to credit transfers (especially that of insolvency of the originator) while at the same time being in conformity with civil law rules on the time of payment.

It was also pointed out that the impact of article 17.2 on conflicting domestic rules has yet to be thoroughly analysed and that, pending such analysis, it might be preferable to delete this provision.

However, it was felt that the rule linking the discharge of a payment obligation to the "crediting of a beneficiary's account or otherwise placing the funds at the disposal of the beneficiary" (article 8.1*(d)*) conformed with precedent and legal doctrine. This rule was also in conformity with the International Law Association's Model Rules on the Time of Payment of Monetary Obligations.

Article 18. *Conflict of laws*

(1) The Model Law seems to take the position that it accepted multiple applicable laws at various stages of a credit transfer, on the assumption that participating countries would enact domestic laws compatible with the Model Law, and that it would be difficult to single out one law which would govern all States of a credit transfer. It was pointed out that a single applicable law governing an entire international transfer might be a preferable outcome, and that article 18 might help to achieve this outcome.

(2) It was suggested that while refining the rules to settle conflicts of law was realistic and meaningful at this stage, harmonization of the laws governing credit transfers was a more important goal.

It was felt that the question of conflict of laws would be less prominent if a large number of countries interested in international credit transfers were to enact the Model Law. The same would be valid if, in a given contract, the Model Law was made applicable by reference; it could even be envisaged that the Model Law should develop into a "usage", similar to the ICC's rules on letters of credit.

(3) However, it could not be expected that all countries will take legislative action to implement the provisions of the Model Law as a whole. It would thus be necessary to have a simple and decisive rule to settle the conflict of laws issue so that the Model Law provides foreseeability to the parties. Article 18 of the Model Law is ambiguous, however, regarding the extent to which the governing law chosen by the parties would be applied and the liability for damages incurred by a third party who is not in a sender-receiver relationship. It was therefore suggested that article 18 should be deleted unless the present text of the draft undergoes considerable amendment.

It was believed that in any event the parties to credit transfers ought to remain free to choose the legal regime applicable to their transactions.

(4) It was suggested that the expression "law chosen by the parties" could be misleading. Even if this was meant to cover the whole transfer procedure, there could be a difference between the rules governing, say, the calculation of interest when a transfer is not completed (article 13) and the technical rules regarding the payment (modalités de paiement). The former rules should be governed by the chosen law but the technical rules might remain governed by the domestic law of the country where the intermediary bank is domiciled. Further discussion and clarifying amendments thus seemed necessary.

(a) *Basle Committee on Banking Supervision*

22 May 1991

Dear Mr. Bergsten,

I refer to your letter to M. Lamfalussy of 8 February 1991 on the UNCITRAL draft Model Law on International Credit Transfers (A/CN.9/344). As M. Lamfalussy indicated in his letter of 13 March 1991, as Secretary of the Basle Committee on Banking Supervision I have drawn the attention of the member institutions to article 13 and specifically to the question whether intermediary banks might be required to hold capital against the risk of having to return funds to the initiator of a transaction, without being able to receive the corresponding funds due to them.

Members do not feel that the 1988 capital accord would require banks placed in this position to include this risk as a contingent liability with a capital weight. Notwithstanding this view of the Model Law, I should add that the 1988 agreement acknowledges that there are a number of risks with which it does not deal, and some countries have additional requirements of their own. Banking practice in some member countries clearly differs from the practice envisaged in article 13 so that a further review might be necessary both by individual supervisors and perhaps by the Committee should the risks become material.

I hope that this letter helps to answer the question raised by the working group, but if I can be of any further help please let me know.

(P. C. Hayward, Secretary)

C. Report of the Working Group on International Payments on the work of its twenty-first session

(New York, 9-20 July 1990) (A/CN.9/341) [Original: English]

CONTENTS

INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to begin the preparation of model rules on electronic funds transfers and to entrust that task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments.[1]

2. The Working Group undertook the task at its sixteenth session, at which it considered a number of legal issues set forth in a note by the Secretariat (A/CN.9/WG.IV/WP.35). The Group requested the Secretariat to prepare draft provisions based on the discussions during its sixteenth session for consideration at its seventeenth session (A/CN.9/297, para. 98). At its seventeenth session the Working Group considered the draft provisions prepared by the Secretariat. At the close of its discussions the Working Group requested the Secretariat to prepare a revised draft of the model rules (A/CN.9/317, para. 10). At its eighteenth session the Working Group began its consideration of the redraft of the model rules, which it renamed the draft Model Law on International Credit Transfers (A/CN.9/318, paras. 10-19). At its nineteenth and twentieth sessions it continued its consideration of the draft Model Law (see A/CN.9/328 and 329).

3. The Working Group held its twenty-first session in New York from 9 to 20 July 1990. The Group was composed of all States members of the Commission. The session was attended by representatives of the following States members: Bulgaria, Cameroon, Canada, Chile, China, Costa Rica, Czechoslovakia, Denmark, Egypt, France, Germany, Federal Republic of, India, Iraq, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

4. The session was also attended by observers from the following States: Australia, Burkina Faso, Colombia, Ecuador, Finland, Indonesia, Israel, Jordan, Liberia, Pakistan, Philippines, Poland, Republic of Korea, Rwanda, Saudi Arabia, Sweden, Switzerland, Thailand, Uganda, United Republic of Tanzania, Vanuatu, Venezuela and Yemen.

5. The session was attended by observers from the following international organizations: International Monetary Fund, Bank for International Settlements, Hague Conference on Private International Law, Banking Federation of the European Community, International Chamber of Commerce, Latin American Federation of Banks and Society for Worldwide Interbank Financial Telecommunication.

6. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora (Mexico)

Rapporteur: Mr. Bradley Crawford (Canada)

7. The following documents were placed before the Working Group:

(*a*) Provisional agenda (A/CN.9/WG.IV/WP.45);

(*b*) International credit transfers: comments on the draft Model Law on International Credit Transfers (A/CN.9/WG.IV/WP.46 and Corr.1);

(*c*) International credit transfers: proposal of the United States of America (A/CN.9/WG.IV/WP.47).

8. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of Model Law on International Credit Transfers.
4. Other business.
5. Adoption of the report.

9. The following documents were made available at the session:

(*a*) Report of the Working Group on International Payments on the work of its sixteenth session (A/CN.9/297);

(*b*) Report of the Working Group on International Payments on the work of its seventeenth session (A/CN.9/317);

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

(c) Report of the Working Group on International Payments on the work of its eighteenth session (A/CN.9/318);

(d) Report of the Working Group on International Payments on the work of its nineteenth session (A/CN.9/328);

(e) Report of the Working Group on International Payments on the work of its twentieth session (A/CN.9/329);

(f) International credit transfers: major issues in the Model Law on International Credit Transfers (A/CN.9/WG.IV/WP.42).

I. CONSIDERATION OF DRAFT PROVISIONS FOR MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

10. The text of the draft Model Law before the Working Group was that set out in the report of the twentieth session of the Working Group (A/CN.9/329, annex) and reproduced with comments in A/CN.9/WG.IV/WP.46 and Corr.1.

Article 14

11. The Working Group recalled that at its twentieth session there had been a short general discussion of article 14 so as to lay a foundation for a more thorough discussion of the article at the current session (A/CN.9/329, paras. 189-192).

Paragraph (1)

12. Although opposition was expressed, the Working Group decided to delete paragraph (1). It was stated that, while many legal systems already recognized credit transfers as an acceptable method of making payment, it was a matter of the policy of each State to decide whether a monetary obligation could be discharged by a credit transfer. It was also noted that it might be contrary to the monetary policy of some countries to consider credit in an account in a bank as having the same legal significance as money issued by a central bank.

Paragraph (2)

13. Under one view paragraph (2) should be deleted. In support of that view it was said that the current text assumed that the function of a credit transfer was to discharge an obligation even though a credit transfer could, in fact, have many other functions such as shifting funds between accounts of the same person. It was also stated that discharge should not result from a credit transfer if payment through another means had been stipulated between the parties or if the transfer had been credited to the wrong account.

14. It was stated that the Model Law should treat a credit transfer as an abstract operation, without regard to the purpose for which the transfer had been made or the legal effect of the transfer on the underlying transaction. Under that view the Model Law should contain a provision stating when a credit transfer was completed. If the transfer was for the purpose of discharging an obligation, other rules of the law applicable to the obligation would determine whether, when and to what extent the obligation had been discharged by the transfer. The proponents of that view also suggested that, in order to be consistent with the definition of a "credit transfer" in article 2, completion of the transfer should result from the placing of the funds at the disposal of the beneficiary and not from the acceptance of the transfer by the beneficiary's bank.

15. Under another view, even though the Model Law would not have a provision providing that a credit transfer would constitute discharge of an obligation, the Model Law might include a provision that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, the Model Law might indicate the time when such a discharge took place. However, it was stated, such a provision should indicate that the extent of the discharge arising out of the credit transfer would not be greater than if the payment had been in cash. The following text was suggested in implementation of that view:

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

16. It was also stated that the two views were not fundamentally incompatible and that the Model Law might include both the provision set out above and a provision on the time of completion of the credit transfer that might read as follows:

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

17. The Working Group decided to adopt the two provisions in the form in which they had been suggested. It noted that its decision comprised both a decision as to the matters that should be included in the Model Law and a decision that the point of time when the credit transfer was completed, with the legal consequences that followed, was when the beneficiary's bank accepted the payment order addressed to it. The Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in articles 5 and 7 in light of the fact that acceptance entailed completion of the credit transfer.

Paragraph (3)

18. The Working Group noted that the sums of money involved in paragraph (3) were relatively small, but that the legal questions that it raised were significant. It was noted that few people could anticipate the extent of the fees that might be charged for the making of an

international credit transfer and that there was a general lack of agreement or understanding as to who should bear those fees or how they should be collected.

19. Although a suggestion that the paragraph should be deleted was not adopted, there was general agreement that the paragraph should not deal with the effect on the underlying transaction resulting from the deduction of fees by the bank from the amount of the transfer.

20. The Working Group decided that paragraph (3) should state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer. The Working Group requested a drafting group to be created at the next session of the Working Group to prepare a provision implementing that decision.

Paragraph (4)

21. The view was expressed that the paragraph was too detailed for a model law. It was also stated that the paragraph as drafted was inconsistent with provisions of paragraph (4) of article 4 in that paragraph (4) of article 14 would give the bank a right to debit the account of the sender when the bank received the payment order, whereas paragraph (4) of article 4 stated that, although the sender's obligation to pay the receiving bank was created upon acceptance of the payment order, actual payment was not due until the execution date of the payment order.

22. The Working Group decided to delete the paragraph.

Title of article

23. The Working Group noted that the title of the article should be changed to reflect the current content of the article.

Article 15

Proposed paragraph (3)

24. The Working Group discussed a proposal of the United States of America contained in A/CN.9/WG.IV/WP.47 that would add a new paragraph (3) as follows:

"(3) A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail."

25. In support of the proposal it was stated that, since the rights and obligations of one party to a credit transfer might be affected by the actions of a party to the transfer located in another State, it was important that one set of rules govern the rights and obligations of all the parties to the transfer. It was stated that the concern was particularly important in respect of high-speed electronic transfers (a term that was defined in another portion of the written proposal). Unless there was a means for the parties to elect the application of a single law as was here proposed, the general rules of choice of law reflected in article 15(1) would lead to the result that the law of different States would apply to the different segments of the credit transfer and that there would be no single law that would govern the entire credit transfer.

26. In addition, it was stated, the Model Law should better accommodate the needs of high-speed electronic transfers than it currently did. It was stated that the current draft reflected the law appropriate to slower means of making credit transfers and that in its current form it would impede high-speed transfers rather than facilitate them. There were two means by which high speed transfers could be facilitated by the Model Law. One was to reconsider all of the substantive provisions and to amend them to reflect the needs of high-speed electronic transfers, or to add special rules reflecting those needs. The other, as proposed here, was to allow a funds transfer system to choose the law of a State that had rules more appropriate to such transfers as the law to govern the entire transfer if any portion of the transfer passed through the system.

27. It was pointed out that the technique suggested had already been implemented by the Clearinghouse Interbank Payments System (CHIPS) in its new rule 3 and the law of New York had been chosen to govern the entire transfer if any part of it passed through CHIPS. (The CHIPS rule was set out in A/CN.9/WG.IV/WP.47.)

28. There was general agreement in the Working Group that the Model Law should meet the operating needs of high-speed electronic credit transfers. It was stated that one of the very purposes of preparing the Model Law was to meet those needs, and that the individual substantive provisions should be reviewed with those concerns in mind. It was suggested that there might be scope for different rules governing paper and electronic transfers to be included in individual articles of the Model Law.

29. A view was expressed that the proposal might be a reasonable means for the banks that engaged in making international credit transfers to agree upon a single law to govern their relations. It was stated, however, that, even if the proposal might be reasonable if it was restricted to the relationships between the banks, it was excessive when it attempted to impose a law upon non-bank originators and beneficiaries that was different from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen. The proposal would give the funds transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds transfer system might choose a law that was particularly favourable to the banks and

unfavourable to the non-bank originators and beneficiaries.

30. A suggestion was made that the Model Law might be drafted so that, while it would apply to the entire transfer, it would recognize that the rules of a funds transfer system would govern the participants in that system to the exclusion of the Model Law to the extent that the rules and the Model Law were inconsistent.

31. Under another view the proposal would lead to the disunification of the laws governing international credit transfers rather than to their unification. It was pointed out that a transfer might go through two funds transfer systems and that the two systems might have chosen different laws to apply to the entire transfer.

32. The Working Group did not adopt the proposal but decided that it would review the draft provisions of the Model Law to be sure that they were compatible with the needs of high-speed credit transfers.

Paragraph (1)

33. The suggestion was made that article 15(1) should be deleted since it would be preferable for the Model Law not to contain any provision on conflicts of law in international credit transfers. It was stated that, considering the variety of national laws on means of payment and the complexity of the issues involved, the draft provisions of article 15(1) did not have the degree of refinement that would make them acceptable to most States. It was noted, for example, that no provision had been made as to the means by which the parties would have to express their choice of the applicable law. In this regard attention was drawn to article 3 of the Rome Convention on the Law Applicable to Contractual Obligations, which states that:

> "The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case."

It was also stated that it would be difficult for States that were parties to the Rome Convention or to other bilateral or multilateral conventions on conflicts of law of contractual obligations to adopt any conflicts of law provisions of the Model Law.

34. Furthermore, it was suggested, no single conflicts rule would be appropriate for both high-speed electronic transfers and paper-based credit transfers. If a need was felt for specific conflicts rules in the area of international credit transfers, the preparation of a convention on the topic should be considered. That would be particularly appropriate since the Working Group contained expertise on the substantive aspects of international credit transfers but not on the complex questions of conflicts of law.

35. In opposition to the suggestion to delete the provision on conflicts of law from the Model Law, it was stated that in an ideal world in which all States would adopt the Model Law no rules on conflicts of law applicable to international credit transfers would be necessary. However, that could not be anticipated and parties should not have to litigate to know which conflicts rule applied to their transfers. It was also stated that the fact that some States might be party to a bilateral or multilateral convention on conflicts of law that would in some measure be applicable to a credit transfer was no more of a reason not to include provisions on the subject in the Model Law than would be the existence of national provisions on the substance of the law governing credit transfers.

36. It was noted that any rule on conflicts of law should take into consideration the needs of certain States where the substantive law governing credit transfers was the law of the constituent jurisdictions rather than of the State itself.

37. After discussion the Working Group decided to retain a provision based upon article 15(1).

38. The suggestion was made that the conflicts of law provision should indicate that the substantive provisions of the Model Law applicable to the relations between the originator and the originator's bank should be governed by the law of the originator's bank but that the rest of the credit transfer should be governed by the law of the beneficiary's bank. It was noted that the identity and the location of the beneficiary's bank were known from the commencement of the credit transfer and were known to all relevant parties.

39. In opposition to the suggestion it was stated that, while it would be desirable for the Model Law to apply to an entire international credit transfer, it was no more feasible for that result to be accomplished by a conflicts of law provision in the Model Law dealing with electronic transfers than it would be by a choice of law by a funds transfer system, a proposal that had already been rejected. Application of the Model Law to the entire credit transfer could be achieved only by its adoption by the several States concerned.

40. The Working Group decided that article 15(1) should continue to be drafted so as to apply to individual segments of the transfer.

41. There was general agreement that the parties to the credit transfer, or to any segment of it, should be free to choose the law applicable to their relations. It was noted that that was not only the general rule in respect of conflicts of law, but that it was specifically stated in the Rome Convention (see paragraph 33 above). It was said that including such a rule in article 15(1) would reduce the possibility of conflict between the Model Law and the Convention, thereby reducing the difficulties for the parties to that Convention to adopt the Model Law.

42. A discussion took place as to whether the Model Law should set forth any limits on the freedom of the parties to choose the law applicable to their relations. It was noted that the provision as currently drafted limited the choice of the parties to the law of the State of the sender, of the receiver or of the State in whose currency the payment order was denominated.

43. Under one view, the Model Law should contain a requirement that some reasonable link existed between the

law chosen by the parties and the credit transfer operation. In that respect, it was suggested that, in addition to the three possibilities that were currently provided, the law of the State in which a funds transfer system through which the credit transfer would pass might be included. A concern was also expressed that the freedom of choice by the parties should be limited by public order considerations. It was stated that the choice of some irrelevant law by the parties should not allow them to avoid application of any mandatory provisions of the Model Law, for example as regards the money-back guarantee in article 11*(b)*.

44. Under another view, the Model Law should recognize the absolute freedom of choice of the applicable law by the parties. It was stated that it would be contrary to the general principles of private international law on party autonomy to create mandatory rules that the parties could not avoid by choosing another law. It was stated that such mandatory rules were highly exceptional in private international law and different from public policy rules under national legislation.

45. The Working Group decided that article 15(1) should contain a general rule that, except where otherwise provided in the Model Law, parties were free to choose the applicable law.

46. The Working Group then considered the law that should be applicable to a segment of the credit transfer when the parties had not exercised their right to choose the applicable law. Under one view the characteristic performance in the transfer process was that of the sender. Under another view the characteristic performance was that of the receiving bank which was faced with the obligation to verify the source of the payment order, to accept it or give notice of rejection, and, if the bank accepted it, to issue a new payment order consistent with the payment order received. Under that view the appropriate law to be applied to that segment should be the law of the receiving bank. It was stated that the only exception to such a rule arising out of the current text of the Model Law was to be found in article 4(1) on the authority of the actual sender to bind the purported sender. However, there was general agreement that the Model Law should not attempt to provide which law would be applicable to the question as to whether the actual sender of a payment order was authorized to bind the purported sender.

47. After discussion, the Working Group decided that, unless otherwise agreed, the law of the receiving bank should apply to that segment of the transfer and that article 15(1) should make it clear that it did not apply to the law applicable to the authority of the actual sender to bind the purported sender.

Paragraph 2

48. In view of the fact that the primary rules on the effect of a credit transfer on the discharge of a monetary obligation had been deleted from article 14 (see paragraphs 15 to 17 above), the view was expressed that paragraph (2) might be deleted as well. In any case, it was stated, it did not set forth appropriate rules. However, the Working Group decided that, since a rule had been retained as to the time when an obligation would be discharged by a credit transfer, paragraph (2) should be retained provisionally.

Square brackets

49. At the close of the discussion the Working Group decided that the entire text of article 15 should be placed in square brackets pending a final review at a later session.

Article 16

50. A proposal for a new article 16 was submitted in A/CN.9/WG.IV/WP.47. The first paragraph of the proposed new article read as follows:

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

The proposed new article provided in its second paragraph that rules adopted by a funds transfer system could be effective between the participating banks "even if the rule conflicts with this law and indirectly affects another party to the funds transfer who does not consent to the rule".

51. Considering that the corresponding proposed amendments of article 15 had not been accepted by the Working Group, the entire proposal was withdrawn by its proponents. The Working Group noted that at its eighteenth session it had decided that the extent to which the Model Law would be subject to the agreement of the parties would be considered in connection with the individual provisions (A/CN.9/318, para. 34). The Working Group also noted that the draft before it mentioned the effect of contractual rules in a number of provisions.

52. Subsequently, the Working Group decided to adopt the first paragraph of the proposed article 16 and to review each of the substantive articles to determine whether the previous statements as to the effect of an agreement should be retained or could be deleted.

Review of the text: General comments

53. The suggestion was made that the legal issues arising out of the use of netting should be addressed in the Model Law and that all provisions of the Model Law should be reviewed with a view to their compatibility with the operation of netting systems. While there was general agreement that the Model Law should take account of the use of netting, the Working Group recalled that at its nineteenth session it had decided to wait for the study on the topic that was expected from the Bank for International Settlements (BIS) (A/CN.9/328, para. 65) and that the study had not yet been made available. The Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not made available soon.

54. The question was raised as to whether the text of the Model Law should take into account exchange control regulations that existed in some countries. The Working

Group agreed that that question should remain outside the scope of the Model Law, although national legislators might have to consider such issues when adopting the Model Law. It was also suggested that the effect of exchange control regulations might be discussed in any commentary that might later be prepared on the Model Law once it has been adopted by the Commission.

55. The view was expressed that the Model Law should not become too favourably oriented to the interests of banks. A contrary view was expressed that the Model Law should be neutral in its coverage concerning all commercial parties rather than focusing on one party, i.e. banks, as a problem. It was said that in some States business users of electronic credit transfer systems had expressed a clear preference for less protection in exchange for lower costs or service fees.

56. It was stated that the general direction of the Model Law might be viewed as running contrary to the needs of high-value, high-speed and low-cost wire transfer of funds systems. It was also stated that UNCITRAL should focus on facilitating international commerce. A concern was expressed that the Model Law could have the effect of burdening commerce. Another view was that the money-back guarantee in article 11*(b)* should be considered in the same light.

Article 1

Paragraph (1)

57. There was strong support for the proposition that the scope of the Model Law should be as broad as possible.

Internationality

58. There was general agreement that the text of the paragraph as it had been modified by the drafting group at the twentieth session did not reflect the result of the decisions made by the Working Group (A/CN.9/329, para. 194). The Working Group decided that further discussion should be based on the text that it had adopted at its twentieth session (A/CN.9/329, para. 23). That text read as follows:

> "This law applies to credit transfers where the originator's bank and the beneficiary's bank are in different States or, if the originator is a bank, that bank and its receiving bank are in different States."

59. The view was expressed that the test of internationality was contrary to the operation of high-value, high-speed and low-cost wire transfer of funds systems. One suggestion was that the Model Law should apply to the situation where, although the originator's bank and the beneficiary's bank were located in the same country, the transfer was denominated in a foreign currency.

60. Another suggestion was that the test of internationality adopted at the twentieth session was unsatisfactory because *(a)* there was an apparently arbitrary distinction between originators that were banks and originators that were not, and *(b)* unless information about an originator was included on a payment order, it would probably not be possible to tell if the payment order was covered by the Model Law or not. In order to overcome those problems the following text was suggested:

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

61. Under another proposal, the test of internationality of a credit transfer should be that it crossed a border. Accordingly, it was stated that the following wording should be adopted:

> "This law applies if any payment order comprising the credit transfer is sent from a sender located in one State to a receiving bank in another State."

62. In opposition to the proposal it was said that, when the transfer was to another bank in the same country but the transfer was denominated in a foreign currency and there was a clearing for that foreign currency in the country where the transfer was taking place, the originator would not be able to foresee, at the time when the credit transfer originated, whether or not the transfer would be sent to the country of the currency or whether it would remain within his country. Therefore, it would not be possible to foresee whether the transfer would be subject to the Model Law. In reply it was said that it would always be possible for the originator to specify to his bank what should be the routing of the credit transfer.

63. An additional objection to the proposal was that it would create a degree of uncertainty since it referred to the location of the sender. Location could be interpreted either as the permanent domicile of the sender or, in the case of a physical person, all possible residences to which he might move. As a solution to that difficulty, it was suggested that only the location of banks and not that of their customers should be considered.

64. After discussion the following text was adopted:

> "This law applies to a credit transfer where a sending bank and its receiving bank are in different States."

Consumers

65. It was suggested that the footnote to article 1 providing that the law "is subject to any national legislation dealing with the rights and obligations of consumers" should be deleted. It was said that the Model Law confined itself to commercial law issues. Therefore, it should neither affect the situation of consumers nor be described as "subject to" consumer legislation. In reply it was said that the footnote served an educational purpose since the Model Law would apply to all bank customers. After discussion, the Working Group decided that the footnote should be reworded to state that the Model Law was not intended to deal with issues related to the protection of consumers. The matter was referred to the drafting group.

Article 2

Definition of a "bank", subparagraph (f)

66. It was noted that the definition of the word "bank" was of particular importance in the Model Law because it was one of the elements in determining the scope of application of the law. The Working Group was in agreement that the definition should exclude telecommunications carriers and other similar entities that carried payment orders but did not perform a credit transfer service. There was also general agreement, despite some continuing opposition, that those entities that did perform a credit transfer service were intended to be covered, even though they might not be defined as banks under other legislation in their country. It was pointed out that the Model Law was not a regulatory statute that was confined to banks in the traditional sense.

67. A proposal was made that a "bank" should be defined as follows:

> "'bank' means an entity which, under the law of the State where it is permitted to act, is authorized to create, keep and destroy funds, as defined in the present Law."

There was no support for the proposal.

68. The suggestion was made to delete the words "and moving funds to other persons", which were within square brackets. It was said that the words were superfluous. In reply it was stated that the words had been added precisely to make it clear that the definition of a bank did not cover message systems. It was therefore decided that a second sentence should be added to the current definition to state specifically that entities that merely transmitted payment orders were not banks. The Working Group decided to delete the words within square brackets.

69. A discussion took place as to whether the definition of a bank should be limited to entities that executed payment orders as a regular part of their business, or whether it should also encompass entities that only occasionally engaged in executing payment orders. The proposal that the definition of a bank should be extended to cover entities that only occasionally executed payment orders was not adopted.

70. At the end of the discussion the Secretariat was requested to reconsider the possibility of using a word other than "bank" and to report to the Working Group at its next session. The Working Group recognized that any word chosen would need to serve in such compound terms as "receiving bank".

Definition of a "branch"

71. A view was expressed that the Model Law should contain a definition of a "branch" of a bank. The reason given was that under some national laws "branches" were defined in a restrictive way that would not cover certain offices or agencies of a bank that might be intended to be treated as separate banks under the Model Law. Accordingly, it was proposed that the significant feature of a "branch" under the Model Law should be that it sent and received payment orders. That proposal was objected to on the ground that the sending and receiving of payment orders were acts that could be carried out by simple message carriers. Although there was a general view that no definition of a "branch" was necessary, the delegation that had raised the question was invited, if it so wished, to prepare a draft definition and to submit it to the Working Group at either the current or the next session of the Working Group.

Definition of a "credit transfer", subparagraph (a)

72. Taking into account the newly adopted provision on completion of the credit transfer in article 14(1) (see paragraph 16 above), the Working Group decided to delete the words in square brackets in article 2*(a)* that indicated when a credit transfer was completed.

Definition of a "payment order", subparagraph (b)

73. It was generally agreed that any reference to conditional payment orders should be deleted from the Model Law. It was also agreed that, in order to accommodate high-speed credit transfers, the Model Law should expressly state that it applied only to unconditional payment orders. The Working Group noted that such a provision would be subject to contrary agreement between the parties. Following the discussion, the Working Group decided that subparagraph (i) should be deleted. The first part of subparagraph *(b)* was reworded as follows:

> "'Payment order' means an unconditional instruction by a sender to a receiving bank to place at the disposal of a designated person a fixed or determinable amount of money if: . . .".

74. A discussion took place on the status of the parties when a customer submitted a conditional payment order to a bank. It was noted that, in such a case, the contract between the sender of the conditional payment order and the receiving bank would not fall within the scope of the Model Law. In the event that the condition was fulfilled, the bank would be expected to execute the conditional payment order by issuing its own unconditional payment order. That payment order and the resulting credit transfer, if the transfer was international, would fall within the scope of the Model Law. The consequence would be that, under the Model Law, the bank would be regarded as the originator of the payment order and not as the originator's bank. The customer who had sent the conditional payment order would have no standing under the Model Law. Therefore, if the credit transfer was not carried out properly for reasons unconnected with the original condition, any rights the customer might have would arise from rules of law outside the Model Law.

75. The Working Group was in agreement that that result was not desirable and decided that a provision should be included in the Model Law so that the sender of the conditional payment order would have the rights of an originator of the credit transfer under the Model Law where the execution of the conditional payment order eventually resulted in an unconditional credit transfer. It was also agreed that the condition itself as well as the

fulfilment or non-fulfilment of the condition would remain outside the scope of the Model Law.

76. The deletion of subparagraph (ii) was suggested on the grounds that the question of reimbursement of the receiving bank should be left for the originator and his bank to agree upon on a contractual basis. After discussion, the Working Group agreed that subparagraph (ii) was necessary in order to exclude debit transfers from the scope of the Model Law.

77. A proposal to delete subparagraph (iii) received no support. Another proposal was that the subparagraph should be replaced by the following wording:

"The payment order is to be transmitted to the receiving bank, either directly [, using or not a communication system established between banks,] or indirectly, using a funds transfer system established between banks."

78. Yet another proposal was that the words "the instruction is to be transmitted" in the existing text should be replaced by the words "the instruction is transmitted". The Working Group agreed that the two proposals should be referred to the drafting group.

79. In view of the deletion of subparagraph (i), the Working Group decided to delete subparagraph (iv).

Definition of "execution"

80. A proposal was made to add to the Model Law a definition of the "execution" of the payment order. It was said that such a definition would be helpful for the interpretation of articles 9(1) and 9(2). There was not sufficient support for the proposal to warrant a change in the text.

Definition of "authentication", subparagraph (j)

81. It was noted that some methods for authentication of the source of a payment order required verification of the contents of the payment order. It was suggested that that fact should be recognized in the definition of authentication. However, the Working Group decided to consider issues having to do with verification that the contents of a payment order as received were the same as the contents of the payment order as sent in its discussion of article 4 (see paragraph 102 below).

Definition of "pay date", subparagraph (l)

82. It was noted that Society for Worldwide Interbank Financial Telecommunication (SWIFT) payment messages no longer carried a field for the indication of a pay date and, it was stated, the International Organization for Standardization (ISO) would delete any reference to a pay date in the next revision of its standards. It was said that the date commonly used on payment orders was the value date, i.e., the date on which the funds were to be available to the receiving bank.

83. It was suggested that the term execution date could be made to serve the intended function of pay date provided that a sender could not stipulate a date earlier than the date when its receiving bank received the payment order. That suggestion was not adopted. It was stated that, even though payment orders used in inter-bank practice might not provide for the designation of a pay date, the original payment order sent by the originator to his bank might stipulate that the funds were to be paid to the beneficiary on a particular date. A proposal was made that the concept of "pay date" should be replaced by that of "payment date". The following draft was suggested:

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

84. The Working Group was in agreement that the question should be reconsidered together with articles 9 and 12. In the meantime, it decided to adopt the above proposal as an interim draft.

Article 3

85. The Working Group noted that it had decided to delete former article 3 at its twentieth session. It also noted that at that session it had decided to address in some other provision the need for payment orders to disclose to receiving banks that the payment order formed part of an international credit transfer (A/CN.9/329, para. 93). It decided to return to that problem at another time.

Article 4

Paragraph (2)

86. The Working Group noted that the *chapeau* to paragraph (2) could be interpreted to mean that paragraph (2) was to apply to a payment order even though the sender was bound under paragraph (1). Therefore, it decided to redraft the *chapeau* as follows:

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

87. The Working Group discussed whether subparagraph *(b)* should be retained. In support of its deletion it was said that it was not possible to implement subparagraph *(b)* from the point of view of the operations of a bank because the bank normally could not know, at the time a payment order was received, whether the order was covered by a withdrawable credit balance. It would be able to do so only if all debits and credits to the account were entered on-line real-time. However, in even the most highly automated banks some types of payment orders were processed in batch with the resulting debits and credits entered to the accounts periodically, and often at the end of the working day. Furthermore, it was stated, subparagraph *(b)* led to an inequitable result since the purported sender of an unauthorized but authenticated payment order would be bound by the order if there was a sufficient withdrawable credit balance at the time the payment order was accepted but would not be bound if the balance was insufficient at that time.

88. In reply it was said that subparagraph *(b)* was a risk allocation rule and not an operational rule. The basic rule in paragraph (1) that a purported sender was bound by a payment order only if it had been issued by him or by another person who had the authority to bind him was reversed by paragraph (2) in the case of an authenticated order only if the conditions specified in paragraph (2) had been met. Subparagraph *(b)* was said to be an important condition because it would protect certain senders from being bound by unauthorized payment orders.

89. A suggestion was made to establish separate rules that would not include subparagraph *(b)* for high-speed electronic transfers whereas the rules for other credit transfers might include the subparagraph. In opposition to that suggestion, it was stated that high-speed transfers were precisely the transfers where the current balance of the sender's account could most easily be verified, since technology permitted on-line real-time monitoring of accounts used for such transfers. A contrary view was expressed that such monitoring of accounts was not consistent with prevailing international banking practice.

90. Another suggestion was that subparagraph *(b)* should apply when the sender was not a bank but should not apply when the sender was a bank. In support it was stated that the limitation of the responsibility of the purported sender for an unauthorized payment order was of greatest importance for non-bank originators.

91. During its discussion of paragraph (2) the Working Group decided to limit the application of subparagraph *(b)* to non-bank senders. Subsequently, in connection with its discussion of paragraph (3), it decided to delete subparagraph *(b)* entirely (see paragraph 101 below).

92. The Working Group noted that subparagraphs *(a)* and *(c)* were cumulative conditions to the application of paragraph (2) and decided to join them by the word "and".

93. The Working Group noted that at its eighteenth session it had decided that a sender and a receiving bank could not agree upon an authentication procedure that was less than commercially reasonable within the context of paragraph (2), but that it had not included a provision to that effect in the text of the Model Law. It also noted that at the current session it had adopted a new article 16 that stated a general principle of freedom of contract unless otherwise provided in the Model Law, and that it had decided to review each of the substantive articles to determine whether the previous statements as to the effect of an agreement should be retained.

94. Under one view the previous decision should be affirmed and incorporated into the text of the Model Law. It was stated that, since the receiving bank would determine the type of authentication it was prepared to receive from the sender, it should be the receiving bank's responsibility to assure that the authentication procedure was at least commercially reasonable. If the receiving bank was willing to accept payment orders even though there was not a commercially reasonable authentication, it should accept the risk that the payment order had not been authorized in accordance with paragraph (1).

95. Under another view the freedom to agree that the sender would be bound by an unauthorized payment order even though there had been no commercially reasonable authentication should come as an application of the general principle of party autonomy, which the Working Group had previously adopted (see paragraph 52 above). It was also stated that, in case of litigation, there would be uncertainty as to the commercial reasonableness of the method of authentication used until the final court decision unless parties were allowed to determine by their agreement what constituted such a procedure.

96. After discussion, the Working Group decided to include in paragraph (2) a provision to the effect that parties would not be allowed to agree on the use of an authentication procedure that was not commercially reasonable.

Paragraph (3)

97. A proposal was made to adopt the following text of paragraph (3):

> "(3) A purported sender is, however, not bound under paragraph (2) if he proves that the payment order as received by the receiving bank resulted from the actions of a person other than a present or former employee of the purported sender, unless the receiving bank is able to prove that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender."

98. The proponents of the proposal also stated that, if the proposal was adopted, subparagraph (2)*(b)* (which at that stage applied to non-bank senders) should be deleted.

99. In support of the proposal it was pointed out that paragraph (3) dealt with the relatively rare case when there had been an unauthorized payment order that had been authenticated in accordance with paragraph (2). In such a case the purported sender would bear the loss unless he could show that the payment order resulted from the actions of a person other than a present or former employee of the purported sender. In order to meet that burden it would not be necessary to show who had sent the payment order; the fact that it could not have resulted from the actions of a present or former employee might be proved by other means. Once that burden had been met by the purported sender, he might still be bound by the payment order if the receiving bank could show that the authentication had been procured by the fault of the purported sender.

100. A suggestion was made that the general rule that had been adopted by the Working Group in article 16 that the provisions of the Model Law could be varied by agreement should be limited in paragraph (3) so that the agreement could not be to the detriment of non-bank senders. Another suggestion was that there should be no limitation on the extent to which paragraph (3) could be modified by agreement, but that the agreement could not be in the general conditions of the receiving bank; the agreement would have to be in an individual contract between the purported sender and the receiving bank.

101. After discussion the proposal set out in paragraphs 97 and 98 above was adopted. Although several delegations expressed strong disagreement, the Working Group decided that nothing needed to be said in the paragraph about the extent to which it could be modified by agreement, because article 16 would automatically be applicable. Those delegations were concerned that extensive provisions giving the parties freedom to vary the provision by contract would seriously reduce the likelihood that the Model Law would be found acceptable by national legislatures.

Errors

102. The Working Group noted that at its twentieth session it had said that, if it was intended that the Model Law should relieve the sender of the responsibility for the erroneous content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that would detect the error or corruption, that intention should be set out separately (A/CN.9/329, para. 79). The Working Group requested the Secretariat to propose a text that would implement this idea for consideration at its twenty-second session.

Paragraph (4)

103. The paragraph was not considered.

Article 12

Paragraph (1)

104. It was noted that the Working Group at its twentieth session had decided to retain the principle of paragraph (1), but to place it in square brackets in the expectation that it might be substantially redrafted. At the current session it was decided to delete the paragraph since the same matter was covered by paragraph (2).

Paragraph (2)

105. It was noted that paragraph (2) was one of the most important provisions in the Model Law because it stated which banks were responsible to the originator or to the sender for any damages that might be payable for the non-execution or improper execution of the credit transfer. It was also noted that the types of damages and the extent of the damages that might be payable to the originator or other claimant were set forth in paragraph (5). It was recognized, however, that there was a relationship between the type and the extent of damages that could be claimed and the appropriate rules for determining which bank or banks should be responsible to the originator for those damages.

106. It was suggested that the Working Group should discuss paragraph (2) as it was set forth in a proposed redraft of article 12 that had been submitted by a delegation and printed in A/CN.9/WG.IV/WP.46, comment 28 to article 12. However, the Working Group decided that it would be a more appropriate procedure to discuss the original text of article 12, including paragraph (2), and to use the suggested redraft as a source of ideas for improving the text.

107. The discussion centred on two questions: whether the originator's bank should be responsible to the originator when the non-execution or improper execution of a payment order that constituted part of the credit transfer was done by a bank that was down-stream from the originator's bank and whether the originator should have a direct claim against the intermediary bank. It was noted that paragraph (2) provided for such responsibility and provided a means by which the damages that the originator's bank would have to pay to the originator could be collected from bank to bank until the liability reached the bank where the problem had occurred.

108. In favour of changing the text to provide that a bank was responsible to the originator or the sender only for its own failures, it was said that in some countries that result would follow from the general principle of law that no one should be responsible for the actions of third parties. Furthermore, an originator's bank was often not in a position to decide what route a credit transfer should take on its way to the beneficiary's bank in a foreign country, nor even to know what route the transfer might take. It was said that when the originator requested his bank to transfer funds to a foreign country, he should know that it was likely that independent intermediary banks might have to be used.

109. Furthermore, in favour of changing the text, it was said that the originator's bank would be held responsible to the originator for the actions of intermediary banks or of the beneficiary's bank in foreign countries when those banks acted in ways that would constitute non-execution or improper execution of the payment order under the standards of the Model Law, but would constitute proper execution according to the standards of the country in question. The example given was that article 9 of the Model Law required the receiving bank to execute the payment order on the day it was received (subject to having received payment for the order) whereas banking law and practice in some countries provided only for next day execution. Not only would the originator's bank be responsible to the originator in such a situation, but it would not be able to recover from the bank in that foreign country the damages it had paid to the originator. It was stated that the final result would be that banks in the State that had adopted the Model Law would stop sending payment orders to banks in the State with laws or banking practice that were inconsistent with the Model Law. It was also said that it would be improper for a State, such as a State that had enacted the Model Law, to attempt to impose its law and banking practices on other States.

110. However, it was also said that the interpretation given to paragraph (2) was not correct since, under the choice of law provision in article 15(1), the standard of performance of the receiving bank would be determined by the law of the receiving bank. To the extent that the period of time for giving value referred to giving value to the beneficiary, it had been decided that the credit transfer came to an end when the beneficiary's bank accepted the payment order. The question as to when the beneficiary's

bank had to give value to the beneficiary was, therefore, of no relevance to the operations of the Model Law.

111. In favour of retaining the rule currently in paragraph (2) that the originator would be able to claim the damages either directly from the bank at fault or from a prior bank in the chain, including the originator's bank, it was said that the originator's bank provides a service to the originator that depends on it having established correspondent relations with other banks. If, as had been said, the originator's bank might not be able to determine or even to know the entire chain that would be used to send the credit transfer to the beneficiary's bank, the originator was even less able to determine or to know the route. The liability of the originator's bank was described as primary only, with ultimate liability being upon the intermediary bank that was at fault. Furthermore, it was said, the procedure envisaged by paragraph (2) was well known in other similar types of economic activity, such as the international transport of goods, where it was common for the carriage to be effected by several different carriers. In some, though not all, conventions on international carriage of goods the claim might be made either against the original contracting carrier or against the carrier where the damage had occurred. The procedure envisaged by paragraph (2), similar to the procedure used in those conventions, would ease the procedural problems for the originator since he would not have to claim against a bank in a foreign country with whom he had no business relationship. However, it would allow the originator's bank to have recourse against its receiving bank, a bank with which it normally had a continuing business relationship.

112. It was also said that article 12 represented a balanced compromise. The extent of consequential damages that might be recovered by the originator had been severely restricted, but the ability to recover other types of damage had been eased. In response, it was said that this so-called compromise would allocate to the originator's bank new risks arising out of international credit transfers. The so-called compromise was to the detriment of the originator's bank.

113. As to the argument that banks in some countries might not meet the standards of performance expected by the Model Law, it was said that one of the functions of the Model Law should be to establish the standards necessary for high-speed international credit transfers to be effective. It was said that receiving banks that did not meet those standards would soon learn that it was to their advantage to do so.

114. After extensive discussion the Working Group noted that the differences between the opposing views had not been reconciled. It decided, therefore, that the present text would be retained. It noted that retention of paragraph (2) did not imply any judgment on the other paragraphs of article 12, and particularly on paragraph (5). Subsequently, the Working Group decided that it should be made clear that in respect of consequential damages, only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender.

115. After a discussion on the meaning of the second sentence of paragraph (2), there was agreement that, since it had been agreed that the first sentence would be retained, the second sentence stated the correct policy and was necessary. It was observed, however, that its meaning was not clearly stated and the Secretariat was requested to propose to the Working Group at its next session a revised draft that was more easily understood. It was suggested that the Secretariat might also propose a revision of the first sentence.

Paragraph (3)

116. The Working Group noted that paragraph (3) had a technical function to make it clear that no bank subsequent to the bank where the problem occurred was liable to the originator for damages. It was noted that there were matters of drafting and of substance that were contained in the redraft proposed in the working paper to which the Working Group would have to return at a later time.

Paragraph (4)

117. It was decided that subparagraph *(a)* should include a reference to failure to perform one of the obligations under article 8. Although a preference was expressed for choosing the first of the two alternative formulations in square brackets, i.e., "account relationship", the Working Group decided not to enter into such drafting details at this time.

Paragraph (5)

*Subparagraph (*a*)*

118. The Working Group noted that the current draft of the Model Law provided for interest to be payable to the originator and to the sender, but that at its nineteenth session it had decided that in appropriate situations the beneficiary should be able to recover interest when completion of the credit transfer was delayed because of a delay by one of the banks in the chain. However, no text had been adopted to implement that decision. It was also noted that the interest was to be payable because of the fact of delay and not because of the fault of the bank. Where there had been delay, the bank had had the use of funds for a period of time that was longer than it should have been and the bank should not be able to keep the benefit arising out of the delay. It had been decided that where the transfer had been completed, but had been completed late, it was the beneficiary who should have a direct right to claim for the loss of interest, since it was the beneficiary who had been deprived of the use of the funds for the period of the delay. He should receive the interest, whether or not the beneficiary had had a right, as against the originator, for the transfer to be completed on a particular day. It was stated, however, that where the credit transfer was not completed and the originator had the right to get his funds back under article 11*(b)*, the originator should also be entitled to receive the interest.

119. It was noted that the typical way in which banks compensated one another for interest due was to adjust the date of the credit to the account so that it showed "as of"

the date on which the credit should have been entered. By changing the date of the credit, appropriate interest would be given automatically to the bank receiving the credit. It was stated that, in practice, delay in executing a payment order was almost always because the payment order had been executed improperly. As soon as the error was brought to the attention of the bank, it would immediately execute the order correctly for the original amount. Interest adjustments would be made later, usually by way of an "as of" adjustment, although that method was less often used where the person receiving the adjustment did not maintain an account with the bank. It was noted that in the United States there was a proposed rule that would require the sender or receiving bank that was the recipient of an "as of" adjustment, but that was not the ultimate party entitled to the interest, to pass on the benefit of the "as of" adjustment to the ultimate originator or beneficiary in the form of interest.

120. It was stated that, while the payment of interest to the beneficiary would usually be satisfactory compensation for the delay, it might not be adequate compensation when the delay in the execution of the credit transfer caused the originator to be late in his payment to the beneficiary. In such a case the beneficiary as creditor of an obligation might have a claim against the originator as debtor of the obligation for interest as a result of the late payment that was at a higher rate than any rate that might be applicable to the interbank relationship. It was stated that in such a case the bank that had caused the delay should have to pay to the beneficiary or to the originator (if the originator had reimbursed the beneficiary) an additional amount equal to the interest due as a result of the late payment, less the amount already paid. In reply, it was stated that such an additional amount was in the nature of consequential damages and should be treated as such under the Model Law.

121. The suggestion was made that the Model Law should indicate the appropriate rate of interest to be paid when a bank was late in executing a payment order. The Working Group recognized that it would not be possible to provide either an appropriate rate in numerical terms or to be specific as to the means of determining the rate. Nevertheless, it was suggested, the Model Law should provide that the interest would be calculated at the interbank rate in the currency in which the payment order was expressed. It was stated that with the open capital markets currently existing, those rates for any given currency tended to be essentially the same throughout the world.

122. Other suggestions were made in respect of the rate of interest that the beneficiary should receive. It was stated that, if a non-bank beneficiary's account was adjusted "as of" the date the credit should have been made, the effective amount of interest it would receive would depend on whether the account was in debit or in credit during that period of time, since the rate charged on a debit balance was always higher than the rate the beneficiary would receive if the account was in credit. One suggestion made was that the beneficiary should receive the current rate for a sight deposit. It was also noted that under the proposed rule in the United States the beneficiary would receive the interbank rate.

123. After discussion the Working Group decided that it would provide only that interest was payable without indicating how that interest should be calculated.

Subparagraph (b)

124. Although there was some support for retaining the subparagraph providing that damages might include exchange losses, the Working Group decided to delete it and to consider any possible recovery for such losses in its consideration of consequential damages.

Subparagraph (c)

125. The Working Group considered that the issues raised in the subparagraph were of minor importance that should be left for discussion at a later stage.

Subparagraph (d)

126. The Working Group noted that it had previously decided that, in respect of consequential damages, only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender (see paragraph 114 above).

127. Under one view subparagraph *(d)* should be deleted. It was said that a consequential damage provision would be inconsistent with the operation of modern wire transfer of funds systems. It was stated that a receiving bank could not anticipate the extent to which it might be held liable for consequential damages. Consequently, it would not be able to obtain appropriate insurance to cover any possibility that it might be held liable. In any case, potential liability for consequential damages would substantially increase the cost of credit transfers, a cost that would have to be borne by all users. It was suggested that the Model Law might indicate that banks were free to contract for such an increase in their responsibility if they so chose. It was noted that banks that offered two different services with different levels of responsibility would charge more for the higher level.

128. Under another view subparagraph (5)*(d)* should be retained. It would be a rare case in which a bank acted with the intent to cause improper execution of or failure to execute a payment order or acted recklessly and with knowledge that such improper execution or failure to execute would probably result. However, if such a case were to occur, it would be unconscionable for the bank not to be responsible for the consequences of its acts. It was stated that that proposition was so fundamental in many legal systems that the Model Law would be unlikely to be adopted if it were to deny such a result.

129. The current drafting of the subparagraph was criticized as making it too easy for a party to allege a bank's wrongful intent or recklessness. It was suggested that, particularly when the bank was large and foreign, there might well be a tendency for a jury to find the ordinary negligence of the bank to have been reckless behaviour. Suggestions were made that were intended to make it clear that the party alleging the reckless behaviour of the bank would have the burden of proving that the behaviour had

been reckless in fact. However, it was stated that none of the suggestions achieved the desired result.

130. A suggestion was made to delete both subparagraph (5)*(d)* and paragraph (8). Under that proposal the Model Law would not provide for consequential damages under any circumstances, but a party would not be precluded from relying on other doctrines of law that might be available in the relevant legal system to claim such damages. A similar suggestion was that subparagraph (5)*(d)* and paragraph (8) might be combined so that banks would be subject to other relevant doctrines of law when they acted in the ways described in the current text of subparagraph (5)*(d)*. In opposition to both suggestions it was pointed out that the purpose of paragraph (8) was to preserve the unity of the law in regard to international credit transfers, a unity that the Model Law sought to achieve. It was also stated that one of the purposes of paragraph (8) was to protect the banking system from unexpected claims for substantial amounts based on doctrines of law outside the Model Law.

131. The Working Group was in agreement that it would need more time to study the implications of the suggestions that had been made. It decided that it would place both texts in square brackets and reconsider them at the next session.

II. FUTURE WORK

132. The Working Group noted that it would hold its next session at Vienna from 26 November to 7 December 1990. It also noted that the Commission had requested the Working Group to finish its task of preparing a draft of the Model Law so that the Commission could consider the draft at its twenty-third session to be held at Vienna from 10 to 28 June 1991.

ANNEX

Draft Model Law on International Credit Transfers resulting from the twenty-first session of the Working Group on International Payments[a]

CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

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

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

*This Model Law is subject to any legislation dealing with the rights and obligations of consumers.[b]

[a]At the twenty-first session the Working Group considered articles 1 to 4, 12 and 14 to 16. In addition to specific changes in the text of those articles, the Working Group made a number of decisions that the text should be changed, leaving to a later time the drafting of a specific text. All such decisions are signalled by a note indicating their location in the report. Draft proposals to implement those decisions will be submitted by the Secretariat in A/CN.9/WG.IV/WP.49.

[b]The Working Group decided that the footnote to article 1 should be reworded to state that the Model Law was not intended to deal with issues related to the protection of consumers (see para. 65).

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.

[c]The Working Group decided that a provision should be included in the Model Law so that the sender of a conditional payment order would have the rights of an originator of a credit transfer under the Model Law where the execution of the conditional payment order eventually resulted in an unconditional credit transfer. It was also agreed that the condition itself as well as the fulfilment or non-fulfilment of the condition would remain outside the scope of the Model Law (see para. 75).

[d]A proposal was to replace the words "the instruction is to be transmitted" by the words "the instruction is transmitted". Another proposal was to reword the subparagraph as follows: "the payment order is to be transmitted to the receiving bank, either directly [, using or not a communication system established between banks,] or indirectly, using a funds transfer system established between banks". The Working Group referred the proposals to the drafting group (see paras. 77 and 78).

[e]The Secretariat was requested to reconsider the possibility of using a word other than "bank" (see para. 70). The Working Group also agreed that the definition should exclude telecommunications carriers and other similar entities that carried payment orders but did not perform a credit transfer service (see paras. 66 and 68).

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

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

Article 3. *Deleted*

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

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

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

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

(b) *Deleted*

(c) the receiving bank complied with the authentication.

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

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

Article 5. *Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank*[i]

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

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

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

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

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

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

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

Article 6. *Obligations of receiving bank that is not the beneficiary's bank*

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

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 9, either to the beneficiary's bank or to an appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

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

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

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

(6) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the credit transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer. The receiving bank acts within the time required by article 9 if, in the time required by that article, it inquires of the sender as to the further actions it should take in light of the circumstances.

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

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[f]This wording was adopted as an interim draft (see para. 84).

[g]The Working Group decided to include in paragraph (2) a provision to the effect that parties would not be allowed to agree on the use of an authentication procedure that was not commercially reasonable (see para. 96).

[h]The Working Group noted that at its twentieth session it had said that, if it was intended that the Model Law should relieve the sender of the responsibility for the erroneous content of a payment order as it was received because of the availability of a procedure agreed between the sender and the receiving bank that would detect the error or corruption, that intention should be set out separately (A/CN.9/329, para. 79). The Working Group requested the Secretariat to propose a text that would implement this idea for consideration at its twenty-second session (see para. 102).

[i]The Working Group agreed that the Model Law should take account of the use of netting. It recalled that at its nineteenth session it had decided to wait for the study on the topic that was expected from the Bank for International Settlements (BIS) (A/CN.9/328, para. 65). The Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not available soon (see para. 53).

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

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

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

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

(c) when it notifies the sender of acceptance,

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

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

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

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

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

Article 8. *Obligations of beneficiary's bank*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 10. *Revocation*

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

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

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

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

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

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

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

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

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

(4) If a revocation order is received by the receiving bank too late to be effective under paragraph (1), the receiving bank shall, as promptly as possible under the circumstances, revoke the

[j]See footnote *i* under article 5 above.

payment order it has issued to its receiving bank, unless that payment order is irrevocable under an agreement referred to in paragraph (3).

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

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

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

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

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

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

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

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

Article 11. *[Assistance and refund]*

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

(a) where a payment order is issued to a beneficiary's bank in an amount less than the amount in the payment order issued by the originator to the originator's bank—to assist the originator and each subsequent sending bank, and to seek the assistance of its receiving bank, to obtain the issuance of a payment order to the beneficiary's bank for the difference between the amount paid to the beneficiary's bank and the amount stated in the payment order issued by the originator to the originator's bank.

(b) where a payment order consistent with the contents of the payment order issued by the originator and containing instructions necessary to implement the credit transfer in an appropriate manner is not issued to or accepted by the beneficiary's bank—to refund to its sender any funds received from its sender, and the receiving bank is entitled to the return of any funds it has paid to its receiving bank.

Article 12. *Liability and damages*

(1) *Deleted*

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 9.[k]

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and the intermediary bank executed the payment order received by it within the time required by article 9.

(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank], and[l]

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date or execution date stated in the order, as provided in article 9.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

(a) loss of interest,

(b) *Deleted*

(c) expenses incurred for a new payment order [and for reasonable costs of legal representation],*

[*(d)* [any other loss] that may have occurred as a result, if the improper [or late] execution or failure to execute [resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result].]

(6) If a receiving bank fails to notify the sender of a misdirected payment order as provided in articles 6(2) or 8(1), and the credit transfer is delayed, the receiving bank shall be liable:

(a) if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank, or

(b) if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days.

(7) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)*(d)*. A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

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

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

[k]The Working Group requested the Secretariat to prepare a revised draft of the paragraph to make it clear that in respect of consequential damages under subparagraph (5)*(d)* only the receiving bank that had committed the error that caused losses could be held responsible to the originator or to its sender (see paras. 114 and 115).

[l]The Working Group decided that subparagraph *(a)* should include a reference to failure to perform one of the obligations under article 8 (see para. 117).

Article 13. *Exemptions*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 12 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to have taken into account at the time of the credit transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

CHAPTER IV. CIVIL CONSEQUENCES OF CREDIT TRANSFER

Article 14. *Payment and discharge of monetary obligations; obligation of bank to account holder*[m]

(1) *Deleted*

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

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

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.[n]

(4) *Deleted*

CHAPTER V. CONFLICT OF LAWS

[Article 15. *Conflict of laws*

(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.[o]

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an originator and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.][p]

Article 16.

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

[m]The Working Group decided that the title should be changed to reflect the new content of the article (see para. 23).

[n]The Working Group decided that paragraph (3) should state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (see para. 20).

[o]The Working Group decided to retain a provision based upon article 15(1) (see para. 37). It decided that article 15(1) should continue to be drafted so as to apply to individual segments of the transfer (see para. 40). It decided that article 15(1) should contain a general rule that, except where otherwise provided in the Model Law, parties were free to choose the applicable law (see para. 45). It decided that, unless otherwise agreed, the law of the receiving bank should apply to that segment of the transfer and that article 15(1) should make it clear that it did not apply to the law applicable to the authority of the actual sender to bind the purported sender (see para. 47).

[p]The Working Group decided that, since a rule had been retained as to the time when an obligation would be discharged by a credit transfer, paragraph (2) should be retained provisionally (see para. 48).