bank or an intermediary bank intended to carry out the originator's payment order."

Proposed article 15(3) enables funds transfer systems to promulgate rules like new CHIPS rule 3. It avoids the possibility of a single funds transfer being subject to conflicting substantive provisions of State law, thereby increasing the predictability and certainty of result that are the hallmarks of commercial law.

Proposed new article 16

"Article 16. *Variation by agreement and effect of funds transfer system rule*

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

(2) 'Funds transfer system rule' means a rule of an association of banks (i) governing transmission of payment orders by means of a funds transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a Central Bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this law, a funds transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this law and indirectly affects another party to the funds transfer who does not consent to the rule."

Comment

It is possible that a funds transfer system processing high-speed credit transfers, or two parties to a part of a credit transfer, might want to adopt the Model Law, with some variation. Article 16 permits this, and embodies a policy judgement that parties to a credit transfer should be able to contract out of those provisions which are unsuitable to their specific purposes.

E. Report of the Working Group on International Payments on the work of its twenty-second session

(Vienna, 26 November-7 December 1990) (A/CN.9/344) [Original: English]

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INTRODUCTION

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

2. The Working Group undertook the task at its sixteenth session (Vienna, 2-13 November 1987), at which it considered a number of legal issues set forth in a note by the Secretariat (A/CN.9/WG.IV/WP.37). The Group requested the Secretariat to prepare draft provisions based on the discussions during its sixteenth session for consideration at its seventeenth session (A/CN.9/297). At its seventeenth session (New York, 5-15 July 1988) the Working Group considered the draft provisions prepared by the Secretariat (A/CN.9/WG.IV/WP.39). At the close

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

of its discussions the Working Group requested the Secretariat to prepare a revised draft of the Model Rules (A/CN.9/317). At its eighteenth session (Vienna, 5-16 December 1988) the Working Group began its consideration of the redraft of the Model Rules, which it renamed the draft Model Law on International Credit Transfers (A/CN.9/318). At its nineteenth, twentieth and twenty-first sessions it continued its consideration of the draft Model Law (A/CN.9/328, A/CN.9/329 and A/CN.9/341).

3. The Working Group held its twenty-second session at Vienna from 26 November to 7 December 1990. The Group was composed of all States members of the Commission. The session was attended by representatives of the following States members: Argentina, Bulgaria, Cameroon, Canada, Chile, China, Czechoslovakia, Denmark, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Singapore, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America.

4. The session was attended by observers from the following States: Australia, Austria, Bolivia, Colombia, Democratic People's Republic of Korea, Dominican Republic, Finland, Indonesia, Kuwait, Lebanon, Oman, Peru, Philippines, Poland, Republic of Korea, Saudi Arabia, Sweden, Switzerland, Thailand, Turkey, Uganda, United Arab Emirates, and Zaire.

5. The session was attended by observers from the following international organizations: International Monetary Fund, Asian-African Legal Consultative Committee, Bank for International Settlements, Commission of the European Communities, Hague Conference on Private International Law, Banking Federation of the European Community, Latin American Federation of Banks and Society for Worldwide Interbank Financial Telecommunication S.C.

6. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora (Mexico)

Rapporteur: Mr. Bradley Crawford (Canada).

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

(a) Provisional agenda (A/CN.9/WG.IV/WP.48);

(b) International Credit Transfers: Comments on the draft Model Law on International Credit Transfers, Report of the Secretary-General (A/CN.9/WG.IV/WP.49).

8. The Working Group adopted the following agenda:

(a) Election of officers.

(b) Adoption of the agenda.

(c) Preparation of Model Law on International Credit Transfers.

(d) Other business.

(e) Adoption of the report.

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

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

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

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

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

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

(f) Report of the Working Group on International Payments on the work of its twenty-first session (A/CN.9/341).

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

10. The text of the draft Model Law before the Working Group was that set out in the report of the twenty-first session of the Working Group (A/CN.9/341, annex) and reproduced with comments in A/CN.9/WG.IV/WP.49.

Article 12

Subparagraph (5)(d) *and paragraph (8)*

11. The Working Group recalled that at its twenty-first session there had been a discussion of subparagraph (5)*(d)* and that a suggestion had been made to delete it as well as paragraph (8). A similar suggestion had been to combine subparagraph (5)*(d)* and paragraph (8). Under that proposal the Model Law would not provide a standard by which to determine whether a party to the credit transfer could recover consequential damages from a bank that had acted improperly. Instead, a bank would be subject to such rules of law otherwise existing in the national legal system when it acted in the ways described in the current text of subparagraph (5)*(d)*. In opposition to both suggestions it had been pointed out that the purpose of paragraph (8) was to preserve the unity of the law in regard to the remedies available to a party to an international credit transfer, a unity that the Model Law sought to achieve in general. It had also been stated that one of the purposes of paragraph (8) was to protect the banking system from unexpected claims for substantial amounts based on rules of law outside the Model Law. The Working Group had agreed that it needed more time to study the implications of the suggestions that had been made. It had decided to place both texts in square brackets for reconsideration at the current session (A/CN.9/341, paras. 126-131).

12. At the current session the Working Group considered a new proposal to delete subparagraph (5)*(d)* and to add at the end of the current text of paragraph (8) the following words based upon subparagraph (5)*(d)*:

"save any under which a bank is liable to compensate for loss because the improper or late execution or failure to execute resulted from an act or omission of that bank done with the intent to cause such loss, or recklessly and with knowledge that such loss might result."

13. In support of the proposal it was stated that, if subparagraph (5)*(d)* and paragraph (8) were simply deleted, it would be unclear whether remedies arising out of other rules of law would be available in cases where a bank acted wilfully with the intention of causing harm or recklessly with the knowledge that harm might result. It was also said that it was appropriate for the Model Law to contain a provision making it clear that in case of intentional or reckless behaviour, the bank might have to pay consequential damages in addition to an obligation to compensate for loss of interest and for expenses incurred for a new payment order, as otherwise provided in paragraph (5).

14. In opposition to the proposal, it was stated that any provision allowing for consequential damages would imply that in case of litigation an attempt would be made to determine the intent of the bank. It was also said that in some legal systems a party was deemed to have intended the consequences of its acts. In those systems it would be at least a question for the trier of fact, which might be a jury of ordinary citizens, whether the bank intended the harm when harm resulted from a failure by a bank to act with due care. It was said that an attempt to determine the intent of the bank would not be compatible with the operation of automated high-value, high-speed funds transfer systems. Therefore, it was stated, subparagraph (5)*(d)* should be deleted and paragraph (8) should be retained without change.

15. Another view was that subparagraph (5)*(d)* should be maintained to state the principle that a bank should be responsible for the consequences of its acts and that responsibility for intentional or reckless acts was the minimum that the Model Law should envisage. It was stated that this should be done even if paragraph (8) was amended as suggested.

16. The discussion in the Working Group focused on the specific wording of the proposal. A concern was expressed by some delegates that the concept of doing an act "recklessly", used in both the current text of subparagraph (5)*(d)* and the new proposal, was unclear and would lead to difficulties of interpretation, especially in legal systems where the concept was not currently in use. It was stated that the concept might be interpreted differently in different jurisdictions. For example, it was stated that in some jurisdictions failure to execute a given payment order might be interpreted as reckless behaviour even though the situation should be treated as ordinary negligence of the bank. In order to avoid those difficulties, it was suggested that the concept should either be defined within the Model Law or deleted altogether. In response to that suggestion, it was noted that the current wording of subparagraph (5)*(d)* had been used in several international texts, including for example the Convention on Certain Rules Relating to International Carriage by Air (Warsaw, 1929) and the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) and, it was stated, no significant difficulties of interpretation had arisen. Furthermore, the aim of the proposal was not to create a general regime of liability for consequential loss applying in the cases where the banks had acted recklessly or with intent to cause the loss. In effect, the proposed deletion of subparagraph (5)*(d)* combined with the amendment of paragraph (8) would only allow the individual States whose law other than the Model Law provided such a remedy to apply that remedy to a bank that had acted improperly in the ways described in the proposed wording of paragraph (8). The crucial question would be whether and under what conditions the law of the State, other than the Model Law as adopted by that State, would provide for consequential damages. Therefore, it was not necessary to be assured that the word "recklessly" would be applied in exactly the same way in all States, or even that the concept of "recklessness" existed in the law of all States. A view was expressed that analogies between the international texts cited and credit transfers were inappropriate because of the high-speed, high-volume nature of credit transfers and other differences in the subject-matter.

17. A suggestion was made that a general provision on the uniform interpretation of the Model Law should be included to help overcome possible difficulties in the use of the concept of recklessness, but there was no support for that suggestion.

18. It was stated that the proposed text was appropriate because under many national laws parties to a contract could not validly agree to exclude liability for their own intentional misconduct. The proposed text would retain such a rule in those States.

19. A proposal was made to amend the proposed addition to paragraph (8) to delete the words "or recklessly". Under that proposal the end of paragraph (8) would read "resulted from an act or omission of that bank done with the intent to cause such loss and with knowledge that such loss would result." The proposal was objected to on the grounds that it would put an excessive burden on the bank customer to have to prove both the intent of the bank and knowledge by the bank of the effect that would result from its failure to execute properly. No support was expressed in favour of the proposal.

20. Another proposal would have deleted the words "or recklessly and with knowledge that such loss might result" so that the end of paragraph (8) would have read "resulted from an act or omission of that bank done with the intent to cause such loss." In response to the proposal it was said that, if paragraph (8) were to address only the case of intentional failure to execute, it could be interpreted as excluding the availability of consequential damages in the cases where the bank acted without caring at all but with no actual intent to cause the loss. It was said that the simple deletion of paragraph (8) would be preferable to such a result. A concern was expressed that the word

"might" was so broad as to leave the last clause without any standard, thereby creating an unacceptably large scope for liability.

21. At the end of its discussion the Working Group recalled that it had to decide: whether a provision of the Model Law should state that consequential damages would be available, for example under the circumstances described in the current version of subparagraph (5)*(d)*; whether the Model Law should state that consequential damages would never be available; or whether the Model Law should leave the matter to national law outside the Model Law. It was noted that this last policy could be implemented either by deleting both subparagraph (5)*(d)* and paragraph (8) from the Model Law or by deleting subparagraph (5)*(d)* and rewording paragraph (8) in the manner set forth in paragraph 12 of the present report. After discussion and consideration of the reservations expressed by several delegations, the Working Group decided to adopt the text set forth in paragraph 12.

22. The Working Group noted that the deletion of subparagraph (5)*(d)* would entail consequential drafting changes to paragraph (7).

Paragraph (6)

23. The Working Group considered a proposal to redraft paragraph (6) to read as follows:

"(6) This paragraph applies to a receiving bank which is liable only in respect of its failure or the failure of a subsequent receiving bank to comply with any of the following notification obligations:

(a) to notify rejection in accordance with article 5(3) or 7(2), where payment has not been received from the sender;

(b) to notify misdirection in accordance with article 6(3) or 8(2);

(c) to notify a lack of sufficient data in accordance with article 6(4) or 8(3);

(d) to notify an inconsistency between the words and figures that describe the amount of money in accordance with article 6(5) or 8(4).

If a bank to which this paragraph applies is liable under this article to the originator or to its sender, it is obliged to compensate only for loss of interest for a maximum of 7 days or the period during which it held the funds, whichever is the longer."

24. It was stated by its proponents that the proposal was intended to include sanctions for all failures to give a notice required by the Model Law, except for the duty of a receiving or beneficiary's bank that had received payment to notify the sender of a rejection of the payment order (for which articles 5(2)*(a)* and 7(1)*(a)* provided the consequences) and the duty of the beneficiary's bank to notify an intended beneficiary who did not maintain an account at the bank that it was holding funds for his benefit (article 8(6)). It was also stated that the proposal aimed at reducing the maximum period of time that interest would be due by the bank to the sender in case of a misdirected payment order where no funds had been made available to the bank from 30 days (as in the current text of article 12(6)*(b)*) to 7 days. It was noted that the reference to "payment" in subparagraph *(a)* would have to be made consistent with the wording adopted in articles 5(2)*(a)* and 7(1)*(a)* (see paragraph 68).

25. It was suggested that the Working Group should not discuss the sanctions for a failure to give a required notification before a final decision had been made as to the contents of the duties to notify and the time when those duties would have to be complied with. Although the view was expressed that the contents of the duties should be considered first, the prevailing view was that consideration of the sanctions might help to understand the nature of the obligations and the advisability of imposing them.

26. A discussion took place as to whether there existed a need for the Model Law to address the issues arising from the misdirection of payment orders. Under one view the duties to notify should be limited to the two cases where a bank decided to reject a payment order and where a bank had to provide assistance to the sender of a payment order under article 11*(a)*. Another view was that there was no need to consider the issue of misdirected payment orders because they were rare in practice. Furthermore, obligations should be created only when a bank had received a payment order addressed to it. In reply it was stated that, however rare misdirected payment orders might be, it was appropriate for the Model Law, as a matter of public policy, to protect the sender against the consequences of a misdirected payment order. Furthermore, it was said, misdirected payment orders were not that rare in international credit transfers, particularly when two banks had similar names.

27. It was suggested that different solutions might be needed where the sender and the receiving bank of the misdirected payment order had an account relationship and where there existed no such relationship. It was stated that where the sender and the receiving bank had an established relationship, there was no need to create a new duty binding upon the receiving bank because the bank would already have an implied contractual duty to notify misdirection of the payment order. It was also stated that where no established relationship existed between the sender and the receiving bank, it might be particularly appropriate for the Model Law, as a matter of public policy, to create such a duty to give notice to the sender.

28. A view was expressed that the Working Group should consider the situation where a payment order was mistakenly sent to a receiving bank where the sender had an interest bearing account but the account had an insufficient credit balance to cover the payment order. It was stated that, in this case, the provisions in articles 5(2)*(a)* and 7(1)*(a)* deeming an acceptance to occur upon failure to notify the sender of rejection of the payment order would not apply. The question was raised as to whether the proposed sanction in case of a failure to notify would modify the amount of interest normally accruing to the account. In response, it was stated that the duty to notify the sender of a misdirected payment order did not provide a claim for damages if no loss had been suffered by

the sender. It was stated that, under the proposed text, the obligation of the receiver of a misdirected payment order was to "compensate for loss of interest". It was stated that no duty and therefore no sanction would apply unless funds had been transmitted for the purpose of funding the particular payment order.

29. It was recalled that where the receiving bank had received funds with the misdirected payment order, it would in any circumstances be under an obligation to return the funds with interest under article 11*(b)* (see paragraphs 105 to 111). A view was expressed that, since the receiving bank would be under the obligation to return the funds with interest under article 11*(b)*, there was no need to specify any sanctions under article 12. The prevailing view was that article 12 should contain a provision in respect of misdirected payment orders so as to prevent unjustified enrichment of the receiving bank.

30. As regards the situations described in subparagraphs *(b)* to *(d)* of the proposal where no funds had been received by the receiving bank, a view was expressed that the principle of liability under article 12 should also be retained. It was stated that such liability would not overburden the banks since it would arise only in rare cases and would lead to limited sanctions. That suggestion was objected to on the grounds that no interest should be recoverable from the receiving bank where it had not received funds. The Working Group decided that the proposed provisions of paragraph (6)*(b)* to *(d)* should not apply where no funds had been received by the receiving bank. In furtherance of that approach, it was decided that the liability should be imposed only upon the bank that received the funds, so that banks would have no responsibility for failures of subsequent banks to notify of a misdirected payment order.

31. As regards subparagraph *(a)* of the above stated proposal, a view was expressed that a duty to notify rejection of the payment order should be maintained as a matter of public policy so as to protect the sender, for example in the situation where a bank would unduly delay payment by refusing to make the appropriate entries into an account. In response, it was stated that in such a situation where funds had effectively been sent to the receiving bank, the sender was sufficiently protected by the fact that the receiving bank would be regarded as having accepted the payment order. After discussion, the Working Group decided not to retain subparagraph *(a)* of the proposal.

32. It was stated that subparagraphs *(b)*, *(c)* and *(d)* placed liability on a receiving bank even though the error was the sender's and, given the liability for errors in execution elsewhere in article 13, penalizing an innocent receiving bank for a sender's error was inappropriate.

33. At the conclusion of the discussion the Working Group decided to retain the proposed text of subparagraphs *(b)* to *(d)* of article 6 where the receiving bank had received the funds to pay for the payment order.

34. A discussion took place as to the definition of the interest and the applicable rate. The Working Group recalled that, at its twenty-first session, it had decided not to attempt to define a rate of interest or a means of determining that rate (A/CN.9/341, paras. 121 to 123).

35. The Working Group then turned to the question as to whether a bank should be responsible for the failure of a subsequent receiving bank to give a required notice, as set forth in the *chapeau* of the proposal. The Working Group decided to delete the words "or the failure of a subsequent receiving bank".

Paragraph (7)

36. The Working Group noted that it had decided to delete subparagraph (5)*(d)* (see paragraph 21) and that the reference to that subparagraph should therefore be deleted from the text of paragraph (7).

37. The attention of the Working Group was drawn to the fact that the principle of freedom of contract set forth in the first sentence of paragraph (7) was currently expressed in article 16. It was therefore agreed that at least the first sentence could be deleted as being unnecessary.

38. It was proposed that the entire text of paragraph (7) should be deleted because it reflected a lack of confidence regarding the banks. In support of that proposal it was stated that, in the context of the paragraph, the Model Law should not attempt to give special protection to bank customers, whose bargaining power might well be equal or superior to that of the banks. Under another view the general principle of freedom of contract in article 16 should be deleted. The prevailing view, however, was that the second sentence should be maintained as there existed a need to set a minimum standard for the protection of bank customers.

39. Another suggestion was that express reference should be made to the possibility that the parties might exercise their right under paragraph (7) to modify the liability regime by use of standard contractual clauses. In explanation it was said that in certain States it was not possible to modify the legal regime of responsibility except by an express contract and that clauses of non-responsibility found in standard form contracts were not enforceable. After discussion, the Working Group decided that such an amendment would be useful and referred the matter to the Drafting Group.

Paragraph (2)

40. The Working Group recalled that the general system of liability set forth in paragraph (2) was that the originator could hold the originator's bank liable for the improper performance of the credit transfer. That made the originator's bank responsible to the originator for loss wherever the loss occurred. The originator's bank and each successive receiving bank could in turn hold its receiving bank liable for the improper performance of the transfer when the improper performance occurred at that bank or at a subsequent bank in the credit transfer chain. The types and extent of the losses for which the originator's bank would be liable were those set forth in paragraph (5).

41. The Working Group based its discussion on a draft it had requested the Secretariat to prepare for the implementation of the policy decisions made at its twenty-first session. The proposed draft read as follows:

> "A receiving bank that is not the beneficiary's bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by a delay in the completion of the credit transfer, a failure to complete the credit transfer or a failure to complete it as instructed in the originator's payment order. A receiving bank is liable under subparagraph (5)*(d)* only to the extent that its actions caused the loss."

42. The Working Group noted that as a result of the decision to delete subparagraph (5)*(d)* (paragraph 21 above) the second sentence of the proposal could be deleted. The Working Group also noted that following the decision to delete subparagraph (5)*(d)* the originator's bank would be liable to the originator only for loss of interest and for expenses incurred for a new payment order.

43. A view was expressed that, since the deletion of subparagraph (5)*(d)* would, in essence, restrict the applicability of the liability regime set forth in paragraph (2) to loss of interest, there might be little justification left for the regime. It was recalled that, at previous sessions, the Working Group had decided that the interest due for delay in the execution of the credit transfer should be passed down the credit transfer chain to the beneficiary. It was noted that that policy decision had not as yet been implemented in the text of the Model Law.

44. The Working Group discussed the relationship between the obligation under article 11*(b)* to refund the principal amount of the transfer to the originator when the credit transfer was not completed and the liability for interest under article 12. The example was given of an intermediary bank that issued to its receiving bank a payment order for a smaller amount than the amount in the payment order it had received from the originator's bank. It was said that, if the intermediary bank subsequently sent a second payment order for the missing amount, the beneficiary should receive the interest for the delay in regard to that amount. However, if the missing amount was not sent forward so as to complete the credit transfer as instructed by the originator, the missing amount should be returned to the originator under article 11*(b)* and, it was said, interest should be paid to the originator on that amount. It was said that the beneficiary should not be able to recover interest while the originator recovered the principal sum. If the beneficiary had a right to interest from the originator for delaying in paying the underlying obligation, it should recover that interest from the originator, along with the amount not transferred to it in the original transfer.

45. In accord with the analysis set forth in the previous paragraph, a proposal was made to amend article 11*(b)* to provide that, where a credit transfer was not completed, the duty should be to refund "with interest". In reply it was said that such an obligation regarding interest would be appropriate in article 12 as a rule on liability, but not in article 11, which operated so as to guarantee the completion of the credit transfer. In response, it was said that it was only logical that the receiving bank that had retained funds for some time in a credit transfer that was not completed should not only refund those funds to its sender, but that it should pay interest on those funds for the period of time during which it had had use of them. After discussion, the Working Group adopted the proposal to add the words "with interest" to article 11*(b)*.

46. The Working Group noted that, having added the words "with interest" to article 11*(b)*, it had provided that the originator would receive the interest in case of a credit transfer that was not completed. It therefore reaffirmed the decision it had taken at an earlier session that the beneficiary should receive the interest allowable as damages under article 12 in case of a credit transfer that was completed, but was delayed.

47. It was said that, even if the beneficiary should have the primary right to receive interest for a delayed transfer, the originator should have a residual right to recover the interest. The example was given of a beneficiary to whom the interest was not paid and who recovered interest from the originator because of the delay in payment of the underlying obligation as suggested in paragraph 44. In reply it was said that, although the originator should undoubtedly be able to recover the interest in such a case, such a right should not be available under the Model Law. Instead, it was said, the originator's right to exercise the claim of the beneficiary should be left to the otherwise applicable law of subrogation or other appropriate doctrine. That solution was objected to on the grounds that it would deprive the originator of the vicarious liability of the originator's bank provided for in paragraph (2).

48. It was suggested that it should be clear in the Model Law that the failure of a sending bank to furnish cover to its receiving bank, as a result of which the receiving bank delayed its execution of the payment order, was one failure for which the sending bank should be liable for interest. In reply it was said that the duties of the sending bank, in its capacity as receiving bank of the order it had received, should be set forth in article 6 and not in article 12. In any case, its obligation as a sending bank under article 4(4) was to pay its receiving bank for the payment order when that receiving bank accepted it. It was agreed that further study of the question was needed.

49. The question was raised as to the party from whom the beneficiary should have the right to receive the interest. It was stated that it would be appropriate for the Model Law to provide a mechanism similar to that in the current text of paragraph (2) to the effect that, in case of late execution of the credit transfer, the beneficiary's bank would be liable to the beneficiary for interest wherever the delay occurred. It would then be necessary to provide that the beneficiary's bank had a right of recourse against its sender and that the liability would be passed up the credit transfer chain to the bank that was responsible for the delay. The objection was raised that making the beneficiary's bank liable for the actions of an intermediary bank up the credit transfer chain would make it liable for actions that had occurred before it had had any awareness

of the existence of the transfer and would possibly discourage it from accepting a payment order to complete a credit transfer that had been delayed. Moreover, while it had a contractual relationship both with the beneficiary and with its sender, it had no such relationship with a remote intermediary bank.

50. While it was acknowledged that there was the same lack of contractual relationship between the beneficiary and an intermediary bank, the Working Group was of the view that it was more appropriate to give the beneficiary a direct right against the bank at which the delay in the transfer occurred than to impose liability upon other banks for delays occurring before they acted in a credit transfer.

51. The Working Group recognized that good banking practice would call for the bank at which the delay occurred to forward the appropriate amount of interest to its receiving bank. It would be difficult and relatively expensive for the beneficiary to make its claim directly against the intermediary bank, especially when that bank was in a foreign country. It would be much better for all concerned if the intermediary bank were to pay any interest incurred by it without the need for a claim to be made against it. In order to foster such a desirable practice, the Working Group adopted in principle the following proposal:

> "The liability of the bank to the beneficiary is discharged to the extent that it transfers to its receiving bank an amount in addition to that it received from its sender."

52. In further support of the decision that the interest due from the intermediary bank that had delayed the execution of a payment order should be passed forward to the beneficiary through the banking system, the Working Group adopted the following provision:

> "If the receiving bank that is the recipient of interest for delay [including by means of an appropriate adjustment in the date of the entry of the debit or credit to an account] is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to its receiving bank."

53. The question was raised whether the Model Law should specifically state that one way for a sending bank to pay interest to its receiving bank was to make an appropriate adjustment in the date of the credit. An objection was raised that the date of the credit might be adjusted in an account that did not bear interest, thereby being of no benefit to the receiving bank. In response, it was stated that the reference to an "appropriate" adjustment made it clear that such adjustment should lead to the production of interest. The substance of the proposal was adopted by the Working Group. However, it was stated that adjustment in the date of the credit might not be the only way by which a bank might pay the interest due. Reference was made to the possible use of a set-off mechanism. The Working Group decided to refer the matter to the Drafting Group.

54. A discussion took place as to whether interest should be due merely because of a delay in the execution of a payment order or whether only a delay in the completion of the credit transfer should create a claim for interest in favour of the beneficiary. A delay in the execution of a payment order, it was stated, should give no claim to the beneficiary if the delay was made up at a later point in the credit chain and the credit transfer was completed by the payment date that had been stipulated. In reply it was said that a rule that relied on a delay in the completion of the credit transfer would be difficult to administer. Such a rule would mean that the intermediary bank would not know whether it was liable to pay interest until it had notice as to whether the credit transfer had been completed on time or not.

55. At the end of the discussion, the Working Group noted that it had adopted the following principles to be implemented by the Drafting Group in its redraft of paragraph (2): late completion of the credit transfer gives the beneficiary a claim for interest against the bank that caused the delay; a bank that does not properly execute a payment order is at fault and must pay interest; the intermediary bank that caused the delay is discharged from its liability if it passes interest to its receiving bank; the interest must be passed down the credit transfer chain by each receiving bank until it reaches the beneficiary. The Working Group noted that it had decided that the Model Law would not specify the rate of interest that would apply in such cases, but that it was proceeding on the assumption that it would be an interbank rate.

Proposed new paragraph

56. It was suggested that the Model Law should address the case where a bank that was obligated to pay interest to its sender (or, in accord with the decisions made at this session, to its receiving bank) and that in turn had a right of reimbursement of that interest, could not recover the reimbursement because that party had become insolvent. The suggestion was made that such a bank should be entitled to recover the reimbursement from any other bank further up or down the credit transfer chain, as the case may be, if that other bank would itself have been obligated to reimburse the insolvent bank.

57. In reply it was noted that such a rule would be of much greater significance in the context of the obligation to reimburse the principal sum under article 11*(b)*. However, it was stated that, although such a rule appeared on first analysis to be a fair rule, a thorough economic analysis would show that it was incompatible with a bilateral or multilateral netting scheme; since the Working Group had decided that it should support the development of such netting schemes by including a rule on the time of payment of a receiving bank made through such a scheme, it would not at the same time be able to adopt the proposed rule. After discussion the Working Group decided not to adopt the proposal.

Article 13

58. In the light of the decisions taken by the Working Group regarding the rules on liability set forth in the Model Law, the view was expressed that, since liability existed only for interest, there was no need to maintain a

rule on exemption. After discussion, the Working Group decided to delete article 13.

Payment to receiving bank

59. The Working Group noted that there was no rule in the current text of the Model Law to indicate when the sender fulfilled its obligation to pay the receiving bank under article 4(4). It noted that payment to the receiving bank might be made either through correspondent banking relations or through a multilateral or bilateral netting arrangement.

60. The Working Group noted that the "Report of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries", which had been presided over by the Managing Director of the Bank for International Settlements, had been published during the month of November 1990. The Working Group noted that the report dealt with policy issues in regard to interbank netting schemes, including payment netting schemes, but that it did not attempt to draft any legal text to implement its policy determinations. The conclusions of the report set forth minimum standards for netting schemes. The first of those minimum standards was that "Netting schemes should have a well-founded legal basis under all relevant jurisdictions." The Working Group noted that for there to be a well-founded legal basis for the netting scheme, it would be necessary that the netting scheme would not only be valid under the civil or commercial law, but that it would also be effective under the law of insolvency. It was also noted that in Part C of the report of the committee on netting schemes it was indicated that the netting scheme would have to function as intended under the law of all relevant States, which included *(a)* the law of each of the parties to the netting scheme, *(b)* the law that governed the individual transactions subject to the netting scheme, and *(c)* the law that governed any contract or agreement necessary to effect the netting.

61. It was stated that the legal issues involved in assuring the existence of a well-founded legal basis for bilateral and multilateral netting schemes had not yet been completely examined. It was said that those issues would be further studied in the work of the committee on netting schemes. It was suggested that until those studies had been completed, it would be unwise for UNCITRAL to attempt to include any provision on the subject in the Model Law. It was said that it could be envisaged that at a later time such a provision might be included. There was general agreement that the report of this session should recommend to national legislators that domestic laws, especially laws dealing with bankruptcy and insolvency, should be reviewed with the objective of supporting interbank netting of payment obligations.

62. Before making a final decision on the question as to whether the Model Law should include any provision intended to give a legal basis to netting schemes, the Working Group decided to turn to the issue of the time when the sender pays the receiving bank. It noted that in A/CN.9/WG.IV/WP.49, comments 31 to 45 to article 4, that issue had been considered in respect of correspondent banking before it was considered in respect of netting arrangements, since the issues were simpler in the context of correspondent banking. It was noted that an important reason for determining when the sender paid the receiving bank for the payment order was to be able to establish the amount in the account at any point of time in case of the insolvency of either the sender or the receiving bank or in case of attachment or other legal process against the account.

Sender has account with receiving bank

63. The discussion in the Working Group was based on the following proposal:

> "Payment of the sender's obligation under article 4(4) to pay the receiving bank occurs:
>
> *(a)* If the receiving bank debits an account of the sender with the receiving bank, when the debit is made, to the extent the debit is covered by a withdrawable credit balance in the account."

64. Under one view payment should be considered to be made at the time that the receiving bank had a right of setoff of the amount of the payment order against the account of the sender. The debiting of the account should be considered to be merely a bookkeeping entry with no independent legal significance.

65. Under another view it was appropriate for payment to be considered to have been made only when the account was debited. The act of debiting the account manifested the decision of the receiving bank that it was able and willing to receive payment in that manner. Even if the account was debited by a computer without human intervention, it had been programmed to do so only under certain conditions, thereby manifesting the decision of the receiving bank. Such a rule would not preclude the possibility that under the applicable law the receiving bank might have a right of setoff prior to the time of payment. It was noted that it was also possible for the receiving bank to debit the account prior to having a right of setoff. One example of such a possibility would be that the receiving bank might debit the account prior to executing the payment order received from the sender in order to be sure that it had been paid before it undertook its own obligation as sender to pay the receiving bank of its payment order.

66. Under one suggestion the words "to the extent of" should be replaced by "and". In support it was noted that it was not sufficient that there be "available credit" in the account, but that the credit should be withdrawable.

67. Under another suggestion the words "to the extent the debit is covered by a withdrawable credit balance in the account" should be deleted from the proposal. It was stated that it was not clear whether there was a withdrawable credit balance under either of two situations: when the account had a debit balance, or when the account had an insufficient credit balance to cover the amount of the payment order, but in either case there was a line of credit from the receiving bank to the sender

sufficient to cover the payment order. It was also questioned whether those words would permit a receiving bank to claim that its action in debiting the account did not constitute payment to it when the bank later discovered that there had been no withdrawable credit in the account or that credit had not been sufficient.

68. The Working Group noted that subparagraphs 5(2)*(a)* and 7(1)*(a)* both provided that the receiving or beneficiary's bank was deemed to accept a payment order by failing to give notice of rejection where the receiving or beneficiary's bank had been paid for the order. It was noted that it would be improper to allow the bank to avoid the effects of its failure to give notice of rejection by simply failing to debit the sender's account. It was, therefore, decided that the drafting of those subparagraphs should be modified to retain their current policy in the light of this discussion.

69. The Working Group, after discussion, decided to adopt the proposed text but to delete the words "to the extent the debit is covered by a withdrawable credit balance in the account".

Receiving bank has an account with sender or third bank

70. A proposal was made to add to the proposal set forth in paragraph 63 the following:

"*(b)* If the sender is a bank and the sender (i) credited an account of the receiving bank with the sender, or (ii) caused an account of the receiving bank in another bank to be credited, when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact."

71. The Working Group was in agreement with the proposal that payment should be considered as having been made to the receiving bank at the latest when the credit was withdrawn. It noted that in most cases the credit would not be withdrawn in specific terms, since the credit and any debit that might be considered to represent the withdrawal would be part of a continuous series of transactions through the account. The Working Group also noted that in some legal systems credits to an account are considered to have been withdrawn in the order in which they were made to the account.

72. The Working Group agreed with the principle that, in respect of a credit that had not been withdrawn, the receiving bank should have a certain period of time after learning of the credit to decide whether it wished to receive payment in that manner. It was noted that the receiving bank might not wish to receive payment by credit with the bank in question, even though it had an account with that bank, in order, for example, to manage its credit exposure to that bank. It was suggested that the problems were somewhat different when the credit was to an account with the sender and when the credit was to an account with a third bank. Consequently, it was said, the two situations should be treated independently in the Model Law.

73. It was stated that the receiving bank would often need additional time when the credit was in a foreign currency that it might need to convert to its own currency before it could use the credit effectively. In reply it was stated that international credit transfers to settle foreign exchange contracts were scheduled ahead of time and that the receiving bank would already have made commitments for the use of the funds. However, a large and unexpected credit in a foreign currency could cause such problems.

74. It was suggested that the time for payment should be extended to midnight of the day following the day on which the credit was withdrawable. While there was general agreement with the suggestion to the extent that it extended the time of payment to the next day, it was said that midnight had no relevance to banking operations in many countries. On the one hand the processing of transactions was completed earlier than midnight in many countries. To accommodate this point of view it was suggested that the proposed text should refer to the end of the banking day. On the other hand the movement to 24-hour banking, including the sending and receiving of international credit transfers, made any point of time arbitrary.

75. It was stated that the point of time when payment took place should be measured at the location of the receiving bank. Under another view it should be measured at the location of the sender. Under yet a third view it should be measured at the location where the account was located, which would be either the location of the sender or of the third bank.

76. A proposal was made to amend the text under consideration to provide "or, if not withdrawn, on the business day following the day on which . . .". It was noted that this proposal did not attempt to specify exactly when on that following day the receiving bank would be considered to have been paid by the sender.

77. Another proposal was to replace the words "the credit is withdrawable" by the words "the receiving bank is in a position to make effective the withdrawal". In opposition it was stated that the proposal would seem to leave the determination as to whether the receiving bank was in a position to withdraw the credit depend on the bank's subjective situation.

78. It was stated that the receiving bank should not be considered to have received payment unless the credit remained withdrawable throughout the entire period of time. It was stated that a credit would be considered to be withdrawable if the credit could be used within the country where the account was located even though it could not be transferred outside that country. If the currency and the account were otherwise appropriate but the receiving bank did not wish the credit, it should reject the credit (and perhaps the payment order if the payment order had not already been executed) prior to the deadline. It was said that in case of a rejection of the credit prior to the time of payment the right to the funds would automatically revert to the sender and the receiving bank would continue to have a right to be paid in an appropriate manner.

79. It was noted that the Model Rules on the Time of Payment of Monetary Obligations prepared by the Committee on International Monetary Law of the International Law Association provide in pertinent part:

> "*Rule 1: Basic rule on time of payment*
>
> Payment is deemed to be made at the moment when the amount due is effectively put at the disposal of the creditor.
>
> *Rule 2: Payment by bank or giro transfer*
>
> Payment by bank or giro transfer, including electronic funds transfer (EFT), is deemed to be made at the moment when the amount due has been unconditionally credited to the creditor's account."

It was also noted that the Model Rules had been drafted to state the time of payment of an obligation that was to be satisfied by a bank transfer and were not necessarily applicable to the satisfaction of an obligation that arose as a part of the transfer.

80. The Working Group decided to adopt the proposal set out in paragraph 70 as modified by the proposal in paragraph 76.

Multilateral netting scheme and central bank credit

81. The Working Group decided to add to the proposal set forth in paragraph 63 a text in respect of the time of payment of a receiving bank that receives payment through a multilateral netting scheme or by central bank credit based on the following:

> "*(c)* If the sender is a bank, when the receiving bank receives final settlement of the obligation with the central bank of the State where the receiving bank is located or through a funds transfer system. If the sender and receiving bank are members of a funds transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with [applicable law and] the rules of the system."

82. It was noted that when the receiving bank receives credit with its own central bank there was no reason for there to be any delay between the time of the credit and the time of payment. It was also noted that the settlement by the central bank had to be final for payment to have occurred. Therefore, if the central bank gave provisional settlement for certain types of transfers, the receiving bank would not be paid until the provisional settlement became final settlement. The Working Group decided not to discuss the question whether the central bank referred to in the provision should be limited by territorial or other connections.

83. The words "applicable law" were intended to indicate that the settlement would have to be final as a matter of law as well as in the manner indicated by the rules of the system. As a result the provision would not purport to validate a netting scheme that might otherwise not be valid under the applicable law. However, a question was raised as to the law of which State was indicated by the reference. Since the Working Group was not yet in a position to answer that question, the words were placed in square brackets.

Bilateral netting

84. It was noted that in some areas of the world banks often engaged in bilateral netting of payment orders rather than posting the individual payment orders to accounts held by the banks with one another or through accounts in third banks. It was said that the Model Law should provide legal support for such bilateral netting schemes. It was pointed out that in the United States the provision on bilateral netting in article 4A-403*(c)* had been drafted in such a way as to overcome the common law rule that in order for there to be a setoff, there had to be mutuality of obligations and the parties had to be acting in the same capacity in respect of the claims that were to be setoff.

85. The Working Group agreed to adopt a provision that would provide that if two banks transmit payment orders to each other under an agreement that settlement of the obligations to each other under article 4(4) will be made at the end of the day or other period, each bank as receiving bank is paid when settlement of the net obligation becomes final. At this stage the Model Law would not provide a rule as to the status of the obligations of the two banks prior to the final settlement of the net obligation.

Article 10

Paragraphs (1) and (2)

Irrevocability of a payment order

86. The Working Group discussed whether, as a matter of principle, payment orders under the Model Law should be revocable or irrevocable. It was noted that, since either of those two principles would require a number of exceptions, the two principles would often result in similar practical solutions. However, it was also noted that, despite the similarity in practical solutions, a distinction between the general rule and the exceptions was of importance. It was stated that, under several legal systems, exceptions to a general rule are construed restrictively by the courts. It was also stated that the general rule might determine, in case of litigation, whether the sender of a revocation order or the receiving bank would bear the burden of proof as regards, for example, the time when the revocation order was received.

87. It was noted that the current draft of article 10 was based upon the principle that a payment order was revocable. It was stated that such a rule would not be compatible with the operation of high-speed electronic transfer systems that would, in most cases, execute payment orders within a few seconds after they had received them. In response, the example was given of a large electronic funds transfer system such as the Swiss Interbank Clearing (SIC) that functions even though it admits the revocability of payment orders sent through it. It was also stated that not all payment orders transmitted electronically were executed immediately, particularly in the case of batch processing. As regards the example of batch processing,

however, another view was that attention should be given to the high costs of removing an order from a batch. It was also stated that in many countries credit transfers were still largely paper-based. After discussion, the Working Group decided to base its discussion on a proposed draft of article 10 originally presented at the twentieth session of the Working Group (A/CN.9/329, para. 184) that read as follows:

"Article 10. *Payment orders not revocable*

(1) A payment order may not be revoked or amended by the sender once it has been received by the receiving bank.

(2) Notwithstanding paragraph (1) a sender may request the assistance of its receiving bank to amend or revoke a payment order and

(a) the receiving bank (other than the beneficiary's bank) may, if it wishes, cooperate with the request of its sender regardless of whether or not it has previously accepted the payment order, except that any request by the receiving bank to amend or revoke its own payment order is subject to this paragraph;

(b) the beneficiary's bank may, if it wishes, cooperate with the request of its sender, provided that it has not accepted the payment order."

88. It was stated that the proposal imposed no duty on the receiving bank to act on a revocation order; the bank had full discretion whether it would cooperate with the sender in trying to stop the execution of the payment order received or in trying to revoke the payment order the bank had issued to its receiving bank. At the same time, by enabling the receiving bank to act, the provision would release the receiving bank from the binding obligations it might have incurred by accepting or executing the payment order before it received the request to revoke. In opposition to the proposal it was said to state the principle of irrevocability of payment orders in too radical a manner. Nevertheless, the Working Group decided that it would state in the Model Law a general principle of irrevocability, which would be subject to limited exceptions.

89. Having adopted the principle of irrevocability, the Working Group considered the point of time when the principle of irrevocability would become applicable. The general view was that, in the case of a receiving bank other than the beneficiary's bank, a payment order should become irrevocable at the latest when it had been executed and, in the case of the beneficiary's bank, when it had been accepted.

90. Another concern was expressed that a bank might receive a revocation order shortly before the time when it executed the payment order or, in the case of the beneficiary's bank, before it accepted the payment order. It was, therefore, decided that the bank should have sufficient time to act pursuant to the revocation order before the payment order became irrevocable.

91. It was stated that execution of a payment order by a receiving bank other than the beneficiary's bank before the execution date (or by the beneficiary's bank before the payment date) should not discharge the bank from the obligation it might have to act upon receipt of an otherwise timely revocation order.

92. After discussion, it was decided that a revocation order would be effective if it was received in sufficient time before the latest of the time when execution took place and the beginning of the execution date (or payment date, in the case of the beneficiary's bank).

Paragraph (3)

93. The Working Group decided to retain the current text of the paragraph.

Paragraph (4)

94. The Working Group considered whether a receiving bank should have any obligations in regard to a revocation order that was received after the payment order had become irrevocable. It noted that the current text of paragraph (4) provided that a receiving bank other than the beneficiary's bank was obligated to issue a revocation order in respect of its own payment order. After discussion, the Working Group decided that the bank that received a late revocation order could endeavour to revoke its own payment order but would be under no obligation to do so. The Working Group therefore deleted paragraph (4).

Authentication of a revocation order

95. The Working Group noted that the current text of paragraphs (1) and (2) provided that a revocation order was to be authenticated in the same manner as the payment order. It was stated that no reason existed why the parties should be prevented from agreeing that some other authentication procedure would apply, particularly when the revocation order was sent by a different means of communication than the payment order. The Working Group decided that a revocation order would have to be authenticated but not necessarily have to be authenticated in the same manner as the payment order.

Paragraphs (5) and (6)

96. There was general agreement with the principle expressed in paragraph (5) that the sender should not have to pay for the payment order if the revocation order arrived in time to be effective. Some doubt was expressed whether paragraphs (5)*(a)* and (6) were necessary since the sender would be refunded any payment it had already made to the receiving bank under article 11*(b)*.

97. The Working Group also agreed that, where the revocation order was effective but, nevertheless, the receiving bank executed the payment order and the credit transfer was completed, the receiving bank should have the possibility of recovering the amount paid to the beneficiary to the extent such recovery would be possible under any otherwise applicable doctrine of law. The matter was referred to the Drafting Group.

Paragraphs (8) and (9)

98. The Working Group decided to retain the substance of the paragraphs subject to drafting changes.

Preparation of new text

99. The Working Group noted that a new text of article 10 would be necessary in the light of its decisions and referred the matter to the Drafting Group.

New proposal

100. The Working Group considered a proposal to include a new provision that would read as follows:

"For proper cause and in compliance with applicable law, a court may restrain:

(a) a person from issuing a payment order to initiate a funds transfer;

(b) an originator's bank from executing the payment order of the originator, or

(c) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing funds.

A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a credit transfer, but a bank has no obligation if it acts in accordance with the order of a court of competent jurisdiction."

101. In support of the proposal, it was stated that considerable disruption of the banking system might result from the execution of court orders that attempted to affect a credit transfer once the transfer process had been initiated. Therefore, it was considered important to restrict the possibility of executing a court order to the two ends of the credit transfer and to state that no action would be available against an intermediary bank. Although some support was given to the proposal, it was stated that it would be improper for the Model Law to include rules governing judicial procedure. It was also stated that there was no reason why the sender of an unsuccessful revocation order should be prevented from using any means that might be available under the applicable law to stop the execution of the credit transfer. After discussion, the Working Group did not adopt the proposal.

Article 11

102. The Working Group noted that the Drafting Group had under consideration a new draft of article 11 that would significantly change its presentation without changing the substance of the article. However, in order to consider the policy issues presented by the article, it decided to base its discussion on the current text.

103. It was pointed out that subparagraph *(a)* did not set forth all of the cases in which a receiving bank was obligated to assist the originator or its sender in carrying out a credit transfer. Where the receiving bank itself had failed in one of its obligations by, for example, misdirecting its own payment order, it would be obligated under article 6 to send a new payment order consistent with the order it had received. Subparagraph *(a)* on the other hand was directed to the situation where another bank in the credit transfer chain had failed in its obligations and the originator or the sender to the receiving bank requested assistance in respect of that bank.

104. In one view the duty that the subparagraph sought to create was unclear in content and of uncertain utility since no remedy had yet been proposed by which breach of the duty might be appropriately redressed. In reply it was observed that in previous sessions the Working Group had indicated its intention to express a broad, general duty to assist which, even if not specifically enforceable by a clear sanction, would establish a norm for conduct and might, in egregious cases, be enforced by a court's application of general principles of law concerning the breach of a statutory duty.

Subparagraph (b)

105. The view was expressed that the general policy implemented in article 11*(b)* was inappropriate since it might adversely affect the banking system. It was stated that the duty of the originator's bank to refund to the originator the principal amount of a failed credit transfer was of particular importance in case of the insolvency of an intermediary bank from which the originator's bank had a right of reimbursement. The risk was a new one for banks in certain countries because previously it had been borne by the customers. It was said that the new risk would not be overly burdensome to large banks with foreign branches. Those banks would route most international credit transfers through their branches. It would be the small and middle-sized banks that had to route international credit transfers through correspondent banks in foreign countries that would run the risk. It was said that this would be of particular concern for banks in developing countries.

106. It was also stated that the increased risk for an originator's bank might give rise to new concerns by banking regulators who were increasingly aware of and interested in reducing systemic risk. Examples given raised the possibility of deposit insurance or reserve requirements being changed to address risks such as that which subparagraph *(b)* sought to create. It was also questioned whether banks might be required to provide capital support for that risk under the Basle Accord. In response, it was stated that at least one country that operated large value funds transfer systems had implemented a rule equivalent to article 11*(b)* without serious repercussions. The analysis carried out in that country by the bank supervisory authorities had led to the conclusion that the duty to refund to the originator did not raise issues under the Basle Accord, or serious risks of new contingent liabilities threatening the banks.

107. Another view was that the general effect of the Model Law would not be to increase the risks borne by banks. It was said that the effect of bilateral and multilateral net settlement agreements, which would be given a certain efficacy by the Model Law (see paragraphs 81 to 85), was estimated to reduce by 50 to 80 per cent the credit risk that otherwise would exist in respect of the transactions.

108. After discussion, the Working Group decided to maintain article 11*(b)*. It requested the Secretariat to send a copy of the present report to the Bank for International Settlements (BIS) for its information. There was a request that delegations specifically prepare for a discussion of the regulatory impact of the new risk at the session of the Commission in June 1991 when the Model Law would be considered, although it was understood by the Working Group that the question of the regulatory impact of bank risk was not within the competence of the Commission.

109. A discussion took place as to whether the provisions of article 11*(b)* should be mandatory. Under one view the mechanism that guaranteed the sender that he would be refunded in case of an unsuccessful credit transfer was one of the main provisions of the Model Law and parties should not be given the opportunity to derogate from it. Under another view, derogation might be acceptable in special circumstances. For example, where the originator specified that the credit transfer was to be carried out through a particularly unreliable intermediary bank or a particularly unstable country, the originator's bank should have the possibility to conclude a special agreement shifting the responsibility of the transfer to the originator. However, the Model Law should not allow easy derogation, especially by means of a bank's standard terms of dealing. Under yet another view, since the refund mechanism set forth in article 11*(b)* could be compared to an insurance or guarantee that the credit transfer would be carried out successfully, it would create a cost for the bank for which the bank should be able to charge. An originator might wish to choose a less expensive method of transfer in which the risk that the credit transfer could not be completed and the principal amount of the transfer could not be recovered would be knowingly borne by the originator.

110. After discussion, the Working Group decided that the provisions of article 11*(b)* would be mandatory, but a receiving bank would not be responsible if refund could not be recovered from another bank (other than the beneficiary's bank) through which the receiving bank was directed to route the transfer. The Drafting Group was requested to prepare a provision to that effect.

111. The Working Group also made certain suggestions as to the content of the provision. It was stated that consideration should be given to the possibility that the funds would be refunded to the originator by a different route from the route used in the failed credit transfer. Another view was that the paragraph should address more clearly the situation where a payment order was issued to a beneficiary's bank in an amount greater than the amount in the payment order issued by the originator to the originator's bank.

Article 15

Paragraph (2)

112. The Working Group noted that, on the proposal of a drafting party, it had already adopted at the current session three paragraphs in place of paragraph (1) and decided that paragraph (2) would be renumbered paragraph (4) (see paragraph 140). A proposal was made to delete renumbered paragraph (4) on the grounds that, in effect, it created a conflict of laws rule of general application between the originator and the beneficiary. After discussion, the Working Group decided to delete the paragraph. A proposal was made to link the deletion of article 15(4) with the deletion of article 14(2). No support was expressed in favour of that proposal.

Proposed additional paragraphs

113. In addition to the new formulation of paragraphs (1) to (3) as they had already been adopted by the Working Group on the proposal of a drafting party (paragraph 140), the Working Group considered a proposal to add the following paragraphs:

"( ) Where the rights and obligations referred to in paragraph (1) are embodied in a contract, the second sentence of that paragraph shall not affect the application of any rule of law

(a) for determining which law governs the formal validity of the contract; or

(b) applying the law of another State if it appears from the circumstances as a whole that the contract is more closely connected with that State.

( ) Paragraph (1) shall not apply to the extent that its application would be manifestly incompatible with the public policy of the forum.

( ) The application of the law of any State specified by this article means the application of the rules of law in force in that State other than its rules of private international law."

114. It was stated by its proponents that the proposed additional paragraphs were intended to make article 15 compatible with the provisions of the Rome Convention on the Law Applicable to Contractual Obligations. In opposition to the proposal it was said that the Model Law should not aim at accommodating the needs that particular States or groups of States would be facing under any other rule of law or international agreement. After discussion, the proposal was withdrawn by its proponents.

Definition of "execution"

115. The Working Group considered a proposal that "execution" should be defined as follows:

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

116. It was pointed out that the term was used in many places throughout the Model Law and that it would be useful to have a definition. A discussion took place as to whether this definition of execution should be extended to cover the action taken by the beneficiary's bank. It was said that the beneficiary's bank did not "execute" the payment order but that it could only accept or reject the payment order it received. Once it accepts the payment order, the credit transfer is completed. The Working Group adopted the proposal, and noted that a careful review of

the entire text of the Model Law would be necessary to ensure that all references to "execution" were correct and that all references to "acceptance", "execution date" or "payment date" (with reference to the beneficiary's bank) that might be incompatible with the new definition of "execution" were brought to the attention of the Commission.

Article 9

117. *Execution date.* A suggestion was made that the requirement to execute the payment order on the day it was received might put an excessive burden on the banks. It was also stated that there might exist good reasons why payment orders would not be executed on the day when they had been received, particularly in the case of paper-based payment orders. No support was given to that suggestion.

118. *Paragraph (2).* The Working Group adopted a proposal to amend article 9(2) so as to replace the words "the day the payment order is received" by the words "the date when a payment order is required to be executed under paragraph (1)". In support of that proposal, it was stated that the receiving bank should have no obligation to examine or process payment orders any earlier than they were obliged to in order to give timely notice under the Model Law.

119. *Derogation by contract.* A suggestion was made that the provisions of article 9(1) should be mandatory. It was stated that contractual derogation to those provisions would make it impossible for the originator's banks to predict how long international credit transfers would take when they had to go through several intermediary banks. Although some support was expressed in support of that view, the Working Group decided that the general recognition of the freedom of contract under the Model Law should prevail. Another suggestion was that derogation from the provisions of article 9(1) should be possible only between the originator and the originator's bank. Under yet another view the extent to which the Model Law will place constraints on derogation by parties' contract should be determined in a review of the Model Law as a whole to ensure that it achieves the correct balance between freedom of contract and a reliable core of content in order to be effective legislation.

Article 8

120. A proposal was made to delete article 8(2) and the references to it. In support of that proposal, it was stated that the case might arise where an originator had made a mistake in the indication of the beneficiary's identity that could not be detected by the beneficiary's bank. As an example, it was stated that a payment order might well contain a reference to an account number as the only indication of the beneficiary's identity. It was stated that, in such a situation, the banking system should bear no liability to the originator. It was also noted that as a technical matter, the definition of "beneficiary's bank" made it impossible for a payment order received by it to be misdirected. After discussion, the Working Group deleted the paragraph.

Article 4

121. At the twenty-first session of the Working Group the Secretariat was requested to propose a provision governing the use by a receiving bank of an error detection procedure. The proposal of the Secretariat was considered by a small group and a revised proposal for a new paragraph (3 *bis*) was submitted to the Working Group. The proposal read as follows:

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

122. It was recalled that some procedures used in respect of the identification of the sender depended upon the use of an algorithm that incorporated the contents of the payment order. In those cases, any error in the content of the payment order would cause the authentication to fail. In other cases a payment order might have an authentication procedure that did not depend on the content of the payment order. In those cases a separate procedure for the detection of errors might be employed. The proposed provision was designed for those situations.

123. It was also recalled that, at its twentieth session, the Working Group had not accepted a suggestion to define "authentication" to cover both identification of source of a message and detection of errors in the message (A/CN.9/329, paras. 77 to 79).

124. A view was expressed that explicitly requiring compliance by the sender with any agreed upon procedure was necessary to protect the rights of a receiving bank in the event of an erroneous payment order. After discussion the Working Group decided that the procedure envisaged in the proposal should not depend on whether the sender complied with any aspect of an agreed upon procedure. If it had not and that made it impossible for the receiving bank to exercise the error detection procedure agreed upon, the sender would bear the risk that an error would not be found.

125. A concern was expressed as to the general policy that a sender should be bound by the payment order as it was received. It was stated that the Model Law did not clearly state the moment when a payment order was received. The example was given of a payment order that would be transmitted through an automatic teller machine controlled by the receiver and corrupted at a later stage during its transmission to the receiving bank's central

computer. It was stated that, in such a situation, the sender should not have to bear the consequences of the error. It was therefore proposed to add the following words at the end of the first sentence of the proposal:

"unless a sender proves that the terms of the payment order issued by the sender are different from the terms of the payment order received by the receiving bank and that the change of the terms occurred during the transmission process of the payment order under the control of the receiving bank and without any fault of the sender."

126. The Working Group did not reconsider its policy decision that the sender would be bound by the terms of the payment order as received by the receiving bank. After discussion, the Working Group adopted the proposal stated in paragraph 121, deleting the words in square brackets.

II. DRAFTING CHANGES IN THE MODEL LAW

127. The Working Group considered the other drafting proposals made by the drafting party. It was noted that these proposals carried no implication as to the substance of the Model Law.

128. The Working Group noted that, at its twenty-first session, it had made a number of policy decisions and requested the Secretariat to propose new draft provisions to implement those decisions. Those drafting proposals were set out in A/CN.9/WG.IV/WP.49. At its current session, the Working Group requested a small drafting party to review those provisions and make appropriate changes. After discussion on the report of the drafting party, the Working Group adopted the provisions set forth in paragraphs 129 to 141.

Article 1

129. The footnote was redrafted as follows:

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

Article 2(b)

130. Subparagraph (iii) was replaced by the following:

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

131. A concern was expressed that the wording may not be sufficiently clear as to exclude point-of-sale payment transactions.

132. The following additional words to the definition of "payment order" were accepted in principle with an expectation that they would be reformulated by the Drafting Group:

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

Article 2(f)

133. As requested, the Secretariat suggested a word to be used in place of "bank". The term suggested was "credit transfer institution". The Working Group decided that the term "bank" would continue to be used.

134. It was decided that the following new sentence would be added at the end of the definition:

"An entity is not to be taken as executing payment orders merely because it transmits them."

Definition of "branch"

135. In place of the proposal to define the word "branch" of a bank as used in articles 1(2), 6(7), 9(5) and 10(9), the Working Group decided that the words "and separate offices" would be added following the word "branch" in those provisions.

Article 4(2)

136. The Working Group added the following sentence:

"The parties may not agree that this paragraph shall apply if the method of authentication is not commercially reasonable."

Article 12(4)

137. The Working Group decided that subparagraph *(a)* should read as follows:

"The beneficiary's bank is liable

(a) to the beneficiary, to the extent provided by the law governing the relationship between the beneficiary and the bank, for its failure to perform one of its obligations under article 8(1) and (6), and"

Article 14

138. The Working Group decided that the title of chapter IV and of article 14 would be changed to

"Completion of credit transfer and discharge of obligation"

139. The Working Group further decided that paragraph (2 *bis*) would be renumbered paragraph (1) and that a new paragraph (3) would read as follows:

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

Article 15

140. The Working Group adopted the following three paragraphs in place of paragraph (1) and decided that paragraph (2) would be renumbered paragraph (4):

"(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.

(2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender for the purposes of article 4(1).

(3) For the purposes of this article

(a) where a State comprises several territorial units having different rules of law each territorial unit shall be considered to be a separate State, and

(b) branches and separate offices of a bank in different States shall be considered to be separate banks."

Article 16

141. The Working Group decided that the article would be moved to article 3 (which currently was deleted) and that it would be given the title "Variation by agreement".

III. DRAFTING GROUP AND ADOPTION OF DRAFT MODEL LAW

142. A Drafting Group was created and was charged with the review of the entire text of the draft Model Law to assure proper style, to eliminate inconsistencies and to assure the concordance of the six language versions. The text of the draft Model Law was adopted by the Working Group on the recommendation of the Drafting Group and is presented to the Commission for its consideration. The text of the draft Model Law as adopted by the Working Group is reproduced in the annex to this report.

ANNEX

Draft UNCITRAL Model Law on International Credit Transfers[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 and separate offices of a bank in different States are separate banks.

Article 2. *Definitions*

For the purposes of this law:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[a]Text of the draft Model Law as adopted by the Working Group on International Payments at its twenty-second session, on 7 December 1990.

Article 3. *Variation by agreement*

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

CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

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

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

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

(b) the receiving bank complied with the authentication.

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

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

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

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

Article 5. *Payment to receiving bank*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) when it notifies the sender of acceptance,

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

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

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

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

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

Article 9. *Obligations of beneficiary's bank*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 11. *Revocation*

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

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

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

(4) A revocation order must be authenticated.

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

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

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

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

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

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

Article 12. *Duty to assist*

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

Article 13. *Duty to refund*

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

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

Article 14. *Correction of underpayment*

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

Article 15. *Restitution of overpayment*

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

Article 16. *Liability and damages*

(1) A receiving bank other than the beneficiary's bank is liable to the beneficiary for its failure to execute its sender's payment order in the time required by article 10(1), if the credit transfer is completed under article 17(1). The liability of the receiving bank shall be to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure. Such liability may be discharged by payment to its receiving bank or by direct payment to the beneficiary.

(2) If a receiving bank that is the recipient of interest under paragraph (1) is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to the next receiving bank or, if it is the beneficiary's bank, to the beneficiary.

(3) A receiving bank other than the beneficiary's bank that does not give a notice required under article 7(3), (4) or (5) shall pay interest to the sender on any payment that it has received from the sender under article 4(6) for the period during which it retains the payment.

(4) A beneficiary's bank that does not give a notice required under article 9(2) or (3) shall pay interest to the sender on any payment that it has received from the sender under article 4(6), from the day of payment until the day that it provides the required notice.

(5) A receiving bank that issues a payment order in an amount less than the amount of the payment order it accepted shall, if the credit transfer is completed under article 17(1), be liable to the beneficiary for interest on any part of the difference that is not placed at the disposal of the beneficiary on the payment date, for the period of time after the payment date until the full amount is placed at the disposal of the beneficiary. This liability applies only to the extent that the late payment is caused by the receiving bank's improper action.

(6) The beneficiary's bank is liable to the beneficiary to the extent provided by the law governing the relationship between the beneficiary and the bank for its failure to perform one of the obligations under article 9(1) or (5).

(7) The provisions of this article may be varied by agreement to the extent that the liability of one bank to another bank is increased or reduced. Such an agreement to reduce liability may be contained in a bank's standard terms of dealing. A bank may agree to increase its liability to an originator or beneficiary that is not a bank, but may not reduce its liability to such an originator or beneficiary.

(8) The remedies provided in this law do not depend on the existence of a pre-existing relationship between the parties,

whether contractual or otherwise. These remedies shall be exclusive, and no other remedy arising out of other doctrines of law shall be available except any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order *(a)* with the intent to cause loss, or *(b)* recklessly and with knowledge that loss might result.

CHAPTER IV. COMPLETION OF CREDIT TRANSFER AND DISCHARGE OF OBLIGATION

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

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

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

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

CHAPTER V. CONFLICT OF LAWS

Article 18. *Conflict of laws*

(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.

(2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender for the purposes of article 4(1).

(3) For the purposes of this article,

(a) where a State comprises several territorial units having different rules of law, each territorial unit shall be considered to be a separate State, and

(b) branches and separate offices of a bank in different States are separate banks.

F. Working paper submitted to the Working Group on International Payments at its twenty-second session: international credit transfers: comments on the draft Model Law on International Credit Transfers: report of the Secretary-General (A/CN.9/WG.IV/WP.49) [Original: English]

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