible exceptions for issues falling outside the scope of the applicable law and with possible clarifications concerning the inclusion of issues that not everyone might expect to fall within the scope of the applicable law. Various drafting suggestions were made, including the following: to mention in addition to "rights and obligations" also "defences" and, taking into account the counter-guarantee and agency relationships between the counter-guarantor and the guarantor, to widen the notion of "arising out of the guaranty letter" by wording such as "or relating to".

D. *Jurisdiction*

104. The Working Group recalled its preliminary discussion on the appropriateness of including in the uniform law provisions on conflict of laws and jurisdiction (see paragraphs 85-87 above). The following additional points were made in respect of possible rules on jurisdiction.

105. The view was expressed that the subject-matter of court jurisdiction was particularly complex and complicated and that only a very detailed regulation could do justice to that complexity. There existed already satisfactory and detailed regulations of that subject-matter in multilateral treaties (e.g., the 1968 Brussels and 1988 Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters). Moreover, the question of court jurisdiction had hitherto not been dealt with in conventions devoted to other subject matters. It was also observed that the Hague Conference on Private International Law, despite its specialization in that subject-matter, had essentially limited its unification efforts to an indirect treatment such as recognition of court judgements.

106. It was stated in reply that the subject-matter of jurisdiction was of considerable practical importance and that its treatment in the special context of guaranty letters would be useful, for example, as regards the validation of an arbitration or choice-of-forum clause in the guaranty

letter which, as a rule, was not signed by the beneficiary. As regards the existence of multilateral treaties on the subject, it was stated that that should not preclude the inclusion of provisions on jurisdiction in the uniform law, taking into account the interests of those States not adhering to those treaties. The interests of the States adhering to those treaties could well be accommodated by reservation clauses if the uniform law were to be adopted in the form of a convention. It was further pointed out that there existed a number of conventions, especially in the area of transport, that contained provisions on jurisdiction and arbitration.

107. Without taking a decision on whether provisions on jurisdiction should be included in the uniform law, the Working Group exchanged views on the issues discussed in the note by the Secretariat. The Working Group was agreed that, as discussed in paragraphs 46 to 50 of that note, arbitration or forum clauses should be allowed. One suggestion was to clarify that there was no need to effect such choice by a clause contained in the original guaranty letter and that it could be effected at any time by a separate agreement. Another suggestion was to allow parties to empower arbitrators to decide their dispute according to rules of law such as an internationally agreed uniform law or international customs or uniform rules.

108. As regards the determination of jurisdiction failing a choice by the parties, as discussed in paragraphs 51 to 55 of the note by the Secretariat, strong reservations were expressed against providing for exclusive court

jurisdiction. It was stated in reply that exclusive jurisdiction of the courts in the guarantor's country would be advantageous in that the courts would be able to apply their own, familiar law, according to the above basic rule on the applicable law (see paragraph 95), and that the enforcement of any decision against the guarantor as the most likely defendant was ensured.

109. Finally, the Working Group considered the suggestion, set forth in paragraphs 56 to 58 of the note by the Secretariat, that any provision on jurisdiction might be expanded so as to cover the principal as the most likely party to initiate proceedings. The view was expressed that such expansion would be inappropriate since neither the substantive law provisions nor any possible conflict-of-laws provisions of the uniform law dealt with the principal-guarantor relationship. Another view was that, since certain issues relating to the principal and possibly injunctions brought by the principal might be addressed by the future uniform law, consideration might be given to ensuring in some way that all principals, including foreign ones, had access to the court that would have jurisdiction under the uniform law.

110. The Working Group decided to reconsider the appropriateness of including provisions on jurisdiction in the uniform law. It requested the Secretariat, for that purpose, to prepare tentative draft provisions in the light of the above deliberations and to consult with the Hague Conference on Private International Law on possible methods of cooperation in that field.

D. Working papers submitted to the Working Group on International Contract Practices at its fifteenth session

1. Independent guarantees and stand-by letters of credit: discussion of further issues of a uniform law: fraud and other objections to payment, injunctions and other court measures: note by the Secretariat (A/CN.9/WG.II/WP.70) [Original: English]

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INTRODUCTION

1. The present note on fraud and other objections to payment, injunctions and other court measures is the third in a series of notes discussing possible issues of a uniform law on independent guarantees and stand-by letters of credit. A fourth note that will also be presented to the Working Group at its fifteenth session discusses conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71). The issues discussed in the first note, i.e. substantive scope of uniform law, party autonomy and its limits, and rules of interpretation (A/CN.9/WG.II/WP.65), were considered by the Working Group at its thirteenth session (A/CN.9/330). The issues discussed in the second note, i.e. amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68), were considered by the Working Group at its fourteenth session (A/CN.9/342).

2. A preliminary discussion of the fraud exception, other objections and supportive court measures was presented in a report of the Secretary-General (A/CN.9/301, paras. 84-90). One of the conclusions of that report was that the vexing problem of fraudulent or abusive calls and of appropriate court measures, which could not effectively be dealt with by contractual rules, would probably be the most important topic for a uniform law (A/CN.9/301, para. 98). The Commission, when considering that report at its twenty-first session, was aware of the difficulties inherent in a unification effort relating to fundamental concepts of law, such as fraud or similar grounds for objections, and touching upon procedural matters; nevertheless, it was felt that, in view of the desirability of legal uniformity and certainty, a serious effort should be made (A/43/17, para. 24).

3. During the consideration of that topic at the twelfth session of the Working Group (A/CN.9/316, paras. 147-

162), it was pointed out that the effect of fraud on guarantees and letters of credit was a complex question and there was disparity in the concepts and rules applied at the national level. While an effort to harmonize the divergent approaches to the problem of fraud would be difficult, there was nevertheless general agreement that there should be greater uniformity in the treatment of that problem and that the formulation of provisions in the uniform law would be a particularly useful contribution. The Working Group agreed that additional study was required on the various aspects of the fraud exception and, in particular, its relationship to the concept of *abus de droit*. The same was true in respect of other possible objections to payment (e.g., impossibility, illegality, violation of public policy, set-off) as well as any judicial measures to block payment.

4. The present note is designed to assist the Working Group in its deliberations and decisions on the scope and content of possible provisions in the uniform law dealing with those problems. Its first part is devoted to fraud, abuse and similar concepts (I). It presents an overview of the basis and scope of these concepts as used and understood in various legal systems. It also takes a closer look at the actual application of these concepts, in particular the concept of "abuse of right" in civil law jurisdictions, to typical fact situations.

5. The second part of this note discusses other possible objections to payment that might be dealt with in the uniform law (II). A distinction is drawn between the invalidity of the guaranty letter and various instances of the guarantor's inability to perform (e.g., insolvency or foreign exchange restrictions). A brief discussion is presented of the possible impact of public policy on the performance or enforceability of the payment obligation, followed by a discussion of the admissibility of a set-off against the payment claim.

6. The third part of the note discusses injunctions and other court measures that might be used, in particular, for blocking payment (III). While closely linked to the discussion of fraud and other objections to payment, the discussion of court measures is kept separate since it pertains to procedural law where different considerations apply to questions of desirability and feasibility. A brief overview is presented of the various types of judicial measures in different jurisdictions, drawing a distinction between, on the one hand, measures enjoining payment by the guarantor or restraining the beneficiary from calling and, on the other hand, arrest or similar measures relating to the claim or funds. Some suggestions are offered on the possible content and scope of provisions for the uniform law that might contribute to legal certainty and uniformity of available court measures and their procedural requirements.

I. FRAUD, ABUSE AND SIMILAR CONCEPTS

7. As provided in draft article 2 of the uniform law (A/CN.9/342, para. 17), the guarantor's undertaking is to pay "in conformity with the terms of the undertaking". Upon receipt of a demand for payment, the guarantor would thus examine its conformity with the terms of the guaranty letter, as discussed by the Working Group at its fourteenth session under the heading "Obligations of guarantor" (A/CN.9/342, paras. 103-110). In case of conformity the guarantor is obliged to pay, unless there is an exceptional ground recognized as basis for refusing payment. The following discussion deals with the so-called "fraud exception" that might cover fraudulent, abusive, arbitrary or unfair calls (other possible objections to payment despite conformity of the demand will be dealt with below, paragraphs 76-89).

8. It may be noted, however, that instances of fraud or abuse of right are not limited to the presentation of a demand by the beneficiary, but may occasionally be found in the conduct of a bank relating to its obligations. For example, the Federal Court of Switzerland regarded the following conduct of a bank as an attempt to exploit a purely formal position, contrary to the rules of good faith, and thus as an abuse of right: The bank had refused payment under a letter of credit by insisting on the production of a signed delivery receipt (as required under the letter of credit) despite the fact that the complete and regular delivery of the goods had been admitted.¹

9. In this connection, the Working Group might wish to consider whether the uniform law should address instances of fraud or abuse that may be relevant otherwise than as an objection to payment. As agreed at the twelfth session, it is not necessarily advisable to limit application of the fraud provisions to misconduct by the beneficiary, particularly in view of the possibility of misconduct by principals as well as guarantors or issuers of letters of credit (A/CN.9/316, para. 151).

A. The fraud exception in selected common law jurisdictions

10. Turning now to the fraud exception, it seems useful to start with an overview of its basis and scope in different legal systems. While necessarily selective and not authoritative in any sense, the overview attempts to give some idea of the legal source or foundation of the fraud exception in different jurisdictions, of the similarity or differences of certain concepts or labels, and, in particular, of the judicial attitude towards the following main questions that should be addressed by the uniform law: (1) what kind of misconduct constitutes fraud; (2) is the innocent beneficiary or any other person protected against the fraud defence; (3) what is the standard of fraud entitling the guarantor to refuse payment, and does the same standard apply to court orders enjoining payment; (4) do any special considerations apply to the undertaking of a counter-guarantor.

1. United States of America

11. The above questions and other important aspects of the fraud exception have extensively been dealt with in particular by courts in the United States of America. Already 50 years ago, a judge of the Supreme Court of New York reasoned in a letter-of-credit case where the seller had shipped worthless rubbish that, where the facts of the underlying transaction indicate that the seller's failure reaches beyond a mere breach of warranty to the level of a complete failure to perform, "the principle of the independence of the bank's obligation under the letter of credit could not be extended to protect the unscrupulous seller".² The *Szteijn* decision thus recognized in the case of intentional and serious misconduct of the beneficiary an exception to the independence of the undertaking and allowed the Court to look behind facially conforming documents.

12. The decision has been relied upon by other courts in the United States, and referred to by courts in other common law countries,³ and, above all, formed the basis of the legislative treatment of the fraud exception in article 5 of the Uniform Commercial Code (UCC). Section 5-114 (1), (2) reads:

"(1) An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary. The issuer is not excused from honor of such a draft or demand by reason of an additional general term that all documents must be satisfactory to the issuer, but an issuer may require that specified documents must be satisfactory to it.

(2) Unless otherwise agreed when documents appear on their face to comply with the terms of a credit but a required document does not in fact conform to the

¹*Société de Banque Suisse (SBS) v. Société Générale Alsace de Banque (Sogénal)*, 11 January 1989 (Ro 115 II 67), reported by Pelichet, *Garanties bancaires et conflits de lois*, in: *Revue de droit des affaires internationales* 1990, 352-353.

²*Szteijn v. Henry Schroder Banking Corp.*, 31 N.Y.S. 2d 631, 634 (1941).

³See cases referred to in notes 28, 33 and 35.

warranties made on negotiation or transfer of a document of title (Section 7-507) or of a security (Section 8-306) or is forged or fraudulent or there is fraud in the transaction

"(a) the issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances which would make it a holder in due course (Section 3-302) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (Section 7-502) or a bona fide purchaser of a security (Section 8-302); and

"(b) in all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents but a court of appropriate jurisdiction may enjoin such honor."

13. Section 5-114 UCC deserves special attention since it probably presents the only extensive treatment of the fraud exception in a statute anywhere. It has been applied and interpreted by many US courts, particularly in proceedings for injunctive relief sought by the principal (applicant for the credit) but also in proceedings between the beneficiary and the issuer or between the principal and the beneficiary.

14. As reported by the Task Force on the Study of Article 5 UCC, Section 5-114(2) "has been uniformly construed as providing defenses to the honor of a letter of credit which may be asserted by the issuer or, where the issuer proposes not to assert them, grounds by which the customer may enjoin payment. Most courts have construed Section 5-114(2) to permit the introduction of extrinsic evidence to establish forged or fraudulent documents or fraud in the transaction and have construed fraud in the transaction to mean fraud in the sale or other transaction underlying the credit."⁴ The fact that several courts have discussed the defences of fraudulent documents and of fraud in the transaction in tandem shows the similarity or proximity of these defences where non-genuine documents were presented; in fact, the drafting history suggests that the defence of fraud in the transaction aims at "clean credits", i.e., credits payable without presentation of documents.⁵

15. The courts have given divergent answers as to what precisely constitutes fraud, in particular, fraud in the transaction. Some have required "a clear intent to defraud"⁶ or otherwise referred to "egregious" or "intentional fraud";⁷ others have applied more flexible standards and, for example, regarded as fraud the seller's breach of warranty⁸

or its breach of an implied covenant of good faith and fair dealing *vis-à-vis* the customer,⁹ or used the wide concept of constructive fraud as used in securities' law¹⁰, or not even mentioned fraud, leaving unclear whether the decision was based on lack of compliance or fraudulent act.¹¹

16. The difficulty of determining whether wrongful misconduct is so serious as to justify interruption of the payment of the credit is "in part due to the somewhat slippery character of fraud in US jurisprudence".¹² This finding of the Task Force lies at the heart of its suggested approach "to focus on the notion that the purpose of the underlying transaction must be rendered virtually without value" and, for stand-by letters of credit, that "the drawing has occurred with no colorable basis whatsoever".¹³ This suggestion is inspired by a Pennsylvania decision¹⁴ (followed by many others), according to which the defence of fraud in the transaction is available if "the wrongdoing of the beneficiary has so vitiated the entire transaction that the legitimate purpose of the independence of the issuer's obligation would no longer be served" or, in shorter terms, if "there is no plausible or colorable basis" (for the declaration of default) or, even shorter, if "the beneficiary has no bona fide claim to payment".¹⁵

17. As may be seen from the text of Section 5-114(2)(a), there exists a protected class of specified persons against whom letter-of-credit fraud may not be asserted either in offence or defence. However, the question of who should be immune from the fraud defence embraces also the difficult issue of fraud committed by a third party even where the beneficiary is not part of the protected class. As reported by the Task Force, a number of cases have held that fraud committed by someone other than the beneficiary may qualify under the Section 5-114(2) defence.¹⁶ Such cases include presentation by the beneficiary of documents fraudulently altered by another, fraudulent presentation of pre-signed documents by the beneficiary's assignee of proceeds, fraudulent draw on a foreign bank guaranty inducing draw on a related US bank letter of credit, and fraudulent procurement from investors of letters of credit in favour of a lender to support loans to a limited partnership.

18. It may be noted that the Task Force regards the avoidance of fraud provisions in Section 5-114 as too narrow in some respects and too broad in others; it recommends as a better approach to ask "what type of person would be induced to act under the credit (not who is a 'holder'), who detrimentally rely on its independence and who would be truly injured by a dishonor intended to

⁴An Examination of U.C.C. Article 5 (Letters of Credit), A Report of the Task Force on the Study of U.C.C. Article 5 (Chairman: J.E. Byrne) p. 81.

⁵*Idem*, p. 82.

⁶*E.g. West Virginia Housing Development Fund v. Sroka*, 415 F. Supp. 1107 (W.D.Pa. 1976).

⁷*E.g. United States v. Mercantile National Bank of Dallas*, 795 F. 2d 492 (5th Cir. 1986).

⁸*E.g. NMC Enterprises, Inc. v. CBS, Inc.*, 14 UCC Rep. Serv. 1427 (N.Y.S.C. 1974).

⁹*E.g. Trans Meridian Trading Inc. v. Empresa Nacional de Comercialización de Insumos*, 829 F. 2d 949 (9th Cir. 1987).

¹⁰*E.g. Dynamics Corp. v. Citizens & Southern National Savings Bank* 356 F. Supp. 991 (N.D.Ga. 1973).

¹¹*E.g. Utica Mutual Insurance Co. v. Walker*, 725 S.W. 2d 24 (Ky.Ct.App. 1987).

¹²Task Force Report (note 4) p. 73.

¹³*Ibid.*, p. 73-74.

¹⁴*Intraworld Industries, Inc. v. Girard Trust Bank*, 336 A. 2d 316, 324 (1975).

¹⁵As to a similar understanding of the concept of abuse in civil law jurisdictions, see paragraph 35 below.

¹⁶Task Force Report (note 4) p. 79.

prevent consummation of fraud or forgery (not who 'gave value'), and who was innocent and not too closely connected with the fraudster when induced to act in reliance on the credit (not whether such reliance took the form of payment or purchase before receiving notice of fraud/forgery)".¹⁷

19. Divergent court decisions have been rendered on the question whether the standard of fraud, including the burden of proof, is the same in the different relationships and procedural settings. For example, several decisions recognize that the same standard applies to a defence raised by the issuer/confirmer in an action by the beneficiary for wrongful dishonour as in an action for injunctive relief brought by the applicant,¹⁸ and that the burden of proof rests with the party asserting fraud.¹⁹ Others, however, appear to place on the beneficiary the burden of disproving fraud;²⁰ this allocation of the burden of proof has been criticized by the Task Force.²¹ As regards the comparison with the principal-beneficiary relationship, some courts have held that the same standard of fraud applies irrespective of whether the action is to enjoin the issuer/confirmer from paying or whether the action is to restrain the beneficiary from presenting documents;²² others, however, have treated an action by the applicant solely against the beneficiary as a contract dispute between these two parties and ignored its letter of credit implications.²³ The Task Force has disagreed with this position.²⁴

20. In conclusion, it should be noted that the issue of fraud is mostly dealt with in the context of applications for temporary restraining orders or preliminary injunctions, since it is reportedly unusual for an issuer or confirmer to dishonour a draft or demand on the grounds of fraud (so-called "elective dishonour"). In that procedural context the substantive aspects of the fraud exception constitute, under the heading "probable success on the merits", only one amongst various factors to be weighed (e.g., irreparable injury, balance of convenience, public interest). As reported by the Task Force, courts tend to concentrate more on irreparable injury than on the showing of fraud, in part because many jurisdictions provide for the issuance of a preliminary injunction on a showing of less than 50-50 probability of success on the merits.²⁵ The procedural requirements of restraining orders, preliminary injunctions and other court measures will be discussed below (paragraphs 90-114).

2. England (Canada and Singapore)

21. English courts have recognized the fraud exception but construed it in a more narrow and rigid manner than courts in other jurisdictions. A first illustration of that judicial attitude is the following statement in a case concerning an injunction against payment under a performance guarantee: "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce . . . Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration."²⁶ It is noteworthy that the judge declared that the plaintiffs had taken the risk of the unconditional wording of the guarantees and at the same time relied on two commercial letter of credit decisions²⁷ as being equally applicable to confirmed performance guarantees.

22. In a similar vein, it was held in another injunction case concerning a performance guarantee that the relevant considerations were those applicable to letters of credit and that the only exception to the irrevocable and independent nature of the guarantee was when clear or obvious fraud on the part of the beneficiary had been established to the knowledge of the bank. In denying relief to the principal who had repudiated the contract because of the beneficiary's failure to open an effective letter of credit, it was remarked: "The bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances where there is no right to payment . . . So long as the customers make an honest demand, the banks are bound to pay; and the banks will rarely, if ever, be in a position to know whether the demand is honest or not. At any rate, they will not be able to prove it to be dishonest. So they will have to pay."²⁸

23. This decision, criticized by one commentator as too rigid in view of the fact that the beneficiary had evidently not even attempted to perform the contract secured by the performance guarantee,²⁹ has been relied upon in other cases.³⁰ Yet, in one such case a somewhat less rigid approach to the standard of fraud and the evidence required for an injunction may be gathered from the following remarks: "While accepting that letters of credit and performance bonds are part of the essential machinery of international commerce (and to delay payment under such documents strikes not only at the proper working of international commerce but also at the reputation and standing of the international banking community), the strength of

¹⁷*Idem*, pp. 80-81.

¹⁸*E.g. Offshore Trading v. Citizens National Bank*, 650 F. Supp. 1487 (D. Kan. 1987).

¹⁹*E.g. Airline Reporting Corp. v. First National Bank of Holly Hill*, 832 F. 2d 823 (4th Cir. 1987).

²⁰*E.g. Arabian Fiberglass Insulation Co. v. Continental Illinois National Bank & Trust Co.*, No. 85C 1268 (N.D. Ill., 19 Dec. 1986).

²¹Task Force Report (note 4) p. 77.

²²*E.g. Jupiter Orrington Corp. v. Zweifel*, 469 N.E. 2d 590 (1984).

²³*E.g. Steinmeyer v. Warner Consolidated Corp.*, 116 Cal. Rptr. 57 (1974).

²⁴Task Force Report (note 4) p. 75.

²⁵*Idem*, p. 69.

²⁶*Harbottle v. National Westminster Bank* (per Kerr J.), Q.B., [1977] 2 All E.R. 862, 870.

²⁷*Hamzeh Malas & Sons v. British Imex Industries Ltd.*, Q.B., [1958] 1 Q.B. 127; *Discount Records Ltd. v. Barclays Bank Ltd.*, Q.B., [1975] 1 W.L.R. 315.

²⁸*Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.*, C.A., [1978] 1 Lloyd's Rep. 166, 171 (per Lord Denning MR and Browne LJ).

²⁹Schmitthoff, Bank's liability under unconditional performance bond, *Journal of Business Law* 1977, 353.

³⁰*E.g. Boliventer Oil v. Chase Manhattan Bank*, C.A., [1984] 1 W.L.R. 392.

this proposition can be over-emphasized . . . [I]t cannot be in the interests of international commerce or of the banking community as a whole that this important machinery that is provided for traders should be misused for the purposes of fraud . . . [W]e would find it an unsatisfactory position if, having established an important exception to what had previously been thought an absolute rule, the Courts in practice were to adopt so restrictive an approach to the evidence required as to prevent themselves from intervening. Were this to be the case, impressive and high-sounding phrases such as 'fraud unravels all' would become meaningless."³¹

24. The fraud exception was further refined in a case where a bank had refused payment after discovering that, unknown to the beneficiary, shipping agents had pre-dated by one day a bill of lading so as to give it the appearance that the goods had been loaded within the shipping period set forth in the letter of credit. The Court of Appeal held that the bank was entitled to refuse payment, stating, *inter alia*, "whether or not a forged document is a nullity, it is not a genuine or valid document entitling the presenter of it to be paid and if the banker to which it is presented under a letter of credit knows it to be forged he must not pay . . . If a document false in the sense that it is forged by a person other than the beneficiary can entitle a bank to refuse payment, I see no reason why a document in any way false to the knowledge of a person other than the beneficiary should not have the same effect . . . There was fraud in the transaction."³²

25. However, the decision was reversed by the House of Lords on the grounds that the case did not fall within the fraud exception, defined as follows: "the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied, it is well established in the American cases . . . The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim *ex turpi causa non oritur actio* or, if plain English is to be preferred, 'fraud unravels all'. The courts will not allow their process to be used by a dishonest person to carry out a fraud."³³

26. The decision emphasized that the fraudulent bill of lading was not a nullity or worthless to the bank as security for its advances to the buyer, but was a valid transferable receipt for the goods giving the holder a right to claim them at their destination. In fact, it expressly left "open the question of the rights of an innocent seller/beneficiary against the confirming bank when a document presented by him is a nullity because unknown to him it was forged by some third party".³⁴

27. In a similar case concerning an allegedly forged and discrepant inspection certificate, the Supreme Court of Canada agreed with the views expressed by the House of Lords that the fraud exception should be confined to fraud by the beneficiary of the credit and should not extend to fraud by a third party of which the beneficiary is innocent and that the fraud exception should not be opposable to the holder in due course of a draft under a letter of credit. Subject to these limits, the fraud exception is not to be confined to cases of fraud in the tendered documents but includes fraud in the underlying transaction of such character as to make a demand for payment under the credit a fraudulent one. However, to be successful in a claim against the issuer of a letter of credit for improper payment it must be shown that the fraud was sufficiently established to the knowledge of the issuer before payment was made to make the fraud clear or obvious to the issuer.³⁵ As a commentator concluded, the law in Canada is now in accord with that of England on the issue as to the fraud exception, except for the degree necessary to establish fraud in an interlocutory application to restrain an issuer of a letter of credit from paying thereunder. In Canada the degree of proof is "a strong *prima facie* case", while England requires fraud to be "very clearly established".³⁶

28. Finally, it may be noted that, encouraged by the judicial statements set forth in paragraphs 23 and 24, two commentators suggested that "it may be timely for English and Singapore courts to reassess their approach" which had generally been less flexible than that of courts in the United States.³⁷ For example, "an injunction restraining the bank from meeting the seller's demand should be granted whenever fraud is alleged and supported by suitable *prima facie* evidence. Naturally, the granting of the remedy should be subject to obtaining security for costs from the buyer and, in addition, it may be advisable to propose that the amount of the credit—the subject of the dispute—be ordered to be paid into court. The bank could not be alleged to have failed to perform its bargain once it has complied with such an order."³⁸

B. Abuse and fraud in selected civil law jurisdictions

29. The following overview of the law in countries of civil law tradition focuses on jurisdictions with extensive case law (i.e., France, Italy, Germany, Belgium, Netherlands, Switzerland and Austria). While there is no

³¹*The Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, 5 March 1987 (per Le Dain J.), reported in *International Banking Law* (June 1987), p. 10, summarized by Zacks, 'United City Merchants'; The Canadian viewpoint, *idem* p. 7 (additional alleged discrepancies related to bills of lading).

³²Zacks (note 35) p. 8 (referring to the English decision set forth above, para. 22).

³³Ho Peng Kee, *The Fraud Rule in Letters of Credit Transactions*, in: *Current Problems of International Trade Financing* (2nd ed. by Ho/Chan, Singapore 1990) p. 208; similarly Ellinger, *Documentary Credits and Fraudulent Documents*, *ibid.*, p. 169 ("It may be that the last word in the development of the doctrine in the UK remains to be said . . . it is believed that the ambit of the fraud rule requires re-examination").

³⁴Ellinger, *ibid.*, p. 208.

³⁵*United Trading Corp. v. Allied Arab Bank Ltd.*, C.A., [1985] 2 Lloyd's Rep. 554, 561 (per Ackner L.J.).

³⁶*United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, C.A., [1981] 1 Lloyd's Rep. 604, 623 (per Stephenson J.).

³⁷*UCM (Investments) v. Royal Bank of Canada*, [1982] 2 All E.R. 720, 725 (per Lord Diplock).

³⁸*Idem*, p. 728.

uniformity in the use of concepts and their application to particular cases, all jurisdictions recognize the fraud exception as an objection to payment, usually to be determined by reference to the underlying transaction and limited by stringent requirements of evidence.

1. Various concepts or labels

30. As regards the concepts or bases of the fraud exception, a variety of terms have been used by the courts, often more than one in a single jurisdiction and sometimes even in a single decision. For example, German, Swiss and Austrian courts predominantly refer to "manifest abuse",³⁹ Dutch courts often use the formula "evidently arbitrary or deceitful",⁴⁰ Italian courts may refer to fraud (*dolo, frode*), bad faith (*mala fede*) or abuse (*abuso*),⁴¹ and French courts employ the terms "manifest fraud" (*fraude manifeste*) and "manifest abuse" (*abus manifeste*).⁴²

31. Where courts indicate the foundation of the fraud exception, they refer to traditional maxims such as *fraus omnia corrumpit* or *exceptio doli* or to general principles such as good faith or the prohibition to abuse a right that are often embodied in the civil code.⁴³ Neither such maxims nor the terms used for labelling the beneficiary's conduct define clearly the ambit of the fraud exception.

32. As noted by commentators, French courts mostly use the terms "abuse" and "fraud" cumulatively and without clearly distinguishing between them. Inspired by various court decisions, the following distinction was suggested: Fraud implies machination or manoeuvres designed to make the principal pay for what it does not owe, while manifest abuse exists where there is absolutely no doubt that the principal has fulfilled all of its obligations, or where a final court decision has declared the underlying transaction as null and void or terminated it as a consequence of the beneficiary's conduct, or where the beneficiary has stated and admitted that it would not perform the contract.⁴⁴

33. The suggested distinction between fraud and abuse provides a basis for grasping the core of both concepts, even though the description of fraud and the instances of abuse are too narrow to reflect the case law of France and other civil law countries. The definition of fraud as an evil scheme, apparently inspired by criminal law concepts, is reminiscent of the common law concept of egregious or

intentional fraud⁴⁵ and should be understood to include such misconduct as presentation of forged or false documents.⁴⁶

34. Yet, even a fraudulent manoeuvre (such as pressuring the principal to convert conditional bank guarantees issued to a State agency into unconditional ones by promising the release of the principal's managing director who had been imprisoned during negotiations)⁴⁷ may be classified as manifest abuse by courts traditionally preferring that formula. As another French commentator remarked, "whichever form it may adopt, fraud always reveals itself through manifest absence of right of the beneficiary at the time of calling the guarantee."⁴⁸

35. "Absence of right" is not to be taken literally, for example, in the sense that the beneficiary has no right because the guaranty letter is invalid (as to objections to payment concerning validity see paragraphs 76-77 below); the concept of "abuse of right" presupposes the existence of a right and constitutes an inherent limit to the exercise of that right by prohibiting its use without pursuing a legitimate interest or with the sole purpose of violating someone else's interests. As suggested by a Swiss commentator, the core of abuse of right consists of a malicious gain derived from the inadmissible exploitation of one's own unlawful conduct, including breach of contract. Thus, a payment demand would be abusive if the beneficiary has undoubtedly in substantive terms no claim that could be covered by the guarantee purpose.⁴⁹ This concrete formulation of the concept of abuse of right echoes the theme struck by some United States courts: "The beneficiary has no plausible or colorable basis under the contract to call for payment of the letters of credit; its effort to obtain the money is fraudulent."⁵⁰

36. The application of such a concept that restricts the exercise of a formal right to the purpose or substantive contingency determined by reference to the underlying transaction risks jeopardizing the principle of independence of first demand guarantees. This risk has generally been avoided, except by some lower courts, in those jurisdictions that fully recognize the independent and abstract character of the guarantee undertaking; it has clearly diminished in jurisdictions where that recognition was achieved only recently, for example, during the last decade in France and Italy.⁵¹

37. The following decision of the German Supreme Court (in civil matters) may be taken as reflective of the current judicial awareness of the risk and the means to

³⁹Horn/Wymeersch, *Bank-Guarantees, Standby Letters of Credit, and Performance Bonds in International Trade*, in: *The Law of International Trade Finance* (ed. by Horn, Deventer 1980) pp. 483, 510.

⁴⁰Bertrams, *Bank Guarantees in International Trade* (Amsterdam 1990) p. 280.

⁴¹Costa, "Astrattezza" ed eccezioni opponibili nel credito documentario irrevocabile (Milano 1989) pp. 199-201 (*Il diritto della banca e della borsa*; No. 8).

⁴²Vasseur, *Dix ans de jurisprudence française relative aux garanties indépendantes*, in: *Revue de droit des affaires internationales* 1990, 372.

⁴³E.g. Articles 242, 226 and 826 German Civil Code; Article 2(2) Swiss Civil Code; Articles 1175 and 1375 Italian Civil Code.

⁴⁴Vasseur, *ibid.* (note 42) pp. 373-374; see also Stoufflet, *La garantie bancaire à première demande*, in: *Clunet* 1987, 280.

⁴⁵See, e.g., decisions referred to in notes 6 and 7.

⁴⁶E.g. Richter, *Standby Letter of Credit* (Zurich 1990) p. 251 (see also paras. 63-64).

⁴⁷Oberster Gerichtshof (Austria), 6 June 1989, 31 *Zeitschrift für Rechtsvergleichung* 1990, 290 (injunction denied on other grounds).

⁴⁸Azencot, *Les difficultés d'exécution des garanties bancaires à première demande*, in: 6 *Cahiers juridiques et fiscaux de l'exportation* (1989) p. 1927.

⁴⁹Richter, *ibid.* (note 46) p. 245.

⁵⁰*Itel Corp. v. The First National Bank of Boston*, 730 F. 2d 19 (1984); see also decision referred to in paragraph 16.

⁵¹E.g. Vasseur, *ibid.* (note 42) p. 358.

contain it: "If it is manifest or established by liquid proof that, despite fulfilment of the formal requirements for a demand ('formal contingency'), the substantive contingency in the underlying transaction has not materialized, the demand for payment is unsuccessful because of the defence of abuse of right. However, that defence is to be restricted to those cases where the abusive exploitation of a formal legal position is obvious to everyone. All disputes on factual, but also legal, points that are not answered by themselves must be settled, after payment, in any recovery litigation."⁵² The reason for that restriction lies, as expressed in another decision of the same Court, in the double purpose of a first demand guarantee, which is to provide the creditor with readily available funds and to reverse the procedural position in case of disputes between the principal and the beneficiary.⁵³

38. This double purpose of a first demand guarantee, often referred to as "liquidity function" and, as regards the reversal of the procedural position, expressed by the slogan "pay first, argue (or litigate) later", provides guidance in distinguishing between "abuse of right" and the unwanted involvement of guarantors in contractual disputes between the principal and the beneficiary. Above all, it explains the extraordinary emphasis of courts on the substantive standard of proof, expressed by notions such as "manifest", "obvious to everyone" or "without any doubt". In this respect, courts of the European continent are generally as strict as English courts; however, they are apparently less strict in ordering injunctions, where English courts require notice or knowledge of the bank.⁵⁴

2. Possible instances of manifest fraud or abuse

39. Any test that attaches importance to the risk or contingency covered by the guarantee has to take into account not only the specific purpose of the individual guarantee but also and primarily the type of guarantee (e.g., tender guarantee, repayment guarantee, performance guarantee, maintenance guarantee, financial stand-by letter of credit, counter-guarantee). It may be noted that the following presentation, while focusing on decisions from civil law jurisdictions, includes, for the sake of comparison, occasional references to cases from common law jurisdictions.

(a) Instances concerning tender guarantees

40. To start with the tender guarantee, a demand for payment would be abusive if the contract had not yet been awarded, or had been awarded but not to the principal, or, if awarded to the principal, the principal had signed the contract and secured any required performance

guarantee.⁵⁵ Any of these facts must be made manifest by the principal, unless they are in positive terms set forth in the guarantee as conditions precedent or payment conditions to be established by the beneficiary.

41. In the light of this, a beneficiary that wants more time for evaluating the tenders is unlikely to succeed with a payment demand presented in the form of "extend or pay" and may thus opt for an "extend or withdraw" request⁵⁶ (that falls outside the issue of objections to payment discussed here). A more problematical situation arises when the beneficiary is desirous of accepting the principal's tender but only with certain modifications which the principal regards as unacceptable. While a rigid approach would lead to rejecting the beneficiary's demand as abusive, a less rigid approach was adopted by a French court in ordering the guarantee sum to be paid into a blocked account, while leaving to main proceedings the issue of whether the principal's refusal to accept the modifications was justified.⁵⁷

(b) Lack of advance payment in case of repayment guarantee

42. To mention now repayment guarantees, a demand for payment would be abusive if non-payment of the advance were manifestly established by the principal, while the fact of advance payment would have to be established by the beneficiary if that fact—as frequently done—were set forth in the repayment guarantee as a condition of effectiveness or of payment.

(c) Completion of contract secured by performance guarantee

43. The bulk of decisions in all jurisdictions has been on performance guarantees, including maintenance guarantees. Here, the distinction between fraud or abuse in respect of the guarantee purpose of securing performance and the need to maintain the independence of the undertaking from the underlying transaction is particularly relevant and crucial. Of the various instances relied upon by principals, probably the most successful is complete execution of the underlying transaction to the satisfaction of the beneficiary.⁵⁸ It is no coincidence that this fact has generally been recognized by courts as a basis of fraud or abuse; after all, it constitutes in the guarantee context the equivalent of the complete non-execution of a contract of

⁵⁵Similarly Kozolchik, *Bank Guarantees and Letters of Credit: Time for a Return to the Fold*, 11 *Univ. of Pennsylvania J.Int.Bus.L.* 1989, 21-23 (discussing such instances in the context of the traditional civil law concept of "cause" and agreeing that events constituting essential presuppositions for issuance must affect the validity or enforceability of bonds or guarantees).

⁵⁶Bertrams, *ibid.* (note 40) pp. 208-209.

⁵⁷*Tribunal de Commerce de Paris*, 29 October 1982, *Dalloz* 1983 I.R. 301. In an unreported Belgian decision, referred to by Bertrams, *ibid.*, a stop-payment order was granted on the grounds that the beneficiary/employer called the guarantee after the expiry date, and because the employer's letter of intent clearly departed from the tender.

⁵⁸E.g. Bertrams, *ibid.* (note 40) pp. 305-308; Horn/Wymeersch, *ibid.* (note 39) pp. 490-492, 502-503, 506; Richter, *ibid.* (note 46) p. 251.

⁵²*Bundesgerichtshof* (Germany), 21 April 1988, *Wertpapier-Mitteilungen* 1988, 935; "liquid proof" is mostly understood as conclusive evidence primarily by means of documents, except affidavits.

⁵³*Bundesgerichtshof*, 12 March 1984, *Wertpapier-Mitteilungen* 1984, 691.

⁵⁴Bertrams, *ibid.* (note 40) pp. 339, 345.

sale (e.g. by shipping worthless rubbish) in the payment context of commercial letters of credit.⁵⁹

44. However, one must hasten to add that the principal's allegation of having completely performed its side of the bargain is far from entitling the guarantor to refuse payment or making a court to enjoin payment.⁶⁰ The fact of completion must "pierce the eyes" ("crêver les yeux"), be "manifest" or "clearly obvious".⁶¹ This was dramatically brought home to a principal, for example, by the French *Cour de Cassation* in holding that, "even if apparently established" that the principal had fulfilled all of its obligations, a stop-payment order would not be granted since there remained a slight uncertainty as to that fact.⁶² In a similar vein, the Court of Appeal of Luxembourg required that the alleged fact be evident without any additional inquiry or verification.⁶³

45. This stringent test would be met only in rare cases where reliable and convincing declarations are presented, such as the beneficiary's definitive declaration of acceptance without further claims,⁶⁴ or the certification of completion by an expert appointed in accordance with the contract between the principal and the beneficiary,⁶⁵ or the declaration of complete performance countersigned by an agent of the beneficiary,⁶⁶ or the beneficiary's statement in a letter accepting the work as correctly executed, while noting that an official certificate of acceptance would be issued and the release of the performance guarantee would take place immediately after the procurement of financial and customs authorizations.⁶⁷

46. In contrast, the test would not be met, for example, where the principal proves only the shipment of the goods but not the beneficiary's acceptance or their conformity with contractual requirements,⁶⁸ or where an expert appointed by the principal certifies completion and elimination of technical defects noticed during the warranty period but where a complaint by the beneficiary prevented the issuance of a certificate of maintenance,⁶⁹ or where the principal and the beneficiary are involved in negotiations or litigation concerning contractual disputes.⁷⁰

⁵⁹See cases referred to in paragraph 28 and note 8.

⁶⁰E.g. *Cour d'Appel de Paris*, 15 February 1989, *Dalloz* 1989 Somm. 159 (reversing the decision of a commercial judge in summary proceedings that had based a stop-payment order on the finding that the circumstances of the case made it appear that there was the risk of an element of fraud).

⁶¹E.g. Vasseur, *ibid.* (note 42) p. 372.

⁶²*Cour de Cassation*, 21 May 1985, *Dalloz* 1986, I.R. 213 (with a note by Vasseur).

⁶³*Cour d'Appel de Luxembourg*, 16 March 1983, *Dalloz* 1983, I.R. 299.

⁶⁴E.g. *Cour de Cassation*, 10 June 1986, *Dalloz* 1987, 17.

⁶⁵E.g. *Cour de justice civile de Genève*, 12 September 1985, *Dalloz* 1986 I.R. 165.

⁶⁶E.g. *Pretore Bologna*, 28 March 1981, *Banca, borsa e titoli di credito* 1983 I p. 119.

⁶⁷E.g. *Pretore Roma*, 11 May 1987, *Foro padano* 1987 I p. 397.

⁶⁸E.g. *Pretore Milano*, 28 June 1982, *Banca, borsa e titoli di credito* 1983 II p. 110.

⁶⁹E.g. *Tribunale Milano*, 30 April 1987, *Banca, borsa e titoli di credito* 1988 II p. 3.

⁷⁰E.g. *Landgericht Köln*, 11 December 1981, *Wertpapier-Mitteilungen* 1982, 438.

47. The test may be less stringent in those cases where, in addition to probable completion, other elements point to the abusive or fraudulent nature of the demand. For example, an Italian judge regarded the principal's detailed certification of completion as relevant since the beneficiary had not made any substantial complaint about the quality of the works and its demand for payment was obviously motivated by the principal's refusal to make certain modifications and improvements not envisaged in the original contract.⁷¹ The additional element may be labelled as "different risk or purpose" and has been widely recognized as an instance of abuse of right.⁷²

(d) Different risk or purpose

48. A payment demand for a purpose other than that for which the undertaking was given may be viewed as abusive since it falls outside the purpose or risk intended by the parties.⁷³ Demands falling outside the covered risk may take various forms. The beneficiary may, for example, intend to reclaim a loan by calling a guarantee that was to secure payment of works,⁷⁴ or to recover losses suffered in a transaction other than the one secured by the guarantee,⁷⁵ or to recoup under a performance guarantee the banking fees charged to the beneficiary.⁷⁶

49. Another form of abuse, constituting partial abuse, would be to demand payment under all guarantees covering the individual instalments of a delivery contract while alleging default only in respect of some instalments,⁷⁷ or to call a number of performance guarantees covering different transactions although all but one have been properly performed.⁷⁸ It may be noted that this form of partial abuse was recognized in principle by an English court but not held to be sufficiently proven in the case at hand: "We therefore conclude that, although the plaintiffs have provided, on the available material, a seriously arguable case that there is good reason to suggest, certainly in regard to some of these contracts, that the demands on the performance bonds have not been honestly made, they have not established a good arguable case that the only realistic inference is that the demands were fraudulent."⁷⁹

50. Yet another form of abuse under the rubric "different risk or purpose" would be, as in the case referred to

⁷¹*Tribunale Milano*, 12 October 1985, *Banca, borsa e titoli di credito* 1986 IV p. 430.

⁷²E.g. Horn/Wymeersch, *ibid.* (note 39) pp. 495, 500, 503.

⁷³E.g. Kleiner, *Bankgarantie* (4th ed., Zurich 1990) pp. 199-200 (referring to two Zurich decisions).

⁷⁴*Oberster Gerichtshof, Evidenzblätter* (decisions of OGH) 1982, 23.

⁷⁵E.g. *Tribunal de Commerce de Bruxelles*, 26 May 1988, *Journal des Tribunaux* 1988, 460 (restraining order based also on other grounds).

⁷⁶*Tribunal de Commerce de Paris*, 24 January 1984, *Dalloz* 1984 I.R. 203.

⁷⁷*Oberster Gerichtshof*, 17 March 1986, *Recht der Wirtschaft* 1986, 340.

⁷⁸*Tribunal de Commerce de Bruxelles*, 21 October 1986, *Revue Droit Commercial Belge* 1987, 706 (Stop-payment orders were granted in respect of three, out of four, guarantees covering properly performed transactions.)

⁷⁹*United Trading Corp. v. Allied Arab Bank Ltd.*, *ibid.* (note 31) p. 565.

in paragraph 47, to put pressure on the principal to make certain concessions. For example, a Belgian judge declared a payment demand as abusive since it was used as a technique to extort a price revision from the principal.⁸⁰ Similarly, an Austrian court regarded as abusive the threat to demand payment aimed at stopping the principal from initiating litigation against the beneficiary concerning a different transaction.⁸¹ The element of pressure may also be found in the common practice of "extend or pay" requests.

(e) "Extend or pay" requests

51. Reportedly, banker's estimate that well over 90 per cent of the calls on first demand guarantees concern "extend or pay" requests; it is not unusual that such requests are lodged over and over again, carrying the repeatedly extended expiry date far beyond the initial expiry date.⁸² If the alternative demand for payment is not merely threatened and if it is made in conformity with the requirements as to form and accompanying documents, one might regard the demand as abusive since it is not a straightforward, unconditional demand or because it is contradictory in itself: either the risk covered has materialized, in which case no extension would be needed, or it has not yet materialized, in which case the demand would fall outside the intended purpose. Thus, where the principal does not agree to the extension or does not respond at all, a later, unqualified demand made after the expiry date was held to be too late.⁸³

52. However, such a view would not be appropriate as a general response to a payment request coupled with an alternative request for extension of the validity period. After all, the request may be made for good reasons and aim, for example, at giving the principal additional time for completing performance, at allowing the parties to the underlying transaction more time for settling contractual disputes, or at enabling the beneficiary to consider its final stand on whether and for what amount to demand payment. Yet, the request might also be made in bad faith, for example, where the beneficiary itself has made the principal's performance impossible or where the motive of the request is to put pressure on the principal to make concessions and, for example, agree to an extended warranty period or to execute works or modifications in excess of the original contract.⁸⁴

53. Since the request for extension is in substance addressed to the principal and since the principal is in the best position to judge whether the alternative demand for payment is abusive and whether that abuse can be

promptly established, the guarantor should immediately upon receipt of an "extend or pay" request inform the principal; if the principal does not consent to the extension or does not make it manifest to the guarantor that the payment demand constitutes an abuse of right, the guarantor should make payment within the legal period of time (still to be determined for the uniform law; see A/CN.9/WG.IV/WP.68, paras. 58-60).

54. It may be noted that a similar approach has been adopted by the draft Uniform Rules for Demand Guarantees of the International Chamber of Commerce. Article 26 URDG reads:

"If the Beneficiary requests an extension of the validity of the Guarantee as an alternative to a claim for payment submitted in accordance with the terms and conditions of the Guarantee, the Guarantor shall without delay so inform the party which gave the Guarantor his instructions. The Guarantor shall then suspend payment of the claim for such time as is reasonable to permit the Principal and the Beneficiary to reach agreement on the granting of such extension and for the Principal to arrange for such extension to be issued.

Unless an extension is granted within the time provided by the preceding paragraph, the Guarantor is obliged to pay the Beneficiary's conforming claim without requiring any further action on the Beneficiary's part. The Guarantor shall incur no liability (for interest or otherwise) should any payment to the Beneficiary be delayed as a result of the above-mentioned procedure.

Even if the Principal agrees to or requests such extension, it shall not be granted unless the Guarantor and the Instructing Party(ies) also agree thereto."⁸⁵

(f) Secured obligation non-existent, invalid, illegal or unenforceable

55. There are various instances where a demand for payment might be regarded as fraudulent or abusive even though the principal has obviously or admittedly not fulfilled the secured obligation. One such instance would be where, at the time of the demand, performance is not yet due,⁸⁶ unless there was an anticipatory breach of contract. Another such instance, not limited to performance guarantees, is where the beneficiary promises the principal to release the guarantee or where such release forms part of a settlement agreement between the principal and the beneficiary.⁸⁷ It may be noted that there is no need for

⁸⁰Président du Tribunal de Gand, 27 December 1983, *Tijdschrift Belgisch Handelsrecht* 1986, 298.

⁸¹Oberster Gerichtshof, *ibid.* (note 77).

⁸²Bertrams, *ibid.* (note 40) p. 207; see also Stoufflet, *ibid.* (note 44), 280.

⁸³E.g. *Cour d'Appel de Paris*, 2 April 1987, *Dalloz* 1988 *Somm.* 248, upheld by *Cour de Cassation*, 24 January 1989, *Dalloz* 1989 *Somm.* 159. Similarly, *Esal (Commodities)*, *Reltor v. Oriental Credit*, [1985] 2 *Lloyd's Rep.* 546.

⁸⁴E.g. Kozolchik, *ibid.* (note 55) pp. 31-32; Bertrams, *ibid.* (note 40) p. 207.

⁸⁵Revised text of the Uniform Rules for Demand Guarantees, ICC Document No. 460/470-1/19 BIS and 460/470-10/1 BIS of 8 February 1991; this draft text constitutes the recent version of the earlier ICC draft Uniform Rules for Guarantees that had been reviewed by the Working Group at its twelfth session (A/CN.9/316).

⁸⁶E.g. *Cour d'Appel de Paris*, 2 June 1982, *Dalloz* 1983 *J.* 437.

⁸⁷E.g. von Westphalen, *Die Bankgarantie im internationalen Handelsverkehr* (2nd ed., Heidelberg 1989) p. 183; it may be noted that the defence of release was in principle recognized by the English Court of Appeal in *Boliventer Oil S.A. v. Chase Manhattan Bank*, [1984] 1 *Lloyd's Rep.* 251; however, fraud in terms of bad faith was not held to be proven since the beneficiary might have, rightly or wrongly, considered in the circumstances that its agreement to release the guarantee had been obtained under commercial pressure.

invoking fraud or abuse where the beneficiary declares the guarantor's release from liability since such act within the guarantor-beneficiary relationship terminates the guarantor's payment obligation.⁸⁸

56. Other instances that principals might wish to rely on are the invalidity of the underlying transaction or the expiry of the prescription or limitation period of the principal's obligation. While a decade ago courts occasionally held otherwise,⁸⁹ the judicial attitude is generally to reject such reliance, unless the lack of a valid underlying transaction has been determined in a final decision by a court or arbitral tribunal.⁹⁰ It may be noted that this latter exception is not limited to findings of invalidity but extends to other decisions that terminate or deny the principal's obligation.⁹¹

57. However, the situation is less clear where the underlying transaction violates public policy or is otherwise illegal. While it seems to be generally accepted that the beneficiary cannot claim payment if the underlying transaction violates public policy, there is hardly any case law that would provide guidance.⁹² A French commentator suggested to distinguish between manifest violation of public policy, in which case payment by the guarantor would intolerably contribute to the implementation of a clearly illegal transaction, and instances of uncertain or doubtful violation of public policy, where payment would accord with the purpose of the guarantee to change the procedural position of the parties.⁹³ While this distinction is in line with the general standard of "manifest abuse", it is submitted that a court would apply a less stringent standard and carefully examine the matter *ex officio* with a view to ensuring compliance with the forum rules on public policy.⁹⁴

58. It may be noted that there is no need for invoking the concept of fraud or abuse where the guarantee itself is affected by the violation of public policy since in that case the right to refuse payment follows from the invalidity or, in case of violation of article VIII of the Bretton Woods Agreement, unenforceability of the payment obligation (see paragraphs 78-79 below). As regards the remaining instances of illegality affecting merely the underlying

transaction, special considerations apply where that illegality results from the law of the principal's country that is different from that of the guarantor or the beneficiary. Since the beneficiary will often not be familiar with regulations in the principal's country restricting, for example, import or export or foreign currency exchange, the possible illegality of the underlying transaction may be regarded as one of the risks intended to be covered by the guarantee.⁹⁵ If a principal would nevertheless want to rely on that illegality, it would seem almost impossible to make the alleged abuse obvious or manifest to the guarantor in view of the difficult legal issues involved, including the controversial effect of foreign mandatory laws and the absence of any earlier breach of a duty to advise the beneficiary of the legal impediments to the transaction and its performance.

(g) *Other instances of allegedly justified non-performance*

59. The latter considerations apply with similar force to various other instances of allegedly justified non-performance by the principal. Since the legal consequences freeing the principal from its obligation vary depending on the particular contract and the applicable law, the instances may appropriately be grouped according to the fact situations relied upon by the principal.

60. A first group comprises circumstances surrounding the conclusion of the underlying transaction, for example, mistake, misrepresentation or duress. Such circumstances that would entitle the principal to avoid the contract or, in certain jurisdictions, lead *eo ipso* to the above discussed invalidity of the contract, have been recognized as possible basis of abuse; however, injunctions were usually not granted because the principal did not overcome the extreme difficulty of establishing within the constraints of preliminary proceedings the facts and legal consequences thereof.⁹⁶

61. A second group comprises acts or omissions by the beneficiary that principals often claim entitle them to rescind the underlying transaction or to suspend performance. The beneficiary's demand for payment was held to be abusive, for example, where the beneficiary itself had impeded performance⁹⁷ or unilaterally avoided the contract without cause.⁹⁸ While case law does not appear

⁸⁸According to Article 23 URDG, "a Guarantee shall be cancelled prior to the Expiry Date or Expiry Event on presentation to the Guarantor of . . . the Beneficiary's written statement of release from liability under the Guarantee, whether or not the Guarantee or any amendments thereto are returned".

⁸⁹E.g. *Tribunale Pavia*, 17 February 1981, *Foro padano* 1982, 88.

⁹⁰E.g. *Cour de Cassation*, 20 December 1982, *Dalloz* 1983 J.365; von Westphalen, *ibid.* (note 87) p. 180 (see also above, para. 32).

⁹¹E.g. *Cour d'Appel de Paris*, 13 December 1984, *Dalloz* 1985 I.R.239.

⁹²E.g. Bertrams, *ibid.* (note 40) p. 317 (referring to *Cour d'Appel de Bruxelles*, 18 December 1981, *Revue de la Banque* 1982, 99); it may be noted that the English Court of Appeal reserved its position in respect of a claim relating to a clause in the underlying transaction that constituted a penalty, which is null and void under English law (*Dodsai PVT Ltd. v. Kingpull Ltd.*, 1 July 1985, unpublished, referred to by Elland-Goldsmith, *Garantie Bancaire: L'évolution de la jurisprudence en Angleterre*, *Revue de droit des affaires internationales* 1990, 434).

⁹³Vasseur, note, *Dalloz* 1984, 421.

⁹⁴E.g. *Bundesgerichtshof*, 28 April 1988, *Recht der internationalen Wirtschaft* 1988, 558.

⁹⁵E.g. Bertrams, *ibid.* (note 40) p. 317.

⁹⁶Bertrams, *ibid.* (note 40) p. 304 (referring, e.g., to *Rechtbank Amsterdam*, 20 December 1984, *Kort Geding* 1985, 21; *Rechtbank Haarlem*, 21 November 1986, *Kort Geding* 1987, 57; *DTH Construction v. Steel Authority of India*, *International Business Lawyer* 1986, 175; *Cromwell v. Commercial & Energy Bank*, 40 *UCC Rep. Serv.* 1814 (La. 1985); *Brown v. United States National Bank*, 41 *UCC Rep. Serv.* 1765 (Neb. 1985)).

⁹⁷E.g. *Landgericht Frankfurt*, 11 December 1979, *Wertpapier-Mitteilungen* 1981, 284 (delivered machinery neither installed nor examined by beneficiary); *Rechtbank Zwolle*, 26 November 1982, *Kort Geding* 1982, 220 (performance of purchase obligation under exclusive dealership agreement made impossible by beneficiary's breach of exclusivity).

⁹⁸E.g. *Tribunal de Commerce de Bruxelles*, 15 January 1980, *Jurisprudence Commerciale Belge* 1980, 147; *Tribunal de commerce de Paris*, 15 March 1985, *Dalloz* 1985 I.R. 244.

to provide clear guidance as to the instances justifying a finding of abuse, one may generally say that the beneficiary's misconduct must be serious, jeopardizing the entire transaction or constituting a breach of a fundamental obligation.⁹⁹ As in respect of other possible instances of abuse, the alleged facts and legal consequences would have to be made manifest or obvious, and, as regards injunctive relief, restraining orders against beneficiaries are less difficult to obtain than stop-payment orders against guarantors, especially issuers of indirect guarantees.¹⁰⁰ Similar considerations apply where the principal bases its right to avoid the contract or suspend performance on the fact that the beneficiary failed to pay due instalments of the contract price.¹⁰¹

62. A third group comprises instances where performance is impeded not by the beneficiary's conduct but by supervening events qualified as *force majeure* or Act of God that may free principals from their obligation or entitle them to avoid the contract (e.g., embargo, blocking of foreign currency funds and similar State interventions, or natural disasters). Reliance on such an event for the purpose of showing manifest abuse would require the establishment of not only the occurrence of the event and the impossibility of foreseeing or overcoming it but also of the legal certainty about its qualification as *force majeure* under the contract and the applicable law, including its effect of freeing the principal from its obligation according to the risk allocation under the contract and the absence of any remaining liability that might fall within the risk covered by the guarantee.¹⁰² It seems almost impossible that all those complex points will ever be manifest or obvious to a guarantor, and principals have very rarely been successful in summary proceedings for injunctive relief.¹⁰³

(h) *Presentation of forged or fraudulent document*

63. A demand for payment is fraudulent or abusive if it is based on a wrongful act such as presentation of a forged or fraudulent document. Payment under guarantees is, however, not often conditioned on the presentation of documents, even if one were to include statements by the beneficiary about the principal's default. Moreover, any documents required would not have the commercial value of a bill of lading as may be required under a traditional letter of credit so that any considerations concerning the

bank's interest in obtaining a document of such value (see paragraphs 25-26 above) are not applicable to guarantees or stand-by letters of credit.

64. It is submitted that the above basis of a fraudulent or abusive demand for payment constitutes, in practical terms, an addition to the previously discussed instances in the following procedural or evidentiary respects. Where the beneficiary presents a forged document, payment should be refused if the guarantor itself detects the forgery or if it is made manifest, for example, by a denial of the purported author. Where the document is fraudulent in certifying wrongly the principal's default, the burden of establishing abuse would be limited to the instance of default as described in the document. For example, if the payment demand under a tender guarantee is based on a statement that the successful tenderer did not secure the required performance guarantee, all that needs to be made obvious or manifest is the issuance of the required performance guarantee; the beneficiary would be precluded from later justifying its demand by the refusal of the principal to sign the awarded contract. In contrast, where the beneficiary calls a tender guarantee payable on simple demand, the showing of abuse in terms of lack of any colourable or plausible basis would have to include the fact that the principal either was not awarded the contract or had accepted the contract as determined in the tender conditions. Thus, the advantage of requiring a statement by the beneficiary is not merely to provide a psychological barrier by "forcing it to lie" but to shorten the "plausible basis", in particular where a statement is required as to the respect in which the principal defaulted.

(i) *Special considerations for counter-guarantees*

65. The above instances of possible fraud or abuse relating to the underlying transaction between the principal and the beneficiary may constitute an objection to payment by any guarantor that issued or confirmed a guarantee to that beneficiary, be it a direct guarantee issued at the request of the principal or be it an indirect one issued on the instructions of an instructing party acting at the principal's request. However, where an indirect guarantee is counter-guaranteed by the instructing party, special considerations apply to the issue of fraud or abuse as a possible objection to payment by the counter-guarantor (hereinafter referred to as "first bank").

66. The reason therefor lies in the fact that the beneficiary of the counter-guarantee is the issuer of the indirect guarantee (hereinafter referred to as "second bank") and not the above beneficiary that is linked with the principal by the underlying transaction. Any fraud or abuse by that latter beneficiary (hereinafter referred to as "ultimate beneficiary") would be that of a third party and thus not directly relevant to the relationship between the first and the second bank. It is exclusively within that relationship that the issue of fraud or abuse as an objection to payment under the counter-guarantee is to be determined, taking into account its purpose of indemnifying the second bank according to the terms and conditions of the counter-guarantee.

⁹⁹E.g. Bertrams, *ibid.* (note 40) pp. 311-312.

¹⁰⁰E.g. *Rechtbank Leeuwarden*, 6 October 1986, *Kort Geding* 1986, 476.

¹⁰¹Stop-payment orders were granted, e.g. *Cour d'Appel de Versailles*, 1 December 1988, *Dalloz* 1989 *Somm.* 155; *Pennsylvania State Const. Inc. v. Cambria Savings & Loan Association*, 2 UCC *Rep. Serv.* 2d 1638 (Pa. 1987).

¹⁰²E.g. Bertrams, *ibid.* (note 40) pp. 315-316.

¹⁰³E.g. *Tribunal de Commerce de Bruxelles*, 6 April 1982, *Revue de la Banque* 1982, 683; *Rechtbank Amsterdam*, 18 December 1980, *Schip and Schade* 1981, 135; *Dynamics Corp. v. Citizens & Southern National Savings Bank*, *ibid.* (note 10); injunction not granted, e.g., *State Trading Corp. of India v. E.D. & F. Man*, *The Times* 22 July 1981 (principal did not show that beneficiary did not honestly believe in principal's unexcused default).

67. For example, if payment by the first bank is conditioned on a statement by the second bank that the ultimate beneficiary has demanded payment by the second bank, presentation of an untrue statement would, if obvious or manifest to the first bank, constitute a basis for objecting to payment. The same would apply in the probably less common case where payment by the first bank is due upon certification by the second bank that it has already paid the ultimate beneficiary.

68. Considerably more difficult are those cases where the conduct of the ultimate beneficiary may be regarded as fraudulent or abusive. While it is generally accepted that in case of collusion between the ultimate beneficiary and the second bank payment may be refused by the first bank, provided that the collusive behaviour is evident,¹⁰⁴ there is no uniformity as to whether or under what circumstances the fraud exception applies to the counter-guarantee outside the rare instance of collusion. While some decisions appear to leave no room for the fraud exception outside the instance of collusion,¹⁰⁵ others lean towards the opposite extreme by according relevance to the ultimate beneficiary's fraud without considering the second bank's position and, in particular, whether it was aware of that fraud when demanding reimbursement from the first bank.¹⁰⁶ The prevailing judicial attitude lies between these two extremes and may be labelled as "double abuse".¹⁰⁷ The first bank may refuse payment if it is evident that the second bank, before paying the ultimate beneficiary, was aware of the fraud or abuse by the ultimate beneficiary.¹⁰⁸

69. The abuse by the second bank would lie in its demanding reimbursement despite the fact that it was entitled, and towards the instructing party obliged, to refuse payment to the ultimate beneficiary. What needs to be established therefore is not only the misconduct or other basis of fraud or abuse on the part of the beneficiary and the second bank's awareness thereof but also the legal consequences concerning the qualification as fraud or abuse and the ensuing duty of the second bank to refuse payment.

70. As regards the legal consequences, the matter is complicated by the fact that different laws might have to be applied and their answer made manifest to the first bank. In all likelihood, the issue of the recognition of fraud or abuse of the ultimate beneficiary is to be determined by the law of the State where the second bank has its place of business and thus, from the perspective of the first bank and the principal, by a foreign law that is difficult to assess. The question of whether the second bank owes a duty of care towards the first bank (and possibly indirectly to the principal) may have to be determined by that same foreign law or by the law of the State where the

first bank has its place of business, in part depending on whether the duty may be based on contract or tort (see paragraphs 98-99 below).

71. As was concluded from a survey of about 60 decisions dealing with (alleged) fraud in cases involving indirect guarantees, "courts very rarely bother to raise the issue of private international law" and "those courts which perfunctorily noted that the guarantee was covered by foreign law evidently applied their own, but not necessarily provincial, notions of fraud."¹⁰⁹ It was also concluded that the rule requiring evidence of the second bank's knowledge of the ultimate beneficiary's fraud, while consistently followed by English courts, is not as firmly entrenched in Continental case law as it is in legal writing. While in some decisions the finding in respect of the second bank's knowledge was based on solid evidence,¹¹⁰ some courts appear not to have given any consideration to the second bank's position and others, once satisfied with the evidence concerning the ultimate beneficiary's fraud, inferred the second bank's awareness from facts that were not always revealed or conclusive.¹¹¹

72. It is submitted that a provision in the uniform law determining the relevance of the ultimate beneficiary's fraud or abuse to the payment obligation of the first bank would constitute a particularly useful contribution to the desired legal uniformity and certainty. In addition to determining the relevance, including the requirements of the fraud exception within the relationship between the first and the second bank, the complex procedural issues of possible injunctions against the first and the second bank need to be addressed (see paragraphs 90-114 below).

C. Tentative conclusions

73. It is hoped that the above discussion of fraud, abuse and similar concepts and of their application by courts of various jurisdictions is, despite its fragmentary and general nature, of assistance to the Working Group in its deliberations. While a number of considerable disparities have become apparent, there exists a remarkable degree of similarity within the selected jurisdictions where courts, especially during the last decade, have developed and refined the law relating to the fraud exception in respect of independent guarantees and stand-by letters of credit.¹¹² However, even within a given jurisdiction one would find more disparity and uncertainty if one were to examine all decisions with their great variety of facts and procedural settings. Above all, there are many remaining jurisdictions where courts did not yet have the opportunity to develop and refine the law.

¹⁰⁴E.g. *Cour de Cassation*, 11 December 1985, *Dalloz* 1986, 214; *Bundesgerichtshof*, 12 March 1984, *Wertpapier-Mitteilungen* 1984, 689.

¹⁰⁵E.g. *Cour d'Appel de Paris*, 21 January 1987, *Dalloz* 1987 I.R. 176.

¹⁰⁶E.g. *Landgericht Dortmund*, 9 July 1980, *Wertpapier-Mitteilungen* 1981, 280; *Cour d'Appel de Paris*, 2 June 1982, *Dalloz* 1983, 437; *Cour d'Appel de Paris*, 18 November 1986, *Dalloz* 1988 Somm. 247.

¹⁰⁷E.g. von Westphalen, *ibid.* (note 87) p. 252.

¹⁰⁸E.g. *Bundesgerichtshof*, *ibid.* (note 104); *Cour de Cassation*, 10 June 1986, *Dalloz* 1987, 17.

¹⁰⁹Bertrams, *ibid.* (note 40) p. 351.

¹¹⁰E.g. *Cour de justice civile de Genève*, 12 September 1985, *Dalloz* 1986 I.R. 165 (knowledge evidenced by stop-payment order of local court against second bank); *Landgericht Düsseldorf*, 9 August 1984, *Recht der internationalen Wirtschaft* 1985, 77 (knowledge evidenced by second bank's receipt of a copy of an arbitral award ordering the beneficiary to return the guarantee).

¹¹¹Bertrams, *ibid.* (note 40) pp. 353, 355.

¹¹²E.g. Horn/Wymeersch, *ibid.* (note 39) p. 529.

74. It is for all these reasons that the Working Group may wish to prepare provisions on the fraud exception that would provide legal certainty and uniformity. In its search for acceptable solutions, it may draw inspiration from the requirements or tests developed in certain jurisdictions. It is submitted, however, that to prefer one test to another, or to opt for a stricter requirement rather than a less stringent one, is not a question of right or wrong but depends essentially on what the precise scope of the fraud exception should be in the light of the conflicting interests of the parties involved. Moreover, what counts is not so much the individual requirement but the totality of the rules on the fraud exception, as illustrated by the rather generous recognition of instances of abuse in civil law jurisdictions that is offset or filtered by such requirements as "manifest", "obvious" or "established by liquid proof".

75. With a view to devising acceptable provisions on the fraud exception, the Working Group may wish to consider the following questions:

1. What conduct of the beneficiary or other facts constitute fraud or abuse?

(a) Should a general definition be restricted by a subjective criterion (e.g., evil intent, dishonesty, bad faith) or should it, following the prevailing judicial attitude, be based on objective criteria that may be more easily established (e.g., lack of plausible basis, purpose of demand falls outside the covered risk)?

(b) Should a general definition be accompanied by a list of instances that may qualify as a basis of fraud or abuse (taking all or some of the instances discussed in paragraphs 39-72) and, if so, should that list be illustrative or exhaustive?

2. What is the substantive standard of proof?

(a) As regards the degree of awareness entitling the guarantor to refuse payment, should any of the above terms (e.g., evident, certain, obvious to everyone, manifest or established by liquid proof) be used or may another appropriate term be found?

(b) Should that standard be limited to the issue of the guarantor's refusal on its own motion or should it apply equally to court orders enjoining payment by the guarantor or restraining the beneficiary from demanding or receiving payment? (Consideration of this question might appropriately be dealt with after the discussion of the procedural aspects of injunctions, see paragraphs 90-114 below).

3. What special considerations apply to the fraud exception available to a counter-guarantor in cases involving fraud or abuse by the ultimate beneficiary?

(a) Should any such fraud or abuse be relevant where there is no collusion between the ultimate beneficiary and the second bank?

(b) If so, what should be the requirements for recognizing the ultimate beneficiary's conduct as a basis for the fraud exception available to the first bank/counter-guarantor (e.g., knowledge of second bank, recognized right of second bank to refuse payment, duty of second bank to refuse payment, certainty of second bank as to ability to establish the previous

points in any proceedings with the ultimate beneficiary, knowledge of first bank of all previous points)?

4. What kind of persons should be protected against the fraud defence?

(a) Is the innocent beneficiary protected and, if so, under what circumstances?

(b) As regards other persons (e.g., transferee, protected holder of bill of exchange), is, for example, the approach suggested by the Task Force on Article 5 UCC (paragraph 18 above) appropriate for the uniform law?

II. OTHER OBJECTIONS TO PAYMENT

A. Invalidity, voidability or unenforceability of payment obligation

76. Where a demand is made in conformity with the terms and conditions of the guaranty letter and the payment obligation has not ceased by termination, release or discharge before the expiry date, there may be other objections to payment than the previously discussed fraud exception. A basic ground for refusing payment would be that the guarantor's undertaking is void or voidable under the law applicable to questions of material validity. Legal consequences of this kind may ensue from acts of the beneficiary (e.g., duress, deceit, misrepresentation) or from facts falling in the guarantor's realm (e.g., mistake).¹¹³

77. Depending on the particular applicable law, such legal consequences may also follow from the fact that the payment undertaking or its fulfilment would be contrary to public policy, in violation of a legal prohibition, immoral or for similar reasons illegal.¹¹⁴ However, at least some such reasons may in other jurisdictions not lead to invalidity but to unenforceability of the payment undertaking, or possibly to impossibility of performance with varied consequences. An illustration thereof would be the violation of a national law on currency, if the guarantee sum is payable in local currency, or on foreign exchange, if it is payable in foreign currency. It might be submitted, in this context, that any restriction or prohibition of foreign currency exchange precluding the guarantor from receiving reimbursement from the principal would be as irrelevant to the guarantor's payment obligation as, for example, the principal's insolvency.¹¹⁵

78. Another example that courts have had to deal with is the violation of Article VIII, paragraph 2(b) of the Bretton Woods Agreement.¹¹⁶ As noted earlier (para-

¹¹³E.g. von Westphalen, *ibid.* (note 87) p. 175; Richter, *ibid.* (note 46) p. 225.

¹¹⁴*Idem.*

¹¹⁵E.g. von Westphalen, *ibid.* (note 87) p. 179; Richter, *ibid.* (note 46) p. 224.

¹¹⁶Article VIII(2)(b) reads in its relevant part: "Exchange contracts which involve the currency of any Member and which are contrary to the exchange control regulations of that Member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any Member".

graphs 57-58 above), if such violation affects merely the underlying transaction (e.g., payment obligation in a sales or works contract), it might constitute the source of an abusive demand under the guarantee; however, if the violation of that Agreement extends to the guarantor's undertaking, payment would be refused because the undertaking is regarded either as invalid or as unenforceable.¹¹⁷

79. As decided by the House of Lords, the same applies in the case of a commercial letter of credit even if the underlying sales contract, qualified in part as a "monetary transaction in disguise", is not illegal under the law of the State where it would be performed by paying the letter of credit (here: English law); it was added that the "bank, if it had known . . . of the monetary transaction by the buyer that was involved, could have successfully resisted payment . . . but . . . there was nothing in English law to prevent it from voluntarily paying . . .".¹¹⁸ As regards this latter conclusion, it is submitted that courts in other jurisdictions might hold otherwise and recognize in such circumstances a duty of the bank to refuse payment.¹¹⁹

B. Set-off with claims of guarantor

80. The possibility of invoking a claim against the beneficiary by way of set-off may be discussed here as an objection to payment, even though it does not constitute a denial of the legitimacy of the beneficiary's demand but may be viewed as a mode of discharging a debt. In discussing the admissibility of a set-off, a distinction should be drawn between the guarantor's own claims and any claim assigned to it by the principal, which would usually relate to the underlying transaction.

81. Starting with the latter kind of claim, the widely prevailing judicial attitude is not to allow a set-off by the guarantor even if the general requirement of a set-off were met, namely that the claim be liquidated and certain or undisputed.¹²⁰ However, courts have occasionally held otherwise.¹²¹ It may be mentioned, in this context, that the fact that the principal has a liquid or certain claim, arising from the underlying transaction and not assigned to the guarantor, has been regarded, often together with completion of the principal's contractual obligation, as a possible basis for fraud or abuse.¹²²

82. Turning now to the guarantor's own claims, a first clarification that somewhat limits the problem is to point to the relevance of any clause that either allows or precludes a set-off by the guarantor. Clauses expressly allowing a set-off are probably very rare in guarantees or stand-by letters of credit; however, they may be found in surrounding bank contracts, including general conditions,

for example, between the second bank and the ultimate beneficiary in the case of an indirect guarantee or, in respect of a counter-guarantee, between the first and the second bank. As regards this latter relationship, it has been suggested that the issue of set-off should be decided in accordance with international banking practices.¹²³ Clauses expressly prohibiting set-off by the guarantor are probably rare. Whether a prohibition may be derived from general expressions such as "waiving any defences" or "without any condition or defence" is at least doubtful; it is submitted that the answer should be the same as in the case of any other guarantee payable on first demand.

83. The answer given by courts and by commentators is by no means uniform. One view is to disallow set-off since the guarantor, when carrying out its task that is based on a request of the principal or instructing party, should not be guided by its own interest and since the beneficiary, in view of the security and liquidity function of the first demand guarantee, is entitled to actual payment.¹²⁴ Moreover, to allow set-off might mean that beneficiaries would not easily accept guarantees from banks with which they may have contacts or that a dissatisfied beneficiary might take retaliatory measures against the principal.

84. Another view, often based on general legal rules about the admissibility of set-off, is to allow the guarantor to discharge its payment obligation by a set-off with its own claims since the liquidity function of the guarantee has no bearing on the issue of set-off but only on that of fraud or abuse.¹²⁵ A similar reason was given by an English judge in a case where a network of financial transactions included a stand-by letter of credit: "There are two striking features of the present case. First, the stand-by letter of credit was opened for the specific purpose of financing the liabilities on the dry cargo transactions, so that it would seem very unjust if the bank were precluded from enforcing a set-off in relation to the present claims which arise directly out of selfsame transactions. Secondly, this is a liquidated set-off, and it would seem to me anomalous that such a set-off should be unavailable in letters of credit cases, but available against bills of exchange which are closely analogous in that a bill of exchange is also virtually equivalent to cash."¹²⁶

85. An intermediate view is to allow set-off only in certain circumstances. It was held, for example, that the general preclusion of set-off, based on an implied exclusion agreement, would not apply where the beneficiary was insolvent and the bank would otherwise probably be

¹¹⁷E.g. von Westphalen, *ibid.* (note 87) p. 181.

¹¹⁸*UCM (Investments) v. Royal Bank of Canada*, *ibid.* (note 33) pp. 729-730.

¹¹⁹E.g. von Westphalen, *ibid.* (note 87) p. 181.

¹²⁰E.g. *Bundesgerichtshof*, 14 October 1982, *Wertpapier-Mitteilungen* 1982, 1324; *Rechtbank Haarlem*, 9 January 1987, *Kort Geding* 1987, 85.

¹²¹E.g. *Rechtbank Amsterdam*, 7 March 1985, *Kort Geding* 1985, 87.

¹²²E.g. von Westphalen, *ibid.* (note 87) pp. 396-397; Bertrams, *ibid.* (note 40) p. 322.

¹²³Bertrams, *ibid.* (note 40) p. 271 (pointing at the difficulty that at present well-established practices do not appear to exist and that the law governing set-off is not easily determined, bearing in mind that the counterclaim and the claim for reimbursement might be subject to different laws).

¹²⁴E.g. *Landgericht Frankfurt*, 21 September 1983, *Wertpapier-Mitteilungen* 1984, 86; Richter, *ibid.* (note 46) p. 225; Bertrams, *ibid.* (note 40) pp. 269-270.

¹²⁵E.g. *Tribunal de Commerce de Bruxelles*, 18 April 1985, *Revue Droit Commercial Belge* 1985, 729; Kleiner, *ibid.* (note 73) p. 198.

¹²⁶*The Hong Kong and Shanghai Banking Corp. v. Kloeckner & Co. A.G., Q.B.*, [1989] 2 *Lloyd's Rep.* 323, 331 (per Hirst J.).

unable to realize its claim.¹²⁷ The German Supreme Court held that set-off was permissible in the case of a payment guarantee, securing payment of the purchase price, since such guarantee served primarily the security function and, apart from that, there was no reason to assume that the beneficiary should be accorded a better position than the one it would have in case of regular fulfilment of the obligation to pay the purchase price that included discharge by means of set-off.¹²⁸ The Court indicated that set-off might be precluded in the case of other guarantees, in particular performance guarantees, since these might serve the liquidity function of providing the beneficiary with readily available funds for curing defects.¹²⁹

C. Tentative conclusions

86. It is submitted that the deliberations of the Working Group need not necessarily aim at finding acceptable solutions to the above questions of invalidity, voidability or unenforceability; primary consideration should rather be given to the preliminary question of whether issues of that kind should be dealt with at all in the uniform law. It may be recalled that, at the twelfth session of the Working Group, the "suggestion was made that it was a complicated area better left to the existing precepts of general contract law. From the discussion which ensued, it appeared that some aspects of the problem might be more appropriate for treatment in the uniform law than others" (A/CN.9/316, para. 157). For example, "doubts were expressed as to whether the uniform law could deal adequately with problems raised by the presence in national legal systems of 'super-mandatory' principles of law and it was suggested that, at least in this respect, the uniform law should confine itself to the execution of the guarantee. A further suggestion was that the uniform law should indicate certain cases in which national law would remain applicable" (A/CN.9/316, para. 160).

87. Starting with the last suggestion, it is submitted that a general or elaborate reference to other possible objections to payment would be appropriate or even necessary so as to avoid any misunderstanding of the principal rule of the uniform law that a guarantor is obliged to pay upon a demand in conformity with the guaranty letter, unless the fraud exception applies.

88. Turning to the basic question as to whether the uniform law should deal with other objections to payment, or at least some of them, the Working Group might wish to use the following considerations as a general guideline. The Working Group might wish to adopt the approach used in other legal texts emanating from the work of

the Commission and refrain from addressing issues of validity or voidability as mentioned in paragraph 76 or, for example, the issue of impossibility to perform due to insolvency or similar impediments. It might also wish to refrain from addressing issues that, while not extraneous to the subject-matter of the uniform law, do not lend themselves to easy answers acceptable on a worldwide basis, such as the impact of public policy and, in particular, the "super-mandatory" principles of law referred to above (paragraph 86).

89. However, the Working Group might wish to address those issues that are of special relevance to the subject-matter of the uniform law (e.g., foreign exchange control). Certainty and uniformity seem to be particularly needed in respect of those issues where divergent decisions have been rendered or where general rules of law appear not to give due regard to the specific nature of the independent undertaking of the guarantor. It is submitted that the duty to refuse payment of an unenforceable obligation (see paragraphs 77-79 above) and the issue of set-off with claims of the guarantor (see paragraphs 80-85 above) fall into that latter category.

III. INJUNCTIONS AND OTHER COURT MEASURES

90. As indicated by various references in the discussion of the fraud exception (e.g., paragraphs 19-21, 27, 38 and 71), the issue of manifest fraud or abuse is relevant not only in the context of the guarantor's determination on whether or not it should pay the beneficiary but also, and more frequently, in the context of injunctive relief sought by the principal from a court. The principal may seek relief against payment by requesting a court order that would enjoin the guarantor from paying or one that would restrain the beneficiary from demanding payment or from receiving payment; the principal might also try to prevent payment by requesting the attachment of the beneficiary's claim or the blocking of funds.

91. Before discussing the procedural aspects of such court measures, it may be mentioned that the issue of fraud or abuse might be relevant in yet other procedural contexts. For example, the fraud exception may be the subject of an action brought by the beneficiary for wrongful dishonour by the guarantor, including a possible preliminary order to pay, or of a claim for interest or other damages in case of late payment. The fraud exception may also become relevant in court proceedings between the principal and the guarantor where the issue of reimbursement may depend on whether the payment by the guarantor was justified despite allegations of fraud or abuse. Such proceedings may be more complicated where the guarantor paid despite a stop-payment order or where the guarantor obeyed a stop-payment order that was later revised on appeal or rendered obsolete in main proceedings.¹³⁰

¹²⁷*Oberlandesgericht Frankfurt*, 26 June 1984, *Wertpapier-Mitteilungen* 1984, 1021.

¹²⁸*Bundesgerichtshof*, 22 April 1985, *Wertpapier-Mitteilungen* 1985, 685 (this decision related to the same case as the German decisions referred to in notes 124 and 127).

¹²⁹*Von Westphalen*, *ibid.* (note 87) p. 178, takes the view that set-off should be precluded under all such other guarantees since they always serve the liquidity function.

¹³⁰For details see, e.g., *Vasseur*, *ibid.* (note 42) pp. 370-371; *Richter*, *ibid.* (note 46) 284-287; *von Westphalen*, *ibid.* (note 87) p. 293.

A. Injunctions against payment

1. Requirements and other procedural aspects of injunctions in general

92. Most jurisdictions, and certainly all those from which court decisions were reported in the discussion on the fraud exception, provide in their procedural laws for injunctions or similar preliminary measures available in case of urgency (e.g., English "preliminary injunction", French "*ordonnance de référé*", German "*einstweilige Verfügung*", Dutch "*kort geding*", Italian "*provvedimento di urgenza*"). The procedures concerning such measures differ considerably from one country to another, and within federal States often from one jurisdiction to another, in respect of such issues as the expected length of the proceedings and of the effect of preliminary injunctions, the possibility of obtaining *ex parte* injunctions in case of extreme urgency or the admissibility of certain means of evidence (e.g., affidavits).

93. However, for the purposes of the following discussion it suffices to see the similarity of the essential requirements for obtaining injunctions in various jurisdictions. For example, courts in the United States, as mentioned above (paragraph 20), tend to require a showing of probable success on the merits, of the danger of irreparable injury and of a balance of hardships tipping decidedly toward the party requesting the preliminary relief,¹³¹ and sometimes also the existence of a public interest.¹³² Similarly, an injunction in Italy under Article 700 Code of Civil Procedure requires the showing of the probable success on the merits and of imminent and irreparable harm.¹³³ To mention only one more example, an injunction in Germany under Article 935 or 940 Code of Civil Procedure requires the probability of the applicant's right or legal position and of serious harm. In determining irreparable or serious harm, courts tend to take into account the kind of considerations that would be dealt with in common law jurisdictions under such labels as "balance of hardship", "balance of convenience" or "public interest".

94. While injunctions are thus generally known and based on essentially similar requirements in the various jurisdictions, the judicial attitude towards ordering injunctions in favour of principals is far from uniform. As will be seen from the following discussion on the answers of courts to the various requirements in the context of independent guarantees and stand-by letters of credit, the views range from a general denial (recently in Germany) or considerable reluctance (in England) and controversy (e.g., in Switzerland) to a more favourable attitude of varying degrees (in other jurisdictions).

2. Special considerations for stop-payment orders

95. To dispose at the outset of a less difficult issue, one may ask whether an injunction may be granted despite the

fact that the beneficiary has not yet demanded payment. While courts have occasionally refused injunctions in such circumstances as premature, for lack of urgency, it is submitted that the prevailing judicial attitude of permitting injunctions is the preferable view, at least where the beneficiary has announced or threatened to call the guarantee.¹³⁴ The principal's interest in obtaining an early injunction is particularly obvious in those jurisdictions where the guarantor is not obliged to notify the principal of a demand, unless so provided in their agreement (e.g., France,¹³⁵ England¹³⁶; United States, where for that reason so-called notice injunctions were developed¹³⁷). Yet, an early injunction should not be categorically denied even if the guarantor is obliged to notify the principal, as provided for in Article 17 URDG (and discussed in A/CN.9/WG.II/WP.68, paragraphs 61 and 63).

96. Turning now to the basic issue of the judicial treatment of the above essential requirements of an injunction, it may be noted that courts often do not address all the requirements when granting injunctions, and they do so even less when refusing injunctions. Moreover, they frequently present their reasons without attributing them to one or the other particular requirement. As indicated by the bulk of court decisions referred to in the discussion on the fraud exception, the most crucial issue determining the fate of the principal's application for injunctive relief appears to be whether or not the instance of fraud or abuse was shown to be manifest or obvious. As previously mentioned (e.g., paragraphs 19-21, 27, 38 and 71), the emphasis is, in the context of preliminary proceedings, more on the showing to the satisfaction of the court than on the knowledge of the guarantor, as would be crucial for the decision of the guarantor whether or not to pay.

(a) Cause of action based on imminent breach of duty

97. National procedural laws on injunctive relief are essentially in accord with the following statements of English judges: "It is common ground that the Courts can only intervene by way of injunction in order to prevent the alleged breach of a legal duty owed by the defendant to the plaintiff, or by way of ancillary relief required by a party to proceedings who asserts a cause of action against the other party";¹³⁸ "the right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action".¹³⁹ Where the principal applies for a stop-payment order against the guarantor relying on fraud or abuse by the beneficiary, the cause of action could only be a claim against the guarantor to refrain from

¹³⁴E.g. Bertrams, *ibid.* (note 40) pp. 337-338.

¹³⁵Vasseur, *ibid.* (note 42) p. 370.

¹³⁶E.g. *Esal (Commodities) Ltd. Reltor Ltd. v. Oriental Credit*, *ibid.* (note 83), except where there is a course of dealing giving rise to some implied agreement.

¹³⁷E.g. *Stromberg Carlson Corp. v. Bank Melli*, 467 F. Supp. 530 (S.D.N.Y. 1979).

¹³⁸*United Trading v. Allied Arab Bank, C.A.*, [1985] 2 Lloyd's Rep. 559 (per Ackner, L.J.).

¹³⁹*The Siskina, H.L.*, [1978] 1 Lloyd's Rep. 6 (per Lord Diplock).

¹³¹E.g. *Caulfield v. Board of Education*, 583 F. 2d 605 (2d Cir. 1978).

¹³²E.g. *Harris Corp. v. National Iranian Radio and Television*, 691 F. 2d 1344 (11th Cir. 1982); see also Task Force Report (note 4) pp. 69-71.

¹³³E.g. Costa, *ibid.* (note 41) pp. 203-205.

paying in the face of abuse since it would otherwise breach a duty owed to the principal.¹⁴⁰

98. The relevant duty of the guarantor is mostly derived from the reimbursement agreement or similar banking contract with the principal and regarded as a fiduciary duty or an ancillary duty of care.¹⁴¹ The guarantor's duty to protect the principal's financial interest in the case of a manifestly abusive demand by the beneficiary is supported by the consideration that the beneficiary is not entitled to payment since abuse constitutes an inherent limit to its right and turns it into an empty formal legal position.¹⁴²

99. Where, in the case of an indirect guarantee, the principal applies for a stop-payment order against the second bank, the cause of action cannot be based on a contractual duty since no contractual relationship exists between that bank and the principal. Here, a duty of care derived from the tort of negligence may be relevant, as recognized in an English decision: "It is arguable that a bank owes a duty of care to the party ultimately liable at the end of the chain not to pay out on a performance bond if, on the information then available to it, there is clear evidence that the beneficiary's demand is fraudulent, because it is the party at the end of the chain who may have to bear the ultimate loss."¹⁴³

100. The existence of a duty to refrain from payment on an abusive demand has been denied in some decisions by holding that a breach of duty might lie in demanding reimbursement or in debiting the principal's account but not in the act of payment to the beneficiary and that the principal was not adversely affected since the guarantor was not entitled to reimbursement if it paid on a manifestly abusive demand.¹⁴⁴ The additional considerations underlying these decisions relate primarily to the independent nature of the guarantor's undertaking and the position of the bank.

(b) Irreparable harm and balance of convenience

101. The decisions referred to in the previous paragraph emphasize the maxim "pay first, litigate later" and the abstract or independent nature of the guarantor's undertaking and conclude that the guarantor should on its own ("autonomously") decide whether or not to pay, without following instructions by the principal. An injunction

against the guarantor would interfere with a relationship to which the principal is not a party, and an injunction would be contrary to the interests of the beneficiary that is not party to the preliminary proceedings and thus unable to present its case.

102. The above considerations have been advanced by some other courts in support of utmost restraint in the context of preliminary proceedings. For example, an English judge, while not denying the guarantor's duty to refuse payment upon an obviously fraudulent demand, deemed restraining orders as inappropriate since they interfered with the bank's obligations and since the principal, in case of breach of that duty, was protected by a claim for damages against the bank.¹⁴⁵ Additional considerations advanced in other decisions or by commentators include the possible danger to the bank's international reputation, the possibility of retaliatory measures against foreign branches and the possibility of conflicting court decisions abroad.

103. The fact that most courts, including German, Belgian and English courts, do not generally deny the availability of stop-payment orders does not mean that they regard all the above considerations as irrelevant. Depending on the particular circumstances of the case, some of the considerations contributed to decisions rejecting injunctions, particularly in cases of indirect guarantees. However, the considerations were not viewed as justifying a categorical denial of injunctive relief. The essential reason is the same as that noted in respect of the cause of action (paragraphs 99-100 above), namely the incidence of fraud or abuse.

104. In line with the recognition of the fraud exception in substantive law, the independent nature of the guarantor's undertaking cannot present an insurmountable obstacle when it comes to procedural protection. The conformity with substantive law is evidenced by the uniform judicial attitude to disallow any stop-payment order based on instances of the underlying transaction other than those recognized as a basis of manifest fraud or abuse.

105. As regards the position of the bank and any possible adverse effect on its reputation, it is recognized that the guarantor is in a dilemma in that it is torn between fulfilling its undertaking towards the beneficiary and bearing in mind the interests of the principal. However, in the case of manifest fraud or abuse it would not be appropriate and fair to one-sidedly favour the interest of the beneficiary or to grant the guarantor, in support of its reputation, the autonomous power to pay despite liquid proof of the beneficiary's fraud or abuse.¹⁴⁶ As stated by an English judge (see paragraph 23 above), "it cannot be in the interests of international commerce or of the banking industry as a whole" that letters of credit and performance bonds are "misused for the purposes of fraud". Moreover, the reputation of a bank is less affected by a court order enjoining payment than by its own decision not to pay.

¹⁴⁰E.g. Bertrams, *ibid.* (note 40) p. 339; however, Richter, *ibid.* (note 46) pp. 279-280, referring to a Swiss decision (BGE 100 II 151), mentions the possibility of an injunction, based on a cause of action against the beneficiary, against the guarantor as a third party, in particular, since the principal is linked with that third party by a contractual relationship that is closely connected with the underlying transaction.

¹⁴¹E.g. *Landgericht Frankfurt*, 11 December 1979, *Wertpapier-Mitteilungen* 1981, 284; von Westphalen, *ibid.* (note 87) pp. 262, 270.

¹⁴²E.g. *Bundesgerichtshof*, 12 March 1984, *Wertpapier-Mitteilungen* 1984, 684.

¹⁴³*United Trading v. Allied Arab Bank, C.A.*, [1985] 2 *Lloyd's Rep.* 560 (per Ackner, L.J.).

¹⁴⁴*Oberlandesgericht Stuttgart*, 11 February 1981, *Wertpapier-Mitteilungen* 1981, 631; *Oberlandesgericht Frankfurt*, 27 April 1987, *Wertpapier-Mitteilungen* 1988, 1480; similarly, *Tribunal de Commerce de Bruxelles*, 7 November 1988, *Dalloz* 1989 *Somm.* 148.

¹⁴⁵*R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.*, Q.B., [1977] 2 *All.E.R.* 862 (per Kerr, J.)

¹⁴⁶E.g. von Westphalen, *ibid.* (note 87) pp. 286-288.

106. As regards the alleged lack of the principal's interest in preventing payment on the ground that it suffers no injury in case of wrongful honour (see paragraph 100 above), the following reasons have been advanced in reply.¹⁴⁷ The principal's harm occurs already before the guarantor asks for reimbursement since the very fact of payment to the beneficiary adversely affects the principal's legal position. For example, where the principal has an account with the guarantor the debiting of that account would reverse the procedural roles of the parties. The principal is in the same disadvantageous procedural position in any proceedings for damages against the guarantor. Above all, if the principal later succeeds in establishing the beneficiary's fraud or abuse but fails to demonstrate the bank's awareness thereof, the principal is left with a loss that could have been avoided.¹⁴⁸

107. As regards the above objection (paragraph 101) that the beneficiary does not participate in the preliminary proceedings on a stop-payment order, it may be noted that at least one court denied the principal's legal interest unless it initiated concurrent preliminary proceedings against the beneficiary,¹⁴⁹ and that it is reportedly the prevailing practice in the Netherlands to seek injunctions against both the guarantor and the beneficiary.¹⁵⁰ While the non-participation of the beneficiary is generally not regarded as a categorical objection to preliminary proceedings against the guarantor, it may become relevant in the context of weighing the evidence presented by the principal. For example, in an English case referred to earlier (paragraphs 23, 49 and 99), the court did not consider itself entitled to draw any strong inference of guilt from the beneficiary's silence since that silence might have been prompted by the understandable desire not to submit to a jurisdiction other than the one stipulated in the underlying transaction.¹⁵¹

B. Restraining orders against beneficiary

108. It is submitted that court orders restraining the beneficiary from demanding or accepting payment or obliging it to withdraw its demand do not give rise to special objections.¹⁵² While the independent nature of the guarantor's undertaking is to be recognized, the above considerations relating to the position of the bank and its relationship with the principal would not apply to such restraining orders.

109. However, two procedural points should be mentioned that arise from the fact that the place of business of the beneficiary is in a country other than that of the principal. Since usually the courts at the place of business or residence of the party against which injunctive relief is

sought are competent for such measures,¹⁵³ it may be doubtful whether a restraining order may be sought in another country; it appears that this is possible, at least in some jurisdictions, where, in line with the above-mentioned procedure (paragraph 107), injunctive relief is sought against the guarantor and the beneficiary as co-defendants.

110. A second point that equally arises in respect of a stop-payment order against a foreign guarantor is whether a court, if competent at all, would refrain from granting an injunction on the ground that its recognition abroad is unlikely. It appears that there exists considerable disparity in procedural laws and the attitudes of courts in various jurisdictions,¹⁵⁴ not only as regards the relevance of foreign recognition to such issues as the principal's legal interest or the balance of convenience but also on specific questions such as whether an injunction may be granted without any sanction that would anyway be unenforceable abroad.¹⁵⁵

C. Attachment and similar measures

111. Principals may seek to prevent the beneficiary from profiting from fraud or abuse by attaching its payment claim against the guarantor. Without going here into details of the different procedural requirements for such measures in different jurisdictions, it may be noted that such attempts have rarely been successful.

112. While the attachment is often refused on the same grounds as a stop-payment order, namely that the principal did not establish manifest fraud or abuse as the basis of its claim the realization of which it seeks to secure by attaching the beneficiary's payment claim or by blocking funds, the more common obstacles in various jurisdictions are of a more basic nature. For example, the principal may be taken, as in the related field of commercial letters of credit, as having impliedly waived any right to prevent the performance of the guarantor's undertaking by means of an attachment,¹⁵⁶ or the principal's application for an attachment may be viewed as necessarily lacking any foundation since the payment claim that it seeks to attach is, based on the principal's own allegations, non-existent or without value or since, based on the same allegations, the principal cannot have any claim for damages against the beneficiary.¹⁵⁷

D. Tentative conclusions

113. It is submitted that the uniform law would not fulfil its task of providing legal certainty and uniformity if it would only deal with the fraud exception in terms of substantive law and not address the matter of injunctions and similar court measures; however, there may be little

¹⁴⁷Ibid., pp. 292-294.

¹⁴⁸E.g. Bertrams, *ibid.* (note 40) p. 345.

¹⁴⁹*Landgericht Dortmund*, 5 April 1988, *Wertpapier-Mitteilungen* 1988, 1695.

¹⁵⁰Bertrams, *ibid.* (note 40) p. 347.

¹⁵¹*United Trading v. Allied Arab Bank, C.A.*, [1985] 2 *Lloyd's Rep.* 565 (per Ackner, L.J.).

¹⁵²E.g. Bertrams, *ibid.* (note 40) p. 338.

¹⁵³E.g. Richter, *ibid.* (note 46) p. 283.

¹⁵⁴E.g. Bertrams, *ibid.* (note 40) pp. 349-350, 360-361.

¹⁵⁵E.g. von Westphalen, *ibid.* (note 87) pp. 305-306.

¹⁵⁶E.g. Vasseur, *ibid.* (note 42) p. 377.

¹⁵⁷E.g. von Westphalen, *ibid.* (note 87) pp. 309-317.

need for dealing with attachments. A first reason may be seen in the fact that, as noted above (paragraph 90), the issue of fraud or abuse is of primary practical relevance in the context of preliminary proceedings. Yet, a second reason, of equal importance, may be seen in the need to address the intricate relationship between elective dishonour by the guarantor and the involvement of courts in ordering injunctions, as alluded to earlier (e.g. paragraph 28) and addressed by Section 5-114 UCC, paragraph 12.

114. In devising appropriate provisions for the uniform law, the Working Group might wish to take into account the following considerations. While one may hesitate to attempt a unification effort in the field of procedural law,

it is submitted that these hesitations should be overcome with a view towards ensuring certainty and uniformity in the use of guaranty letters as truly international instruments. In order to achieve that goal, provisions are required on such issues as the standard of proof and the admissible means of evidence, the cause of action as a basis for injunctions, the considerations determining the danger of serious harm and the balance of convenience or similar factors, the appropriateness of requiring a security from the principal and of envisaging payment into court of the disputed amount. Moreover, issues of court competence and recognition of injunctions need to be addressed, as may be done in connection with the discussion on conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71).

**2. 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
(A/CN.9/WG.II/WP.71) [Original: English]**

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INTRODUCTION

1. The present note on conflict of laws and jurisdiction is the fourth in a series of notes discussing possible issues of a uniform law on independent guarantees and stand-by letters of credit. The third note, also before the Working Group at its fifteenth session, discusses fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70). The issues discussed in the first note, i.e. substantive scope of uniform law, party autonomy and its limits, and rules of interpretation (A/CN.9/WG.II/WP.65), were considered by the Working Group at its thirteenth session (A/CN.9/330). The issues discussed in the second note, i.e. amendment, transfer,

expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68), were considered by the Working Group at its fourteenth session (A/CN.9/342).

2. The Working Group, at its twelfth session (A/CN.9/316, paras. 163-171), noted that questions of applicable law and jurisdiction were likely to arise in the context of international guarantees and commercial letters of credit. While some doubts were expressed, the Working Group was agreed that the uniform law should address the question of the applicable law, in addition to the determination of its own territorial scope of application. The Working Group also considered the basis and scope of dispute settlement clauses. The Working Group was

divided on whether the uniform law should address the question of court jurisdiction for those cases where the guarantee contained neither an arbitration clause nor a choice-of-forum clause.

3. The Working Group was agreed that the questions relating to applicable law, arbitration and court jurisdiction required further consideration and study. Since difficult issues of conflict of laws were involved, it was suggested that the Secretariat, in its preparatory work, might have cooperative consultations with the Hague Conference on Private International Law.

4. Pursuant to that suggestion, the present note has been prepared in consultation with the Deputy Secretary-General of the Hague Conference.¹ It is based on the considerations and tentative conclusions of the Working Group at its twelfth session and takes into account the discussions of the Working Group earlier at that session (A/CN.9/316, paras. 111-120) on the relevant Articles of the ICC draft Uniform Rules for Guarantees (URG).

I. POSSIBLE RULES ON CONFLICT OF LAWS

A. Distinguished from rule on territorial scope of application

5. At the fourteenth session of the Working Group, it was pointed out during the discussion on draft article 1 of the uniform law that the decision on the territorial scope of application of the uniform law would in some respects depend on whether the uniform law would eventually be adopted in the form of a convention or in the form of a model law. In the latter case the question could be settled by rules on conflict of laws that would probably be included in the model law (A/CN.9/342, para. 16). It may be added that rules on conflict of laws could be included in the uniform law even if it were to be adopted in the form of a convention.

6. Since it is not yet decided whether the uniform law will eventually be adopted in the form of a convention or in the form of a model law, both options need to be kept in mind when considering the appropriateness of including in the uniform law provisions on conflict of laws and, possibly in addition, a rule on the territorial scope of application. In those considerations account should be taken of the difference in purpose and effect between

provisions on conflict of laws and a rule on the territorial scope of application.

7. The effect of a rule on the territorial scope of application, in contrast to provisions on conflict of laws, is limited in two respects. Firstly, the rule covers only those international fact situations that are territorially linked with the respective State, namely the contracting State or States in the case of a convention or the State enacting legislation based on the model law. It is in view of this effect that a rule on the territorial scope of application is less common and appropriate in a model law than in a convention. Secondly, a rule on the territorial scope of application concerns exclusively the provisions of the legal text of which it forms a part.

8. In contrast, a rule on conflict of laws is, firstly, designed for all international fact situations of the relevant subject-matter whether or not they are territorially linked to the State that has adopted that rule. Since those fact situations that are territorially linked to that State are thus included, it would be inappropriate for a model law to contain, in addition to the all-embracing conflict-of-laws rule, a rule on its territorial scope of application. Secondly, a conflict-of-laws rule incorporated in the uniform law would not necessarily be limited to the issues addressed in the uniform law, but would cover all the issues determined by the conflict-of-laws rule itself as the so-called domain or scope of the applicable law.

9. In this connection, it may be recalled that during the review of the then current draft Article 27 of the URG ("Unless otherwise provided in the Guarantee, the applicable law shall be that of the Guarantor's place of business . . .") the treatment of the issue of the applicable law was viewed as incomplete and imprecise, and questions were raised as to which of the relationships involved in a guarantee situation were covered by the Article (A/CN.9/316, paras. 112-113).

B. Relationships to be covered by conflict-of-laws rules

10. As regards the relationships for which conflict-of-laws rules might be included in the uniform law, it seems clear that the focus should be on the relationship between guarantor and beneficiary. That relationship may exist under a direct guaranty letter (issued at the request of a principal) or under an indirect one (issued upon the instructions of an instructing party acting at the request of a principal). Another guarantor-beneficiary relationship to be covered exists between a counter-guarantor and its beneficiary that itself issues a guaranty letter to the ultimate beneficiary. Conflict-of-laws rules for the guarantor-beneficiary relationship would also apply to a confirming guarantor and to guarantors under multiple or syndicated guaranty letters, whereby consideration should be given to whether an express statement to that effect in the uniform law seems necessary. Whether the conflict-of-laws rules for all those types of guarantors can be incorporated in a single provision depends in large measure on whether, failing a choice of law by the parties, the same connecting factor (e.g. guarantor's place of business) would be appropriate for all those types (see paragraphs 22-35 below).

¹The Secretariat wishes to express its gratitude to the Deputy Secretary-General who kindly gave his comments and advice despite his reservations about the inclusion of conflict-of-laws rules in the uniform law, at least if it were to be adopted in the form of a model law. In his view, only a separate convention on the law applicable to bank guarantees and stand-by letters of credit could regulate in sufficient detail the many questions concerning, in particular, the modalities and limits of choice-of-law clauses and the clear delimitation of the scope of the applicable law. In view of the almost uniformly accepted connecting factor (i.e. guarantor's place of business), he regards a regulation of the applicable law as needed and appropriate only if one were to aim, as he proposes, at a different connecting factor which would take into account the overall socio-economic situation of the contractual relationship for which the guarantee was given (see para. 35).

11. The Working Group may wish to consider whether the uniform law should include a conflict-of-laws rule for any other relationship such as that between principal and guarantor, principal and instructing party, instructing party and guarantor (apart from their relationship under a counter-guaranty letter), or issuing guarantor and confirming guarantor, or even the underlying relationship between principal and ultimate beneficiary. If any of those relationships (e.g., that between principal and guarantor) were to be dealt with in the substantive provisions of the uniform law, it would seem appropriate to include a conflict-of-laws rule for that relationship as well. As mentioned earlier (paragraph 8 above), the relationships and issues covered by the conflict-of-laws rule need not coincide with those dealt with in the substantive provisions of the uniform law. However, it might be surprising to see in the uniform law a conflict-of-laws rule for a relationship not dealt with in substantive terms, unless there are special reasons for its inclusion. Such reasons might include the experience of serious conflict-of-laws problems in a given relationship, or the idea of harmonizing the conflict-of-laws rule either for two relationships between the same parties (e.g., counter-guaranty letter and indemnity agreement between instructing party and guarantor; see paragraphs 28-29 below) or even for all above-mentioned relationships so as to embrace the overall socio-economic situation of which the guaranty letter forms a part (see paragraph 35 below).

12. After the Working Group has agreed on the relationships to be covered by conflict-of-laws rules in the uniform law, it may wish to discuss and decide on which law should be applicable and then determine the scope of that law (as discussed in paragraphs 36-43 below).

C. Designation of applicable law

13. As regards the designation of the applicable law, the Working Group was agreed at its twelfth session that the future provisions of the uniform law should be composed of two elements: recognition of party autonomy to choose the applicable law, and determination of the applicable law failing agreement by the parties (A/CN.9/316, para. 164).

14. Those two elements are seemingly contained in the current conflict-of-laws rule of the URDG. Draft Article 27 reads:

"Unless otherwise provided in the Guarantee or Counter-Guarantee, its governing law shall be that of the place of business of the Guarantor or Instructing Party (as the case may be), or if the Guarantor or Instructing Party has more than one place of business, that of the branch which issued the Guarantee or Counter-Guarantee."²

²Revised text of the Uniform Rules for Demand Guarantees, ICC Document No. 460/470-1/19 BIS and 460/470-10/1 BIS of 8 February 1991; this draft text constitutes the most recent version of the earlier ICC draft Uniform Rules for Guarantees that had been reviewed by the Working Group at its twelfth session (A/CN.9/316).

15. However, due to the contractual character of the URDG, the effect of the rule differs considerably from the effect of a provision in the uniform law, even if the two were formulated in identical terms. Since the URDG are contractual rules, the second element does not provide the final determination of the applicable law but merely a supplementary choice (like one in general conditions or standard forms) failing a specific choice by the individual parties. Another difference is that, again due to the contractual character of the URDG, either choice would be subject to a law that provided limits to party autonomy or contained requirements as to the form or modalities of the parties' agreement. In contrast, the uniform law, due to its statutory character, would provide the final determination and could impose any such limits or requirements.

1. Freedom of parties to choose applicable law

16. The Working Group was agreed at its twelfth session that any future rule on party autonomy should take a stand on whether the law chosen by the parties had to have a connection with the guarantee or letter of credit transaction or whether the freedom of choice was unlimited (A/CN.9/316, para. 166). In favour of requiring such a connection, one might refer to certain national laws of common law or civil law tradition that tend to limit party autonomy by requiring a certain connection (e.g., reasonable relation) to the given contractual relationship.³

17. However, the more common and modern attitude is to favour unlimited party autonomy, as evidenced, for example, by the Convention on the Law Applicable to Contractual Obligations (Rome 1980). The first sentence of its Article 3(1) reads: "A contract shall be governed by the law chosen by the parties." This liberal attitude seems particularly convincing in respect of the guaranty letter as an international commercial or financial instrument, irrespective of whether it would be classified as a mutual or unilateral contract or as a specialty of the law merchant. Moreover, as a practical matter, there would seem to be little need for limiting party autonomy since it is highly unlikely that a guarantor would include in the guaranty letter the choice of a law that bore no connection whatsoever to the case.

18. Other points to be considered in preparing an appropriate rule on party autonomy relate to the form and modalities of the choice by the parties. At the twelfth session, attention was drawn to the impact of the concept or nature of the guarantee in that it was difficult to conceive of an agreed choice if the guarantee constituted a unilateral undertaking, even if the guarantor had included the choice-of-law clause as a result of a request or assent by the beneficiary or the principal. It was stated in response that, at least from a practical point of view, the

³Pelichet, *Garanties bancaires et conflits de lois*, *Revue de droit des affaires internationales* 1990, 338 (citing the laws of Portugal, Poland and Spain and referring to case law in the United States and other common law countries).

choice-of-law clause in a guarantee should be given effect without the need for investigating the nature and genesis of the guarantee in question (A/CN.9/316, para. 166). It is submitted that, even from a legal point of view, there is no serious obstacle to giving effect to a choice-of-law clause in a guaranty letter even if the guarantor's undertaking is characterized as unilateral. The choice-of-law clause is, after all, but one of the terms of the guaranty letter and usually not the most important one. It should thus be treated in the same way as the entire guaranty letter the establishment of which has been discussed by the Working Group in the context of draft article 7 (A/CN.9/342, paras. 62-67).

19. Another point to be considered is whether only an express choice should be recognized or whether the choice may be implied or deduced from the terms of the guaranty letter or from surrounding circumstances. The 1980 Rome Convention provides in this regard that "the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case" (Article 3(1)). In a similar vein, the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods provides in Article 7(1) that "the parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety". Its predecessor of 1955 followed a more limited approach by requiring in Article 2 that the choice must be by "an express clause or result without doubt from the terms of the contract".

20. Yet another approach might be that followed, in the somewhat different context of excluding the application of the Convention, by article 6 of the United Nations Convention on Contracts for the International Sale of Goods ("The parties may exclude the application of this Convention . . ."). While not requiring an express clause, such wording could, however, entail uncertainty in two respects. Unlike the sample provisions cited in paragraph 19, it provides no guidance as to which kinds of implied or otherwise non-express choice would be recognized, and it might even be misinterpreted as requiring an express clause. Particularly the latter difficulty might ensue if one were to follow the approach of draft Article 27 URDG ("Unless otherwise provided in the Guarantee . . .").

21. Whichever approach the Working Group may agree on, consideration might be given to including in the uniform law a statement to the effect that any choice-of-law clause found in another relationship (e.g., between principal and guarantor, principal and beneficiary, principal and instructing party or instructing party and guarantor) has no bearing on the issue of the law applicable to the guarantor-beneficiary relationship. Such a statement, while technically unnecessary, might help to underline the independence of the guaranty letter in the context of the conflict of laws. If such a clarifying statement would be deemed useful, it should not be limited to the choice-of-law by the parties but should embrace the determination of the applicable law according to an objective criterion or connecting factor.

2. *Determination of applicable law failing choice by the parties*

22. As regards the possible content of a rule determining the applicable law in the absence of agreement by the parties, it was noted at the twelfth session that the most common solution appeared to be the law of the guarantor's country. It was suggested that the uniform law might follow this approach; however, consideration should be given to whether that solution met the interest of the parties in all circumstances (A/CN.9/316, para. 167).

(a) *Basic criterion: guarantor's place of business*

23. There are hardly any statutes on conflict of laws that deal specifically with bank guarantees or stand-by letters of credit. The 1982 Yugoslav Statute on Conflict of Laws is one such rare case. Its Article 20(17) reads:

"Failing a choice of the applicable law by the parties and unless the circumstances of the case indicate another law, the independent bank guarantee contract is governed by the law of the country where, at the time when the contract is concluded, the guarantor has its place of business."

24. Another example is Article 117 of Switzerland's 1987 Federal Statute on Private International Law which reads:

"1. If no law has been chosen, the contract is governed by the law of the country which it is most closely connected with.

2. The closest connection is presumed to exist with the country where the party that is to effect the characteristic performance has its habitual residence or, if the contract is entered into in the course of a professional or commercial activity, its place of business.

3. The characteristic performance is, in particular:

...

(e) in guarantee or surety contracts, the performance of the guarantor or surety."

25. In most jurisdictions, the same result obtains from conflict-of-laws rules that apply generally to contracts or obligations. While the criteria or concepts differ (e.g., closest connection, characteristic obligation or performance, professional activity, performance or execution of the contract (*lex solutionis*)), the solution in respect of the guarantor-beneficiary relationship is almost uniformly the same: the law of the guarantor's place of business.⁴

26. However, there appears to be less uniformity in respect of the relationship between counter-guarantor and guarantor and in those cases where a correspondent bank is involved as advising bank or paying agent. Those situations, which might call for exceptions or refinements, will be discussed later (paragraphs 28-35 below).

⁴For more details see Pelichet, *ibid.*, pp. 338-345.

27. Wherever the basic connecting factor is appropriate, it needs to be qualified for those cases where the guarantor has more than one place of business. Article 27 URDG provides in that case that the governing law shall be "that of the branch which issued the Guarantee . . ." (see paragraph 14 above). If that solution would be adopted for the uniform law, the term "branch" should probably not be used since it might be misunderstood, at least in the English language, as excluding the guarantor's headquarters or principal place of business. Instead, reference could be made to "that place of business where the guaranty letter was issued".

(b) *Possible refinement for cases involving more than one bank*

28. The Working Group may wish to consider whether the above basic rule needs to be refined for those cases where, in addition to one guarantor, a second bank is involved either as another guarantor or as an advising bank or as a paying agent. The most common case is an indirect guaranty letter that is counter-guaranteed by the instructing party. Since the guarantor and the counter-guarantor/instructing party usually have their place of business in different States, the two guaranty letters would be governed by different laws that might take a different stand, for example, on the effect of expiry dates or other terms determining the conformity of a call by the ultimate beneficiary. Another source of complications might be seen in the fact that a separate indemnity or reimbursement agreement, while serving essentially the same purpose as the counter-guaranty letter, tends to be governed by the law of the issuer of the indirect guaranty letter as the recipient of the instructions, by virtue of conflict-of-laws rules for contracts or for agency.

29. Suggestions for avoiding such complications by applying a single law, such as that of the issuer of the indirect guaranty letter,⁵ have not found wide support, mainly because the application of different laws is viewed as a necessary consequence of the independent nature of the counter-guarantor's undertaking.⁶ While the purpose of that undertaking is to indemnify the issuer of the indirect guaranty letter for its payment upon a conforming demand by the ultimate beneficiary, the law determining the conformity of the demand is only of indirect relevance (as a fact) to the decision about the counter-guarantor's payment obligation under the law applicable to the counter-guaranty letter. Where a separate indemnity or reimbursement agreement exists, the issuer of the indirect guaranty letter would anyway have two causes of action against the counter-guarantor/instructing party with often different content such as the amount of reimbursement. It may be added that any banks desirous of applying a single law may achieve that result by appropriate choice-of-law clauses. Finally, the promulgation of the uniform law and its adoption by many States would go a long way towards reducing any remaining concerns.

⁵E.g. Bertrams, *Bank Guarantees in International Trade* (Amsterdam 1990) p. 380; Richter, *Standby Letter of Credit* (Zürich 1990) p. 98.

⁶E.g. Dohm, *Bankgarantien im internationalen Handel* (Bern 1985) p. 145; Kleiner, *Bankgarantie* (4th ed., Zürich 1990) p. 252.

30. Turning now to the less frequent situations where an advising bank in a different State is involved as a confirming guarantor, as an advising or notifying bank or as a paying agent, reference may be made to a recent survey of English cases dealing with conflict-of-laws issues relating to commercial letters of credit, stand-by letters of credit and bank guarantees.⁷ The author concluded that there existed a very strong presumption that, except for the relationship between the applicant for the credit and the issuing bank, all aspects of the letter of credit are governed by the law of the place at which the advising bank carries on business; the presumption would not apply if the law of the advising bank was excluded by a choice-of-law clause or by surrounding circumstances.

31. To start with the case where the advising bank confirms the undertaking of the issuing guarantor, the application of different laws might lead to the result that the payment obligation of the issuing guarantor is judged differently from that of the confirming guarantor even if cast in identical terms. Any such difference might be viewed as undesirable in view of the fact that, unlike the case of a counter-guaranty letter, both payment obligations are owed to the same beneficiary. If one were thus to aim at a single law, the above presumption in favour of the law of the advising/confirming guarantor would have the advantage of pointing to the country where payment is most likely to be demanded and of aligning the law of both payment obligations to that most likely governing the inter-bank relationship. However, it may again be pointed out that the application of different laws is a consequence of the independent nature of the undertakings, that banks may avoid that result by appropriate choice-of-law clauses and that the uniform law promises to alleviate remaining concerns.

32. It is submitted that it would be even less appropriate to apply to the undertaking of the issuing guarantor the law of an advising bank that merely advises or notifies the guaranty letter. What might be considered, however, is whether the uniform law should include a separate rule on the law applicable to questions relating to the obligations of an advising bank or at least determine whether those questions fall within the scope of the law applicable to the guaranty letter (see paragraph 38 below).

33. Different considerations may apply in those cases where a second bank is entrusted with receiving and examining a payment demand and paying on behalf of the issuing guarantor. It appears that this situation constituted the essence of those English cases of non-confirming advising banks on which the above presumption in favour of the law of the advising bank was based (in fact, in one of the main cases relied upon in the survey the bank where payment was to be made was not the advising bank⁸). The

⁷Schmitthoff, Conflict of laws issues relating to letters of credit: an English perspective, in: *Current Problems of International Trade Financing* (2nd ed. by Ho/Chan, Singapore 1990) pp. 103-114. In the same publication, a critical appraisal of English court decisions, noting their consistent application of the *lex fori*, is presented by Gopal, English courts and choice of law in irrevocable documentary letters of credit (pp. 115-136).

⁸*Power Curber International Ltd. v. National Bank of Kuwait S.A.K.*, C.A. [1981] 2 Lloyd's Rep. 394.

recurrent reasoning was that the place where the bank must perform its obligation under a letter of credit determines the proper law to be applied to the letter of credit.⁹ As was stated in a bank guarantee case concerning an injunction, both from the point of view of the payer and from that of the payee, payment in one country can be a very different matter from payment in another.¹⁰

34. The Working Group may wish to consider whether any conflict-of-laws consequences should be drawn from the apparent importance of the place of payment which, after all, is the place of performance of the main obligation under the guaranty letter. If so, one possibility would be, in line with the above presumption, to declare the law of the place of payment to be the law applicable to the guaranty letter; this could be done either by providing an exception to the basic rule for those rare cases where payment is to be made in a State other than that of the guarantor's place of business or by adopting, in lieu of the above basic rule, a general rule referring to the place of payment since it coincides with that of the guarantor's place of business (and the issuance of the guaranty letter) in all but the most exceptional cases. Another possibility might be to take the issues relating to payment, including receipt and examination of the demand, out of the scope of the law applicable to the guaranty letter and to subject them to another law, namely that of the State where payment is to be made. However, this possibility may be viewed as undesirable in that it would split the rights and obligations under a guaranty letter into two parts governed by different laws.

35. Finally, it may be noted that the thrust of the above presumption was to have a single law govern all relationships in a letter of credit transaction, except for the relationship between the applicant and the issuing bank. In this connection, mention may be made of an even more embracing suggestion. Based on the view that the application of different laws to a socio-economic situation that undeniably forms a whole is regrettable and a possible source of problems, it has been suggested that the underlying transaction and the various bank guarantees should be governed by one and the same law.¹¹ A possible basis for determining that law was seen in Article 4(5) of the 1980 Rome Convention according to which the presumption in favour of the place of business of the party who is to effect the characteristic performance shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. It was thus said to be possible to identify a centre of gravity, a socio-economic function of all the contractual relationships which would be the basis for attaching these to a single law.¹² However, even leaving

aside the considerable uncertainty of application of this integral approach, one may here again (see paragraph 29 above) point out that the independent nature of each guarantor's undertaking might be called into question, that parties desirous of applying a single law to the entire transaction network may achieve that result by appropriate choice-of-law clauses, and that the uniform law promises betterment by reducing differences between national laws.

D. Scope of applicable law

36. On the assumption that the Working Group will favour a conflict-of-laws rule that is limited to the relationship between guarantor and beneficiary (including relationships between counter-guarantors, confirming guarantors or syndicated guarantors and their respective beneficiaries; see paragraph 10 above), the following discussion may assist the Working Group in determining the scope or domain of the applicable law. While the issues falling within the scope of the applicable law need not coincide with those issues dealt with in the substantive provisions of the uniform law (see paragraph 8 above), one may use the substantive provisions as a basis for considering the kind of issues that are expected to be dealt with and governed by the applicable law as determined by the conflict-of-laws rule.

37. The applicable law should thus cover the establishment and amendment of the guaranty letter, including the questions of form and of time of effectiveness; however, it would not cover questions relating to the capacity of parties or to the authority of individuals to bind or act on behalf of others. The applicable law would determine the meaning and effect of an expiry clause as well as any other term contained in the guaranty letter. It would also decide on the transferability of the beneficiary's rights, including the discharging effect of the guarantor's payment to a transferee.

38. The applicable law should, in particular, answer the questions arising in the most crucial situation in the life of a guaranty letter, that is, when the beneficiary demands payment. It would govern the assessment of the conformity of the demand with the terms and conditions of the guaranty letter and set the standard of the guarantor's duty to examine the demand, including the regularity of any required documents. As regards the standard of examination, consideration might, however, be given to excluding that issue from the scope of the applicable law for those cases where the examination is to take place in a different State, since document checkers may not be prepared to handle documents under laws other than their own (see paragraph 32 above). The idea of excluding standards of examination from the scope of the applicable law and localizing them has inspired, for example, Article 13 of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods ("In the absence of an express clause to the contrary, the law of the State where inspection of the goods takes place applies to the modalities and procedural requirements for such inspection").

⁹E.g. *Offshore International S.A. v. Banco Central S.A.*, C.A. [1976] 2 Lloyd's Rep. 402.

¹⁰The "Bhoja Trader", C.A. [1981] 2 Lloyd's Rep. 258 (per L. J. Donaldson).

¹¹Pelichet, *ibid.* (note 3) pp. 345-348, referring to an earlier proposal by Stoufflet, *L'ouverture de crédit bancaire en droit international privé*, *Clunet* 1966, 582, and Bonelli, *La Convention de Rome du 19 juin 1980 et la loi applicables aux opérations bancaires*, *Revue de droit des affaires internationales* 1985, p. 389.

¹²Pelichet, *ibid.*, p. 347.

39. It is submitted that the applicable law should also govern the question of whether the guarantor's obligations include the duty to notify the principal of a payment demand, in the absence of a clause to that effect in its contract with the principal.¹³ The fact that this question affects the interests of the principal should not be viewed as necessitating its exclusion from the scope of application; after all, the same is true in respect of many other questions relating to the guarantor's obligations, such as examining the conformity of the demand with the terms of the guaranty letter or invoking valid objections to payment.

40. As regards objections to payment, the applicable law would determine the kinds of admissible objections and any limits or requirements for invoking them, although a different law might indirectly become relevant as, for example, in certain cases of manifest abuse or fraud (as discussed in A/CN.9/WG.II/WP.70). It is submitted that the same considerations should apply to the admissibility of a set-off, which is technically not an objection to payment but a modality of paying a recognized claim (as discussed in A/CN.9/WG.II/WP.70). However, certain objections to payment or other requirements affecting payment (e.g., restrictions on currency or foreign exchange or other matters of public policy) might be derived from laws other than the law applicable to the guaranty letter.¹⁴

41. Finally, the applicable law would govern such questions as whether the beneficiary may claim interest in case of late honour or damages in case of wrongful dishonour of its demand. Conversely, it would govern such questions as whether the guarantor has a right to reclaim from the beneficiary its payment in a case of wrongful honour or an amount erroneously paid in excess of the sum owed. Both sets of questions should, irrespective of whether they will be dealt with in the substantive provisions of the uniform law, fall within the scope of the applicable law as determined by the conflict-of-laws provisions of the uniform law.

42. In the light of the above presentation of issues, the Working Group may wish to consider how the scope of the applicable law should be formulated in the future conflict-of-laws rule of the uniform law. One approach, as used in the Yugoslav Statute and the URDG (see paragraphs 14 and 23 above), would be to speak simply of "the law governing the guaranty letter". However, one might doubt whether such a formula would do justice to the complexity of the matter and provide sufficient guidance to those applying the conflict-of-laws rule of the uniform law.

43. Another approach could be inspired by the conflict-of-laws rule in draft article 18 of the Model Law on International Credit Transfers, which describes its scope with the words "the rights and obligations arising out of

a payment order", with an exception for the question whether the actual sender of the payment order had the authority to bind the purported sender.¹⁵ If one were to follow that approach in the uniform law, one could refer to "the rights and obligations arising out of a guaranty letter", with possible exceptions for issues falling outside the scope of the applicable law (e.g., capacity of parties, authority of agents, or, possibly, examination of documents abroad) and with possible clarifications concerning the inclusion of issues that not everyone might expect to fall within the scope of the applicable law (e.g., establishment and amendment, duty to notify principal, set-off against payment demand).

II. JURISDICTION

44. The Working Group may wish to take current draft Article 28 of the URDG as a basis for its consideration of issues relating to the settlement of disputes and, in particular, of jurisdiction. Draft Article 28 on jurisdiction reads:

"Unless otherwise provided in the Guarantee or Counter-Guarantee, any dispute between the Guarantor and the Beneficiary relating to the Guarantee or between the Counter-Guarantor and the Guarantor and relating to the Counter-Guarantee shall be settled exclusively by the competent court of the country of the place of business of the Guarantor or Counter-Guarantor (as the case may be) or, if the Guarantor or Counter-Guarantor has more than one place of business, by the competent court of the country of the branch which issued the Guarantee or Counter-Guarantee."¹⁶

45. As was noted in respect of draft Article 27 URDG (paragraphs 14-15 above), the effect of such a rule differs considerably from the effect of a provision in the uniform law, even if the two were formulated in identical terms. Since the URDG are contractual rules, the reference to the exclusive jurisdiction of the competent court of the guarantor's country constitutes merely a supplementary choice of forum, failing a specific choice by the parties, and either choice would be subject to a procedural law that might establish certain limits or requirements. In

¹³Draft article 18 (A/CN.9/344, annex) reads as follows:

"(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."

¹⁴E.g. von Westphalen, *Die Bankgarantie im internationalen Handelsverkehr* (2nd ed., Heidelberg 1990) p. 330.

¹⁵Von Westphalen, *ibid.* pp. 330-334.

¹⁶Revised text of the Uniform Rules for Demand Guarantees (note 2).

contrast, any provision on jurisdiction in the uniform law would constitute a legislative determination of jurisdiction or lack of jurisdiction of the courts in the State adopting the uniform law. It may be added that, in this respect, a provision as part of the *lex fori* is more limited in scope than a conflict-of-laws rule with its universal scope (see paragraph 8 above).

A. Arbitration or forum clause

46. The proviso in draft Article 28 URDG ("Unless otherwise provided in the Guarantee . . .") does not expressly state whether it embraces only the choice of a court or jurisdiction or, as one may assume, also an arbitration clause. When the Working Group reviewed that proviso in the context of a previous version of the draft Article, a view was expressed that it should be redrafted along the following lines: "Unless arbitration or the competent court is provided for in the Guarantee . . ." (A/CN.9/316, para. 119).

47. It is submitted that the proviso in a rule on jurisdiction should, for the sake of certainty, be formulated along the lines suggested in the Working Group, although arbitration clauses in bank guarantees and stand-by letters of credit appear to be rare, except for syndicated guarantees.¹⁷ While arbitration may not always be appropriate for settling disputes arising under a guaranty letter, in particular as regards urgent decisions and provisional measures of protection, it is up to the parties to make that assessment.

48. As regards the choice of either arbitration or court jurisdiction, the same observations were made, during the twelfth session of the Working Group, as in the context of choice-of-law clauses concerning the uncertain basis of the parties' agreement if the guarantee constituted a unilateral undertaking (A/CN.9/316, para. 169). The response submitted in respect of choice-of-law clauses (paragraph 18 above) should apply here with equal force.

49. What remains to be considered is whether the uniform law, in view of its statutory character, should deal with questions concerning the validity and effect of a choice-of-forum clause, in particular, one that simply refers to the courts of State X or to a specific court located in State X. One may ask, for example, whether such a clause confers exclusive jurisdiction upon the chosen court, irrespective of whether that court would otherwise be competent, or whether it merely confers upon an otherwise not competent court jurisdiction that would concur with that of another court. Another question would be whether the choice-of-forum clause might apply to interim or provisional measures, which may be of special relevance in the context of guaranty letters. It may be noted, in this context, that the 1965 Hague Convention on the Choice of Court provides in Article 6(4) that "every court other than the chosen court or courts shall decline

jurisdiction except . . . for the purpose of provisional or protective measures". Special treatment is accorded to provisional and protective measures also by Article 24 of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Brussels 1968), which recognizes for such measures the jurisdiction of the courts of a State under its domestic law even if under the Convention the courts of another State would be competent to decide on the substance of the case in the main proceedings. Yet another question may be whether a court chosen for settling disputes within a given relationship might be competent for proceedings involving a third party as co-defendant or addressee of a provisional measure.

50. One may come to the conclusion that these and similar questions relating to choice-of-forum clauses need not be dealt with in the uniform law, taking into account the basic purpose of the uniform law as well as the fact that it would, where adopted, become part of a legal system expected to provide answers to these questions. In respect of some such questions, the situation may, however, be different when it comes to the statutory determination of court jurisdiction failing a choice by the parties.

B. Determination of jurisdiction failing choice by parties

51. At its twelfth session, the Working Group considered whether the uniform law should address the question of court jurisdiction for those cases where the guarantee contained neither an arbitration clause nor a choice-of-forum clause. Under one view, an attempt should be made to agree on an acceptable provision on court jurisdiction. Under another view, the uniform law should not deal with this issue (A/CN.9/316, para. 170). It appears that the divergent views within the Working Group relate to the need or appropriateness of including in the uniform law a rule on jurisdiction at all and not to the particular court jurisdiction, such as the one specified in draft Article 28 URDG.

52. It seems indeed appropriate to confer jurisdiction on the courts of the State where the guarantor has its relevant place of business (in line with the basic connecting factor for the conflict-of-laws rule; see paragraphs 23-27 above). As reported in an extensive survey of case law in many countries, "beneficiaries and second issuing banks have invariably brought proceedings for payment in the (first) bank's domicile, which is universally recognized as a proper forum".¹⁸ Jurisdiction of the courts in the State where the guarantor has its place of business is in line with the fundamental principle expressed, for example, in Article 2 of the 1968 Brussels Convention (" . . . persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State"). It would often be justified on the additional basis of the place of performance of the obligation in question (recognized, for

¹⁷E.g., Dohm, *ibid.* (note 6) pp. 143, 146.

¹⁸Bertrams, *ibid.* (note 5) p. 373.

example, as special jurisdiction in Article 5(1) of the 1968 Brussels Convention).

53. However, national rules of jurisdiction based on the same principles may in less frequent cases point to the courts of the beneficiary's country, for example, for proceedings brought by the guarantor against the beneficiary or when the place of payment is in the beneficiary's country. Consideration may thus be given to aiming in the uniform law at exclusive jurisdiction in the guarantor's country, since otherwise the courts in the beneficiary's country would in such cases retain jurisdiction. That aim could be furthered by a rule according to which the courts of any State other than that of the guarantor shall decline jurisdiction unless the parties have chosen its courts. If one were to combine that rule with the positive rule designed for the guarantor's country, a provision in the uniform law to become part of the *lex fori* of the adopting State might be formulated as follows:

"(1) The courts of [this] [a Contracting] State shall exercise jurisdiction only if:

(a) the guarantor has its place of business in the territory of that State, unless the guaranty letter provides for arbitration or for the exclusive jurisdiction of the courts of another State;

or

(b) the guaranty letter confers jurisdiction upon the courts of that State.

(2) The jurisdiction conferred upon the courts of [this] [a Contracting] State by the provisions of paragraph (1) of this article shall be exclusive, unless the guaranty letter contains a non-exclusive choice-of-forum clause."

54. The Working Group may wish to consider refining this provision with a view to clarifying the scope of the court jurisdiction. The provision might, for example, determine whether the jurisdiction conferred by it covers all disputes between the guarantor and the beneficiary (as, e.g., provided for in draft Article 28 URDG) or whether certain types of disputes (e.g. tort claims) would be excluded. As mentioned in the context of choice-of-forum clauses (paragraph 49 above), it might address the question whether the jurisdiction conferred by it extends to provisional measures, and whether jurisdiction would be exercised over a third party, for example, a counter-guarantor or confirming guarantor as co-defendant or as addressee of an injunction.

55. Even if the uniform law would answer all these questions in favour of a wide scope of jurisdiction, the resulting scope of jurisdiction would still be limited and constitute but a segment of the realm of possible court involvement in guaranty letter transactions. The main limiting factor is that the rule on jurisdiction covers only the relationship between guarantor and beneficiary (including that between counter-guarantor and guarantor) and thus leaves out the person most likely to initiate

proceedings, namely the principal (or possibly the instructing party).

C. Possible expansion of rule on jurisdiction to cover principal

56. The Working Group may thus wish to consider broadening the rule on jurisdiction so as to cover at least certain proceedings involving the principal (e.g., injunction enjoining payment by the guarantor or counter-guarantor, restraining orders against the beneficiary or the guarantor under an indirect guaranty letter). Such broadening would increase the usefulness of the rule. However, it would be a complex and difficult task in view of the variety of possible fact situations and the various relationships involved. To mention only a few questions that might have to be addressed, one may ask, for example, whether the courts of the State where an indirect guaranty letter is issued should accept jurisdiction for an application by a foreign principal to enjoin payment; whether the courts of the State of the counter-guarantor may grant such an injunction against the foreign guarantor (second issuing bank); or whether any courts outside the beneficiary's country would be competent to issue restraining orders against the beneficiary and, in particular, whether the courts of the State of the issuer of a direct guaranty letter have jurisdiction over the foreign beneficiary as a co-defendant in proceedings brought by the principal.

57. On such questions of considerable practical importance, national laws and court decisions do not always provide certain, let alone uniform, answers. While that may create difficulties in finding acceptable solutions for the uniform law, it may be taken as supporting the desirability and usefulness of expanding the rule on jurisdiction to proceedings involving the principal. One may point to the fact that, within that expanded scope, the issue of jurisdiction over foreigners is certain to arise since the issuer of an international guaranty letter tends to have its place of business in a State other than that of the principal (in the case of an indirect guaranty letter) or of the beneficiary (in the case of a direct guaranty letter); if the rule on jurisdiction would be limited to the relationship between guarantor and beneficiary, it would be less needed in view of the fact that both parties are often in the same country.

58. Finally, it is submitted that the decision should to a considerable extent depend on whether the uniform law would include provisions on the procedural requirements of injunctions or other court measures (as discussed in A/CN.9/WG.II/WP.70). If such provisions were to be included, an expanded rule on jurisdiction covering the most likely applicant for court measures would complement these provisions and further the same goal, namely to provide a certain and uniform procedural framework. This, in turn, would complement, from the procedural angle, the substantive provisions of the uniform law in their aim of ensuring a level playing field for all parties involved in guaranty letter transactions.

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.¹

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."*²

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.³

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

¹Report 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.

²*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, para. 360.

³*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.⁴

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.⁵

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.⁶

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

⁵TEDIS PROGRAMME 1988-1989 Activity Report, (Brussels, Commission of the European Communities, COM(90) 361 final, 25 July 1990), p.10 ff.

⁶TEDIS—The legal position of the Member States with respect to Electronic Data Interchange, (Brussels, Commission of the European Communities, September 1989).

⁴Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17 (A/45/17), paras. 34 to 40.

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*⁷

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.

⁷This 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".⁸

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".⁹

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".¹⁰

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."¹¹

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

⁸Joint Working Group "Legal and Commercial aspects of EDI"—Terms of Reference, (ICC Document No. 460-10/2, Paris, 22 October 1990).

⁹Joint 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.

¹⁰Ibid., p. 4.

¹¹Joint 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".¹² 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).¹³ 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,¹⁴ 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

¹³Françoise Gallouédec-Genuys and others, *Une société sans papier? Nouvelles technologies de l'information et droit de la preuve*, (Paris, La documentation française, 1990).

¹⁴The 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).

¹²Comité 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 Report¹⁵ 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);

¹⁵The 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 Cooperation Council (March 1990);¹⁶
- 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”¹⁷ 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,

¹⁶As regards the legal issues of EDI, the CCC Guidelines expressly follow the UNCIT Rules (see A/CN.9/333, paras. 82 to 86).

¹⁷The 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 CIREDDIT 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.¹⁸ 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 systems¹⁹ that bring different EDI networks into contact.

¹⁸See *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.

¹⁹New 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 CIRECIT 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.²⁰

(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

²⁰See 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 CIREDIT 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."²¹

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."²²

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

²¹Joint 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).

²²Jan 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.¹ 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."²

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:

"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."³

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.

¹A/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.

²A/CN.9/9, para. 20, incorporated into *ibid.*

³Report 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.

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.

A.7. Notice to the buyer

Give the buyer sufficient notice as to when and where the goods will be placed at his disposal.

A.8. Proof of delivery, transport document or equivalent electronic message

No obligation.

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.

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.

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.

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.

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

Provide the seller with appropriate evidence of having taken delivery.

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).

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.

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.

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.

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.

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.

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 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.

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.)

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

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

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.

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 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

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 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.

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.

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.

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.

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.

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.

Provide the buyer, upon request, with the necessary information for procuring insurance.

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.

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**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.

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.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**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 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**

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) 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.

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

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.

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.

— 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.

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**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 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.

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) 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

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.

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.

— 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.

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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.^a

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*.

^aReport 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
<i>Guinea</i>		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 ¹	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

¹Upon 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 ¹	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

¹Upon 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 ¹	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

¹Upon 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 ¹		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 ¹		9 October 1989	1 November 1990
Canada ^{8, 9}		23 April 1991	1 May 1992
Chile ¹	11 April 1980	7 February 1990	1 March 1991
China ²	30 September 1981	11 December 1986	1 January 1988
Czechoslovakia ³	1 September 1981	5 March 1990	1 April 1991
Denmark ^{4, 5}	26 May 1981	14 February 1989	1 March 1990
Egypt		6 December 1982	1 January 1988
Finland ^{4, 5}	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982	1 January 1988
Germany*, ⁷	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 ^{1, 6}	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 ^{4, 5}	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 ^{4, 5}	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 ³	31 August 1981	11 December 1986	1 January 1988
Venezuela	28 September 1981		
Ukrainian SSR ¹		3 January 1990	1 February 1991
USSR ¹		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

*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

¹Upon 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.

²Upon 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.

³Upon 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.

⁴Upon 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).

⁵Upon 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.

⁶Upon 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.

⁷Upon 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).

⁸Upon 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.

⁹Upon 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 ^{1, 2}		7 February 1989
Antigua and Barbuda ^{1, 2}		2 February 1989
Argentina ^{1, 2, 7}	26 August 1958	14 March 1989
Australia		26 March 1975
Austria		2 May 1961
Bahrain ^{1, 2}		6 April 1988
Belgium ¹	10 June 1958	18 August 1975
Benin		16 May 1974
Botswana ^{1, 2}		20 December 1971
Bulgaria ^{1, 3}	17 December 1958	10 October 1961
Burkina Faso		23 March 1987
Byelorussian SSR ^{1, 3}	29 December 1958	15 November 1960
Cambodia		5 January 1960
Cameroon		19 February 1988
Canada ⁴		12 May 1986
Central African Republic ^{1, 2}		15 October 1962
Chile		4 September 1975
China ^{1, 2}		22 January 1987
Colombia		25 September 1979
Costa Rica	10 June 1958	26 October 1987
Côte d'Ivoire		1 February 1991
Cuba ^{1, 2, 3}		30 December 1974
Cyprus ^{1, 2}		29 December 1980
Czechoslovakia ^{1, 3}	3 October 1958	10 July 1959
Denmark ^{1, 2}		22 December 1972
Djibouti		14 June 1983
Dominica		28 October 1988
Ecuador ^{1, 2}	17 December 1958	3 January 1962
Egypt		9 March 1959
El Salvador	10 June 1958	
Finland	29 December 1958	19 January 1962
France ¹	25 November 1958	26 June 1959
Germany ^{*, 1}	10 June 1958	30 June 1961
Ghana		9 April 1968
Greece ^{1, 2}		16 July 1962
Guatemala ^{1, 2}		21 March 1984
Guinea		23 January 1991
Haiti		5 December 1983
Holy See ^{1, 2}		14 May 1975
Hungary ^{1, 2}		5 March 1962
India ^{1, 2}	10 June 1958	13 July 1960
Indonesia ^{1, 2}		7 October 1981
Ireland ¹		12 May 1981
Israel	10 June 1958	5 January 1959
Italy		31 January 1969
Japan ¹		20 June 1961
Jordan	10 June 1958	15 November 1979
Kenya ¹		10 February 1989
Kuwait ¹		28 April 1978
Lesotho		13 June 1989
Luxembourg ¹	11 November 1958	9 September 1983
Madagascar ^{1, 2}		16 July 1962
Malaysia ^{1, 2}		5 November 1985
Mexico		14 April 1971
Monaco ^{1, 2}	31 December 1958	2 June 1982
Morocco ¹		12 February 1959
Netherlands ¹	10 June 1958	24 April 1964
New Zealand ¹		6 January 1983
Niger		14 October 1964
Nigeria ^{1, 2}		17 March 1970
Norway ^{1, 5}		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 ^{1, 2}	10 June 1958	6 July 1967
Poland ^{1, 2}	10 June 1958	3 October 1961
Republic of Korea ^{1, 2}		8 February 1973
Romania ^{1, 2, 3}		13 September 1961
San Marino		17 May 1979
Singapore ¹		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 ¹	29 December 1958	1 June 1965
Syrian Arab Republic		9 March 1959
Thailand		21 December 1959
Trinidad and Tobago ^{1, 2}		14 February 1966
Tunisia ^{1, 2}		17 July 1967
Ukrainian SSR ^{1, 3}	29 December 1958	10 October 1960
USSR ^{1, 3}	29 December 1958	24 August 1960
United Kingdom ¹		24 September 1975
United Republic of Tanzania ¹		13 October 1964
United States of America ^{1, 2}		30 September 1970
Uruguay		30 March 1983
Yugoslavia ^{1, 2, 6}		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)

¹State will apply the Convention to recognition and enforcement of awards made in the territory of another Contracting State.

²State 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.

³With 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.

⁴The 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.

⁵State 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.

⁶State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

⁷The 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".¹

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.

¹Report 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 (Berne, 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.¹ 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

¹Report 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.²

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

²In 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.

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

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 1966.³

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.⁴ 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.⁵

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

³Official Records of the General Assembly, Twenty-first Session, Annexes, (A/6396), reprinted in *UNCITRAL Yearbook*, Vol. I: 1968-1970, Part One, II, B.

⁴The 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.

⁵The 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.⁶

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.

⁶The 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 UNCITRAL 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^a

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

^aThe 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-subparagraphs (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(1). Perhaps the point made in the second sentence of subparagraph (f) could be taken care of instead by adding at the end of subparagraph (1) 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 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. CONOBOY (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. CONOBOY (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. CONOBOY (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. It 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 INTELSAT 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 INTELSAT 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. CONOBOY (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. CONOBOY (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. CONOBY (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. CONOBOY (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. CONOBY (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.

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Protocolo por el que se modifica el Convenio Internacional para la Unificación de Ciertas Reglas en Materia de Conocimiento, firmado en Bruselas el 25 de agosto de 1924, p. 91-98—3. Reglas de Hamburgo: Convenio de las Naciones Unidas sobre el Transporte Marítimo de Mercancías—1978, p. 99-126.

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—Algunos aspectos de las Reglas de Hamburgo a la luz del sistema jurídico latinoamericano / P. Calmon Filho; L. Beltrán Montiel, relator, p. 126-128.

—Fundamentos de la responsabilidad / J. D. Ray; J. Roca Marcos, relator, p. 128-129.

—El conocimiento de embarque / F.J.J. Caldwell, relator, p. 130-131.

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IV. CHECK-LIST OF UNCITRAL DOCUMENTS

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A/CN.9/340	Provisional agenda	Note reproduced
A/CN.9/341	Report of the Working Group on International Payments on the work of its twenty-first session	Part two, I, C
A/CN.9/342	Report of the Working Group on International Contract Practices on the work of its fourteenth session	Part two, III, A
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
A/CN.9/344	Report of the Working Group on International Payments on the work of its twenty-second session	Part two, I, E
A/CN.9/345	Report of the Working Group on International Contract Practices on the work of its fifteenth session	Part two, III, C
A/CN.9/346	International credit transfers: comments on the draft Model Law on International Credit Transfers: report of the Secretary-General	Part two, I, A
A/CN.9/347 and Add. 1	Model Law on International Credit Transfers: compilation of comments by Governments and international organizations	Part two, I, B
A/CN.9/348	International Chamber of Commerce (ICC) INCOTERMS	Part two, V, B
A/CN.9/349	United Nations Decade of International Law: note by the Secretariat	Part two, VIII
A/CN.9/350	Electronic data interchange: report of the Secretary-General	Part two, IV
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.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
A/CN.9/XXIV/CRP.5 and Add.1 and Add.2/Rev.1	Preliminary report of the Drafting Group	Not reproduced
A/CN.9/XXIV/CRP.6	Proposal of Switzerland and the United States of America: article 10(1) and (1)(<i>bis</i>)	Not reproduced
A/CN.9/XXIV/CRP.7	Proposal of Canada, Singapore, the United Kingdom of Great Britain and Northern Ireland and the United States of America: article 6(3) and (4)	Not reproduced
A/CN.9/XXIV/CRP.8	Proposal by the United Kingdom of Great Britain and Northern Ireland: article 7(5)	Not reproduced
A/CN.9/XXIV/CRP.9	Proposal by the United Kingdom of Great Britain and Northern Ireland: article 9(4)	Not reproduced
A/CN.9/XXIV/CRP.10	Proposal by the United Kingdom of Great Britain and Northern Ireland: article 16	Not reproduced
A/CN.9/XXIV/CRP.11	Proposal by Mexico on an article concerning completion of the sense of the Model Law by analogy	Not reproduced
A/CN.9/XXIV/CRP.12	Report of the Drafting Group	Not reproduced
3. Information series		
A/CN.9/XXIV/INF.1/Rev.1	List of participants	Not reproduced

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.46 and Corr. 1	International credit transfers: comments on the draft Model Law on International Credit Transfers: report of the Secretary-General	Part two, I, D, 1
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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3. *Information series*

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C. List of documents before the Working Group on International Payments at its twenty-second session

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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

2. *Restricted series*

A/CN.9/WG.V/XII/CRP.1/Add.1-14 and CRP.2	Draft report of the Working Group on the New International Economic Order on the work of its twelfth session	Not reproduced
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3. *Information series*

A/CN.9/WG.V/XII/INF.1/Rev.1	List of participants	Not reproduced
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A/CN.9/WG.II/WP.68	Independent guarantees and stand-by letters of credit: discussion of further issues of a uniform law: amendment, transfer, expiry, obligations of guarantor, liability and exemption: note by the Secretariat	Part two, III, B, 2
2. Restricted series		
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A/CN.9/WG.II/WP.70	Independent guarantees and stand-by letters of credit: discussion of further issues of a uniform law: fraud and other objections to payment, injunctions and other court measures: note by the Secretariat	Part two, III, D, 1
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
2. Restricted series		
A/CN.9/WG.II/XV/CRP.1/Add.1-6	Draft report of the Working Group on International Contract Practices on the work of its fifteenth session	Not reproduced
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V. LIST OF UNCITRAL DOCUMENTS REPRODUCED IN THE PREVIOUS VOLUMES OF THE YEARBOOK

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6. Documents submitted to the Working Groups:
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 - (c) Working Group III: International Legislation on Shipping;
 - (d) Working Group IV: International Negotiable Instruments (1974 to 1987: seventh to twentieth session); International Payments (1988 to 1990: twenty-first to twenty-third session);
 - (e) Working Group V: New International Economic Order
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