# I. INTERNATIONAL PAYMENTS

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

CONTENTS

## INTRODUCTION

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

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

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

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

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

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

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

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

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

## COMMENTS ON THE DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

*Title of the Model Law*

*Prior discussion*

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

*Comments*

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

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

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

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

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

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

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

## CHAPTER I. GENERAL PROVISIONS

Article 1. *Sphere of application**

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

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

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

*Prior discussion*

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

*Comments*

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

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

*Internationality of a transfer*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Territorial scope of application*

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

*Consumer transfers*

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

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

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

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

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

Article 2. *Definitions*

For the purposes of this law:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Prior discussion*

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

*Comments*

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

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

*Chapeau*

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

*"Credit transfer"*

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

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

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

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

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

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

*"Payment order"*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*"Originator"*

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

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

*"Beneficiary"*

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

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

*"Sender"*

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

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

*"Bank"*

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

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

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

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

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

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

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

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

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

*Whether the term "bank" should be replaced*

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

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

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

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

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

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

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

*"Receiving bank"*

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

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

*"Intermediary bank"*

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

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

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

*"Beneficiary's bank"*

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

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

*"Funds" or "money"*

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

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

*"Authentication"*

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

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

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

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

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

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

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

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

*"Execution date"*

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

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

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

*"Execution"*

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

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

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

*"Payment date"*

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

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

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

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

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

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

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

Article 3. *Variation by agreement*

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

*Prior discussion*

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

*Comments*

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

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

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

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

## CHAPTER II. DUTIES OF THE PARTIES

Article 4. *Obligations of sender*

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

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

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

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

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

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

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

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

*Prior discussion*

A/CN.9/297, paras. 39 to 45 and 69 (sixteenth session, 1987)
A/CN.9/317, paras. 57, 69 to 79 and 84 (seventeenth session, 1988)
A/CN.9/318, paras. 70 to 109 (eighteenth session, 1988)
A/CN.9/329, paras. 94 to 111 (twentieth session, 1989)
A/CN.9/341, paras. 86 to 103 (twenty-first session, 1990)
A/CN.9/344, paras. 121 to 126 (twenty-second session, 1990)

*Comments*

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

*Paragraph (1)*

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

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

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

*Paragraph (2)*

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

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

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

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

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

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

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

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

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

*Paragraph (3)*

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

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

*Paragraph (4)*

15. The paragraph was prepared in two versions at the eighteenth session of the Working Group (A/CN.9/318, paras. 88 to 90). In general, those who were in favour of placing on the receiving bank the major risk that an authentication had been falsified by a known or unknown third person favoured variant A. Placing the major risk on the receiving bank was said to be appropriate because it was the receiving bank that usually designed the authentication procedure (see comment 7). In general, those who were in favour of placing the major risk on the sender favoured variant B. Placing the major risk on the sender was said to be appropriate because it was the sender who chose the means of transmission of the particular payment order. Moreover, variant B would act as an incentive to senders to protect the authentication or encryption key in their possession.

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

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

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

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

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

*Paragraph (5)*

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

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

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

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

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

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

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

*Paragraph (6)*

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

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

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

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

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

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

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

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

Article 5. *Payment to receiving bank*

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

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

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

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

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

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

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

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

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

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

*Prior discussion*

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

*Comments*

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

2. At the nineteenth session in July 1989 the Working Group engaged in a preliminary discussion of the desirability of introducing a provision on netting into the Model Law. The Working Group noted that important studies on this issue were taking place elsewhere, and particularly in a committee of the central banks of the Group of Ten, presided by the General Manager of the Bank for International Settlements (BIS). Therefore, the Secretariat was requested to follow those developments and to report to the Working Group on the conclusions that had been reached, including the submission of a draft text for possible inclusion in the Model Law if that seemed appropriate (A/CN.9/328, paras. 61 to 65; see A/CN.9/WG.IV/WP.42, paras. 47 to 57). At the twenty-first session in July 1990 the Working Group noted that it might have to proceed with the preparation of provisions on netting without the benefit of the BIS study if the study was not available soon (A/CN.9/341, para. 53).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*(b)* Whether some or all of the payment orders that have been sent subject to the netting agreement can be reversed, or are to be reversed, in case one of the participating banks is unable to meet its obligations in the settlement.

*(c)* The time when payment is considered to have been made to the receiving bank by the sender of any given payment order.

27. The Working Group at its twenty-second session decided that the preparation of a legislative provision on netting for use in the Model Law should be restricted in its scope since the legal issues involved in assuring the existence of a well-founded legal basis for bilateral and multilateral netting schemes had not yet been completely examined. It was said that those issues would be further studied in the work of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries (comments 2 and 3).

28. Consequently, subparagraph *(b)*(iv) does not specifically validate netting agreements, whether bilateral or multilateral. The validity of a netting agreement is to be determined by the applicable law, which, as pointed out in comment 3, may include *(a)* the law of each of the parties to the netting scheme, *(b)* the law that governs the individual transactions subject to the netting scheme, and *(c)* the law that governs any contract or agreement necessary to effect the netting scheme. Nevertheless, the recognition in the Model Law that successful implementation of the netting scheme will have positive legal consequences will give netting schemes a certain efficacy that they may not currently have (see the comment made in A/CN.9/344, para. 107).

29. Subparagraph *(b)*(iv) also does not indicate the consequences for the netting scheme if any participant should be declared insolvent or otherwise become unable to fulfil its obligations prior to settlement of the net or if any participant with a net debit in the netting scheme is unable to settle for that debit. No indication is given whether the debits and credits arising out of the payment orders sent subject to the netting scheme are to be treated as gross amounts owing between the participants or whether only the net amounts of debits and credits are to be considered. Similarly, no indication is given whether payment orders from or to the party that is unable to fulfil its obligations are or can be withdrawn from the net prior to settlement.

30. The only specific rule given in subparagraph *(b)*(iv), and the reason for the rule being in article 5, is that the sender of every individual payment order that was sent subject to the netting scheme pays the receiving bank of that payment order when final settlement in favour of the

receiving bank is made. By the nature of a netting scheme, final settlement is made in favour of those receiving banks that receive the amount of the net credit due to them as well as in favour of those receiving banks that must pay the amount of the net debit that they owe.

*Other means for the sender to pay the receiving bank, subparagraph (c)*

31. While the situations specifically mentioned in subparagraphs *(a)* and *(b)* cover all the usual means for a sender to pay the receiving bank, other means of payment are possible. The sender might, for example, pay the receiving bank by negotiating to it discounted bills of exchange. For all such cases subparagraph *(c)* simply refers to the otherwise applicable law.

32. *Comparison with Article 4A.* Article 4A-403 is similar to article 5. When the payment is made by crediting the receiving bank's account with the sending bank or with a third bank, payment by passage of time takes place at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact, instead of the next business day as under subparagraph *(b)*(i). The only central bank mentioned is the Federal Reserve Bank. Therefore, payment by credit in an account with any other central bank, including the central bank of the State of the receiving bank, is treated the same as credit in an account with any other third bank. The provisions on bilateral and multilateral netting provide for the same time of payment as does the Model Law. Those provisions are more complete in recognizing the validity of netting schemes and providing particular rules considered necessary to overcome doctrines of the law of set-off in the United States that were thought to call in question the efficacy of a netting scheme in case of insolvency.

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

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

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

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

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

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

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

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

*Prior discussion*

A/CN.9/297, paras. 46 to 51 (sixteenth session, 1987)
A/CN.9/317, paras. 80 to 84 (seventeenth session, 1988)
A/CN.9/318, paras. 110 to 120 and 126 to 134 (eighteenth session, 1988)
A/CN.9/WG.IV/WP.42, paras. 7 to 16 (submitted to the nineteenth session, 1989)
A/CN.9/328, paras. 12 to 16 (nineteenth session, 1989)
A/CN.9/329, paras. 112 to 127 (twentieth session, 1989)
A/CN.9/341, para. 53 (twenty-first session, 1990)
A/CN.9/344, para. 68 (twenty-second session, 1990)

*Comments*

1. The drafting group at the nineteenth session substantially restructured the portion of the draft Model Law dealing with acceptance of a payment order by a receiving bank and the statement of the obligations of a receiving bank. Under the new structure articles 6 and 7 deal with a receiving bank that is not the beneficiary's bank while articles 8 and 9 deal with the beneficiary's bank. Since a "receiving bank" is defined in article 2*(g)* in such a way as to include a "beneficiary's bank", it was necessary to include paragraph (1) in this article to make it clear that article 6 does not apply to a beneficiary's bank.

*Concept of acceptance*

2. In the draft prepared by the Secretariat for the eighteenth session of the Working Group a number of the substantive rules depended on the acceptance of a payment order by the receiving bank. Discussion at that session showed that the Working Group was strongly divided on the desirability of using such a concept (A/CN.9/318, paras. 127 to 130). Its use was advocated as a convenient means to describe in a single word a number of different actions of different receiving banks that should have the same legal consequences, making it possible to use the word in various substantive provisions. In response, it was said that use of the term "acceptance" was not necessary and that it would cause difficulties in many legal systems because it seemed to suggest that a contract was created as a result of the receiving bank's actions.

3. In order to help resolve the controversy, the Secretariat prepared a report for the nineteenth session of the Working Group that described the criteria for determining when a receiving bank had accepted a payment order and the consequences of acceptance (A/CN.9/WG.IV/WP.42, paras. 2 to 42). The matter was discussed at length by the Working Group at its nineteenth session, at the conclusion of which the Working Group decided to retain the use of the concept (A/CN.9/328, para. 52).

4. A proposal was made at the twentieth session to define the term "acceptance". The proposal received no support (A/CN.9/329, paras. 112 and 113).

*Paragraph (2)*

5. At the twenty-first session, when it made its decision that the credit transfer was completed when the beneficiary's bank accepted the payment order addressed to it, with the legal consequences that followed, "the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in what are now articles 6 and 8 . . ." (A/CN.9/341, para. 17).

*Subparagraph* (a)

6. The current text of subparagraph *(a)* was adopted at the twenty-second session (see comment 10), based upon the text previously adopted at the twentieth session (A/CN.9/329, paras. 123 and 175). It is fundamentally a combination of paragraphs (1) and (2)*(a)* of the text as it emerged from the nineteenth session (A/CN.9/328, Annex). Paragraph (1) of that text was in turn composed of elements that had been in articles 5(1) and 7(1) of the text that had emerged from the eighteenth session (A/CN.9/318, annex). Throughout these various forms of presentation the basic policy, first established at the eighteenth session, has remained unchanged.

7. Except for certain obligations of notification of error set out in articles 7 and 9, the receiving bank is normally not required to act upon a payment order it receives unless it accepts the order. Nevertheless, the expectation is that a receiving bank will execute a payment order it has received. Therefore, if the receiving bank does not accept the order, paragraph (3) provides that it is required to notify the sender of the rejection. (See comments 16 to 20.) If the required notice of rejection is not given, paragraph (2)*(a)* provides that the payment order is accepted.

8. One of the most difficult issues has been whether the receiving bank should have an obligation to give a notice of rejection when the reason that it has not accepted the payment order is that it has not as yet received payment for it from the sender. In favour of such an obligation it is pointed out that a notice of rejection informs a good faith sender that there is a problem that needs to be rectified, a problem that otherwise may be unknown. Failure to rectify the problem may have adverse consequences for the sender, for the originator, if the sender is not the originator, and for the beneficiary. Opposed to such an obligation of notification is the fact that in most cases the failure to receive payment is in fact only a technical delay that is automatically rectified. A notification of rejection, or even of non-receipt of payment without specifying that rejection will follow, will merely add to the message flow between banks and will itself lead to additional confusion. In any case, a sender is expected to know whether it has made adequate provision for paying the receiving bank, whether by debit of an account of the sender with the receiving bank or by credit of an account of the receiving bank with the sender or with a third bank.

9. The Working Group decided at the eighteenth session that the receiving bank should have no obligation to give the notice of rejection (the notice now called for by paragraph (3)) if one of its reasons for rejecting the payment order was insufficient funds (A/CN.9/318, para. 119). That led to discussions at the nineteenth and twentieth sessions as to what constituted insufficient funds, and whether any distinctions should be made between the different reasons why the funds were insufficient (A/CN.9/328, para. 15, and A/CN.9/329, paras. 119 to 122). The result was that the reference to insufficient funds was deleted from what is now paragraph (3) (A/CN.9/329, paras. 123 and 175). Paragraph (2)*(a)* was amended to provide that even if a required notice of rejection was not given, the payment order is not accepted "until the receiving bank has received payment from the sender in accordance with article 4(4)". See comments 17 to 19 as to when a notice of rejection is required and article 5 as to when payment has been received.

10. During the discussions at the twenty-second session of the Working Group that led to the preparation of article 5 on when the sender pays the receiving bank, it was noted that one of the ways in which the receiving bank might be paid was by debiting the sender's account with the receiving bank. Since what is now article 6(2)*(a)* provided that the receiving bank was deemed to accept a payment order by failing to give notice of rejection where the receiving bank had been paid for the order, it would be possible for the receiving bank to avoid the effects of its failure to give notice of rejection by simply failing to debit the sender's account and therefore failing to receive payment. That result was thought to be improper (A/CN.9/344, para. 68). Therefore, subparagraph (2)*(a)* was redrafted to provide that acceptance would occur if there were funds available in the account to be debited sufficient to cover the amount of the payment order.

*Subparagraph* (b)

11. Paragraph 2*(b)* was originally in prior article 6(2)*(a)* and was applicable only to the beneficiary's bank. At the eighteenth session of the Working Group it was decided that the provision should be modified by adding to it a requirement that the beneficiary's bank exhibit a volitional element before the beneficiary's bank could be deemed to have accepted the payment order (A/CN.9/318, para. 137). However, the required volitional element was not added to the text at that session. At the nineteenth session of the Working Group the original provision was discussed at length in the context of the beneficiary's bank (A/CN.9/328, paras. 45 to 49). In favour of retaining the original text without any volitional element it was stated that contracts between banks that the receiving bank would execute payment orders when received even if funds were not yet available existed both in regard to multilateral net settlement systems and bilateral banking relations. They were entered into to increase the security of the operation of the funds transfer system. The legal security provided by those contractual obligations would be increased if the receiving bank was considered to have accepted the payment order as soon as it was received.

12. At the conclusion of the discussion at the nineteenth session it was decided to retain the original text as it applied to the beneficiary's bank and to extend the rule to receiving banks that were not the beneficiary's bank (A/CN.9/328, paras. 32 and 49; see also A/CN.9/329, para. 126 where a technical amendment was made).

*Subparagraph* (c)

13. Paragraph 2*(c)* providing that a receiving bank might expressly accept a payment order was added by the Working Group at its nineteenth session (A/CN.9/328, paras. 29 to 31). In the discussion doubts were raised as to the likelihood that a receiving bank would expressly accept a payment order for future implementation, but it was suggested that in the case of a large transfer a bank might be asked whether it would be prepared to handle the transaction. Its agreement would function as an express acceptance of the order.

*Subparagraph* (d)

14. Paragraph 2*(d)* provides for the normal way in which a receiving bank that is not the beneficiary's bank would accept a payment order it had received, i.e., by sending its own payment order intended to carry out the payment order received. If the payment order sent is consistent with the payment order received, the undertaking of obligations by the receiving bank and the execution of the most important of those obligations under article 7(2) are simultaneous. However, a receiving bank accepts a payment order even though the order it has sent is for the wrong amount, to an inappropriate bank or for credit to the account of the wrong beneficiary, so long as the payment order sent was intended to carry out the payment order received. If such an inconsistent payment order is sent, the undertaking of obligations and the failure to carry out those obligations are also simultaneous.

15. *Comparison with Article 4A.* Article 4A-209 provides that "a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order". Such a receiving bank executes the order, according to Article 4A-301*(a)* "when it issues a payment order intended to carry out the payment order received by the bank." That is the only way in which such a receiving bank can accept a payment order. If a notice of rejection is not given "despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order", Article 4A-210*(b)* provides that the bank is obliged to pay interest to the sender on the amount of the order, but that failure to give notice of rejection does not constitute acceptance of the order. Article 4A-211*(d)* provides that "An unaccepted payment order is cancelled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order." If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, Article 4A-212 provides that it is liable for breach of the agreement.

*Paragraph (3)*

16. The text of article 7(4) following the eighteenth session of the Working Group provided that "a notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order" (A/CN.9/318, annex). The drafting group at the nineteenth session moved the rule as to when the notice must be given by a receiving bank that is not the beneficiary's bank to article 5(1). In conformity with a decision of the Working Group it deleted the requirement that the notice must be given on the day the decision is made (A/CN.9/328, para. 86). At the twentieth session the requirement that a notice of rejection must be given was moved by the drafting group to article 5(3), i.e. current article 6(3).

17. Paragraph (3) now provides that, if the receiving bank does not accept the payment order under paragraph (2)*(b)*, *(c)* or *(d)*, it must give a notice of rejection and that notice of rejection must be given by the execution date. The provision should be understood to require the notice to be given by an expeditious means, which would normally mean by telecommunications.

18. The need to give notice of rejection exists even if the sender has no account relationship with the receiving bank or has even had no prior dealings with it of any kind (A/CN.9/318, paras. 114 to 116; A/CN.9/329, para. 118). There is no requirement that the notification give any reason for the rejection of the payment order (A/CN.9/297, para. 51). However, no notice of rejection need be given if there is insufficient information to identify the sender (A/CN.9/329, para. 117).

19. It was decided at the twentieth session of the Working Group that paragraph (3) would apply even though the receiving bank had not received payment for the payment order from the sender (A/CN.9/329, para. 123). It should be noted that if the receiving bank has received payment, the failure to give the notice required by paragraph (3) results in acceptance of the payment order by the receiving bank.

20. At the twenty-second session of the Working Group a proposal was made that where a receiving bank did not receive payment from the sender and failed to give a required notice of rejection, the bank would be obliged to compensate for loss of interest for a maximum of 7 days or for the period during which it held the funds, whichever was longer (A/CN.9/344, paras. 23 and 24). The proposal for the payment of interest was consistent with the consequences arising out of other failures to give notice covered by the same proposal. Since by hypothesis there would have been no funds in the possession of the receiving bank, unless they were received after the time when the notice of rejection should have been sent, the proposed sanction was effectively 7 days interest for failure to give the required notice of rejection. The proposed sanction was supported on the grounds that the duty to notify rejection of the payment order should be maintained as a matter of public policy so as to protect the sender, for example in the situation where a bank would unduly delay payment by refusing to make the appropriate entries in an account (A/CN.9/344, para. 31). In response, it was stated that where funds had effectively been sent to the receiving bank, the sender was sufficiently protected by the fact that the receiving bank would be regarded as having accepted

the payment order. As a result, the proposal was not adopted and no consequences are stated in the Model Law for the failure to give the required notice of rejection where the receiving bank has not received payment from the sender. However, the failure to give the required notice of rejection may have consequences for the receiving bank if its good faith or its care in handling the payment order is otherwise in question.

21. The text of article 5(1) (current article 6(1)) following the eighteenth session of the Working Group stated that the obligation of the receiving bank to notify the sender of its decision that it would not comply with the sender's payment order was subject to the contrary agreement of the sender and receiving bank. Although the drafting group at the nineteenth session deleted those words from the text, the deletion did not indicate a change in policy on the part of the Working Group. At the twentieth session the Working Group took note of the above statement, which had originally been made in A/CN.9/WG.IV/WP.44, comment 9 to article 5 (A/CN.9/329, para. 124). At the twenty-first session the Working Group adopted what is currently article 3, which gives the parties the power to vary any provision of the Model Law, unless specifically provided otherwise in the provision itself.

22. *Comparison with Article 4A.* As indicated in comment 15, although Article 4A does not require a notice of rejection, Article 4A-210*(b)* requires the receiving bank to pay interest to the sender if the bank fails to execute the order or give notice of rejection "despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order." While the provision applies whether the sender is a bank or not, it seems to be intended to apply primarily when the sender is a non-bank originator. No rule is given when the receiving bank has received payment in some other way but fails either to execute the order or to give notice of rejection.

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

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

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

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

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

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

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

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

*Prior discussion*

A/CN.9/317, paras. 62 to 67 and 88 (seventeenth session, 1988)
A/CN.9/318, paras. 60 to 69, 121, 122 and 144 to 154 (eighteenth session, 1988)
A/CN.9/328, paras. 17 to 20 and 75 (nineteenth session, 1989)
A/CN.9/329, paras. 128 to 141 (twentieth session, 1989)
A/CN.9/344, paras. 26 to 35 (twenty-second session, 1990)

*Comments*

*Paragraph (2)*

1. Paragraph (2) is prior paragraph (4), drafted in essentially the current form as article 5(3)*(a)* at the eighteenth session (A/CN.9/318, paras. 152 and 154) and redrafted by the drafting group at the nineteenth session. The paragraph states the basic obligation of a receiving bank other than the beneficiary's bank that has accepted a payment order, i.e., to send its own proper order to an appropriate bank within an appropriate period of time. On most occasions when a receiving bank is held liable to its sender it will be for failure to comply with the requirements of this paragraph. When the receiving bank sends its own payment order to its receiving bank, it becomes a sender and undertakes the obligations of a sender under article 4.

2. *Comparison with Article 4A.* Article 4A-302*(a)*(1) is essentially the same in substance.

*Paragraph (3)*

3. Paragraph (3) is based on paragraph (2) as it emerged from the nineteenth session (A/CN.9/328, annex),

which in turn was based on the first sentence of article 5(1 *bis*) as it was adopted at the eighteenth session (A/CN.9/318, annex).

4. The Working Group decided at its eighteenth session that a receiving bank should be required to notify the sender when the payment order received indicated that it had been misdirected to the incorrect bank. (Problems of misidentification of the beneficiary are considered in article 9(4).) The imposition of such a duty will help assure that the funds transfer system will function as intended (A/CN.9/318, para. 122). Although it was argued at the twenty-second session that there was no need for the Model Law to deal with misdirected payment orders since they were so rare in practice, it was replied that however rare misdirected payment orders might be, it was appropriate for the Model Law, as a matter of public policy, to protect the sender against the consequences of a misdirected payment order (A/CN.9/344, para. 26). Furthermore, it was said, misdirected payment orders were not that rare in international credit transfers, particularly when two banks had similar names.

5. The duty to notify the sender of a misdirection applies whether or not the sender and the receiving bank have had any prior relationship, whether or not the receiving bank accepted the order and whether or not the bank recognized that the payment order had been misdirected (see A/CN.9/328, para. 18 and A/CN.9/344, para. 27). The duty to notify of a misdirection is, therefore, an objective duty arising out of the fact of misdirection and that the misdirection could be determined from the payment order.

6. As the result of a concern expressed at the nineteenth session that the bank might not be able to fulfil its obligation even if it wished to, paragraph (3) was modified to provide that the receiving bank is required to notify the sender only if the payment order "contains sufficient information to identify and trace the sender" (A/CN.9/328, para. 20). The words "and trace" were deleted at the twentieth session (A/CN.9/329, annex).

7. Paragraph (3) was retained at the twentieth session in spite of the argument that an excessive burden was being placed on the receiving bank, especially when the error was that of the sender (A/CN.9/329, paras. 129 to 131; see also A/CN.9/344, para. 32). In particular, it was said that when modern means of transmitting payment orders were used, the addressing of the payment order was done primarily by bank identification number and not by name.

8. The draft text of the Model Law prior to the twenty-second session contained a provision on misdirected payment orders received by the beneficiary's bank that was identical to article 7(3), except that the reference was to the beneficiary's bank. At the twenty-second session that provision in what is currently article 9 was deleted (A/CN.9/344, para. 120). It was noted that, although the term "beneficiary's bank" was not defined, it could refer only to the bank of the person designated in the originator's payment order (see definition of "beneficiary" in article 2*(d)*; but see comment 49 to article 2 and comments 4 to 6 to article 17). A bank to which a payment order was sent as the beneficiary's bank but that was not in fact the bank of the beneficiary as defined would have obligations under article 7(3) and not under article 9.

9. *Comparison with Article 4A.* Article 4A-208*(b)*(4) provides that "if the receiving bank knows that the name and number identify different persons", (person here means intermediary or beneficiary's bank) reliance on either one is a breach of the bank's obligations. However, Article 4A is more positive than is the Model Law in authorizing a receiving bank to rely on identification of another bank by number alone.

*Paragraph (4)*

10. Paragraph (4) was added at the twentieth session (A/CN.9/329, para. 132) to cover a situation that did not fall within the scope of the already existing provisions requiring notice when a message is received that purports to be a payment order but that cannot be executed as such.

11. *Comparison with Article 4A.* There is no equivalent provision in Article 4A, but the same result might be reached in some instances through Article 4A-208*(b)*.

*Paragraph (5)*

12. Paragraph (5) as adopted at the twentieth session (A/CN.9/329, annex) is essentially the same as paragraph (3) as adopted at the nineteenth session (A/CN.9/328, annex), which in turn was identical to article 3(1) as it was adopted at the eighteenth session (A/CN.9/318, paras. 60 to 69). If the amount is expressed in both words and figures and there is a discrepancy, the receiving bank is required to notify the sender. The obligation to notify exists whether or not the receiving bank has accepted the payment order. If the receiving bank does not give the required notice and it acts upon the incorrect amount, it is responsible for the consequences, even if it had no knowledge of the discrepancy.

13. At the twentieth session arguments were presented in favour of the rule that, in case of discrepancy, the traditional banking rule should be applied that words controlled over numbers (A/CN.9/329, paras. 133 to 135). Other arguments were presented in favour of the opposite rule that, in regard to modern electronic means of transmitting payment orders where the orders were processed by number, the numbers should control the words. Both arguments were rejected on the grounds that the current rule was a compromise and if a bank did process payment orders by number only, it could contract with its customers to that effect.

14. The rule is expressed in general terms to apply to payment orders between any sender and receiving bank. However, it was the expectation in the Working Group that paragraph (5) would apply in fact only between the originator and the originator's bank, since interbank payment orders in electronic form transmit the amount of the transfer in numbers only (A/CN.9/318, paras. 61 and 63).

15. The view was expressed in the twentieth session that the paragraph was too restricted in that the amount might be represented in clear text by numbers but might also be

part of a code, as a result of which the conflict might be between two sets of numbers (A/CN.9/329, para. 134). The suggestion was made that the reference should be only to a discrepancy in amount without saying how that discrepancy might appear. That suggestion was not implemented by the drafting group at the twentieth session.

16. *Comparison with Article 4A.* There is no equivalent provision in Article 4A. In some cases Article 4A-205 governing the security procedure for the detection of error would be applicable.

*Paragraph (6)*

17. Although a receiving bank is normally bound to follow any instruction in the payment order specifying an intermediary bank, funds transfer system or means of transmission, it may appear to the receiving bank that it is not feasible to follow the instruction or that doing so would cause excessive costs or delay in completing the transfer (A/CN.9/328, para. 75). This paragraph gives the receiving bank an opportunity to make such a determination, so long as it does so in good faith. As an alternative, the receiving bank can enquire of the sender as to the actions it should take, but it must do so within the time required by article 10.

18. Several more restrictive provisions were suggested at the twentieth session of the Working Group (A/CN.9/329, para. 139). One suggestion was that a receiving bank that had accepted a payment order that contained instructions should be required to follow those instructions unless it was impossible to do so. Another suggestion was that the receiving bank should be permitted to use a different funds transfer system or communications system under the conditions described in paragraph (6), but should be bound to use any intermediary bank specified by the sender. The reason given was that the sender was more apt to have reasons of its own, unknown to the receiving bank, for specifying an intermediary bank than for specifying a funds transfer system or communications system.

19. *Comparison with Article 4A.* Article 4A-302*(b)* contains essentially the same rule as does paragraph (6), except that a receiving bank may not choose an intermediary bank other than the one specified in the payment order received. The reason given in the Official Comments is that "The sender's designation of that intermediary bank may mean that the beneficiary's bank is expecting to obtain a credit from that intermediary bank and may have relied on that anticipated credit. If the receiving bank uses another intermediary bank, the expectations of the beneficiary's bank may not be realized. The receiving bank could choose to route the transfer to another intermediary bank and then to the designated intermediary bank if there were some reason such as a lack of correspondent bank relationship or a bilateral credit limitation, but the designated intermediary bank cannot be circumvented."

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

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

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

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

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

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

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

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

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

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

*Prior discussion*

A/CN.9/297, paras. 46 to 51 (sixteenth session, 1987)
A/CN.9/317, paras. 80 to 84 (seventeenth session, 1988)
A/CN.9/318, paras. 110 to 120 and 135 to 143 (eighteenth session, 1988)
A/CN.9/WG.IV/WP.42, paras. 32 to 42 and 59 to 65 (submitted to the nineteenth session, 1989)
A/CN.9/328, 44 to 51, 59 and 60 (nineteenth session, 1989)
A/CN.9/329, paras. 142 to 147 (twentieth session, 1989)
A/CN.9/341, para. 53 (twenty-first session, 1990)
A/CN.9/344, para. 68 (twenty-second session, 1990)

*Comments*

1. As a result of the restructuring of the draft Model Law by the drafting group at the nineteenth session of the Working Group, the provisions on the acceptance or rejection of a payment order by the beneficiary's bank were placed in an article separate from that containing similar provisions in respect of a receiving bank that is not the beneficiary's bank. The changes made to article 5, currently article 6, at the twentieth session were also introduced into article 7, currently article 8. Consequently, the majority of the provisions are identical, with the exception of the way in which the bank is referred to, and the

comments to article 6 relative to use of the concept of acceptance and to paragraphs (2)*(a)*, *(b)*, *(c)* and (3) are applicable to article 8(1)*(a)*, *(b)*, *(c)* and (2). In particular, at the twenty-first session, when it made its decision that the credit transfer was completed when the beneficiary's bank accepted the payment order addressed to it, with the legal consequences that followed, "the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in [what are now] articles 6 and 8 . . ." (A/CN.9/341, para. 17).

2. Paragraph 1*(c)*, *(d)*, *(e)*, *(f)* and *(g)* represents various forms of volitional act by the beneficiary's bank to accept the payment order received by it. Subparagraphs *(d)* to *(g)* were carried over from article 6(2) as adopted at the eighteenth session (A/CN.9/318, annex). At the twentieth session a suggestion was made, but was not acted upon, that subparagraphs *(d)* to *(g)* could be replaced by words to the effect "when the beneficiary's bank placed the funds at the disposal of the beneficiary" (A/CN.9/329, paras. 143 and 147).

3. At the nineteenth session the Working Group deleted from what is currently paragraph (1)*(d)* the words that had been in square brackets "[without reserving a right to reverse the credit if cover is not furnished]" (A/CN.9/328, para. 49). Those words recognized a practice in some countries to allow a receiving bank, including a beneficiary's bank, to give the credit party provisional credit awaiting the receipt of cover from the sending bank. (Compare last sentence of comment 7.)

4. The discussion at the nineteenth session recognized that the granting of provisional credit to the credit party had the advantage of making the processing of credit transfers more efficient in the vast majority of cases in which cover arrived at an appropriate time. Since the receiving bank was never required to grant provisional credit as a matter of law, it would do so only where it made the credit judgment that it was highly likely to receive the cover or that, if it did not, it could recover the provisional credit from the credit party. Such a credit judgment might be reflected in an agreement with a credit party to grant such provisional credit. Such an agreement would always authorize the receiving bank to reevaluate its decision to grant provisional credit, although the bank might be required to give advance notice of its decision that it would no longer do so.

5. The discussion at the nineteenth session also noted that the possibility that provisional credit might be reversed introduced elements of insecurity into the funds transfer system that affected not only the credit party, but in extreme cases might endanger the functioning of the entire system. Therefore, the Working Group decided that it was undesirable for a receiving bank, including the beneficiary's bank, to be allowed to reverse a credit (A/CN.9/328, paras. 59 to 60).

6. At the twenty-second session the Working Group partially reversed its prior decision by which it did not approve of the granting of provisional credit when it recognized that a central bank might reverse a provisional credit (see article 5*(b)*(iii) and comment 21 to article 5). When the central bank is the beneficiary's bank, article 5*(b)*(iii) and article 8(1)*(d)* may be in conflict.

7. *Comparison with Article 4A.* Article 4A-209 makes a larger distinction than does the Model Law between the events leading to acceptance of a payment order by the beneficiary's bank and the events leading to acceptance of an order by any other receiving bank. Article 4A-209*(b)*(1) is substantially equivalent to subparagraphs *(c)* through *(g)* of this article. Article 4A-209*(b)*(2) and (3) base the acceptance of a payment order on when the beneficiary's bank is paid for the order, i.e., when it receives credit in its account at the Federal Reserve Bank, receives final settlement through a funds transfer system (e.g., CHIPS) or "the opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless . . ." The "unless" clause introduces the possibility of rejection of a payment order by the beneficiary's bank. Rejection of a payment order by the beneficiary's bank is not possible when the bank receives the order through FEDWIRE. In the case of CHIPS and as far as Article 4A is concerned, the beneficiary's bank can reject a payment order until it has accepted the order in one of the ways indicated above. Under Article 4A-405*(d)* and *(e)* it is possible for a beneficiary's bank to reverse its acceptance of a payment order under certain circumstances if a net settlement system is unable to complete the settlement.

Article 9. *Obligations of beneficiary's bank*

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

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

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

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

(5) The beneficiary's bank shall on the [execution date] give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for

his benefit, if the bank has sufficient information to give such notice.

*Prior discussion*

A/CN.9/317, paras. 62 to 67 and 89 to 92 (seventeenth session, 1988)
A/CN.9/318, paras. 64, 66 and 156 to 159 (eighteenth session, 1988)
A/CN.9/328, paras. 17 to 20 (nineteenth session, 1989)
A/CN.9/329, paras. 148 to 167 (twentieth session, 1989)
A/CN.9/344. paras. 26 and 27 (twenty-second session, 1990)

*Comments*

*Paragraph (1)*

1. The Working Group discussed at its nineteenth and twentieth sessions the issue of the extent to which the Model Law should be concerned with the relationship between the beneficiary and the beneficiary's bank (A/CN.9/328, paras. 37 to 43; A/CN.9/329, paras. 151 to 159; see A/CN.9/WG.IV/WP.42, paras. 58 to 68). The majority of the discussion at the nineteenth session related to the extent to which the Model Law should contain rules in respect of the civil consequences of the credit transfer as in current article 17, but the discussion was generally relevant to the question as to whether the Model Law should include rules on the obligation of the beneficiary's bank to the beneficiary in respect of the credit transfer. At the conclusion of the discussion at the nineteenth session the Working Group decided to defer any decision on the question until it had discussed the time when acceptance took place. It returned to the question at the twentieth session at which time the current text was adopted.

2. Paragraph (1) provides only that the funds must be placed at the disposal of the beneficiary in accordance with the payment order and the applicable law governing the relationship between the bank and the beneficiary. The paragraph serves primarily as a reminder that the ultimate purpose of a credit transfer is to make funds available to the beneficiary.

3. A proposal to include a more detailed statement of the obligations of the beneficiary's bank to the beneficiary was rejected at the twentieth session (A/CN.9/329, paras. 151 to 153). The limited approach taken in paragraph (1) conformed to the general policy that the Model Law should set forth the rights and obligations of the parties up to the moment when the beneficiary's bank accepted the payment order. However, the Model Law should not enter into the account relationship between the beneficiary and the beneficiary's bank, including in respect of issues that are closely related to the credit transfer, such as whether the bank must give the beneficiary notice of receipt of the credit (A/CN.9/329, paras. 165 and 166; see comments 13 and 14 for the notice requirement when there is no account relationship and article 17(1), and comment 3 to that article, in respect of the relationship between beneficiary and beneficiary's bank on completion of the credit transfer).

4. Notice by the beneficiary's bank to the beneficiary that it has the right to withdraw the funds or use the credit (or any of the other actions set out in article 8(1)*(c)* to *(g)*) would constitute acceptance of the payment order, if the payment order had not already been accepted in some other manner. To that extent the Model Law gives legal significance to the notice, in addition to any legal significance it may have under other applicable rules of law. However, the Model Law leaves it to those other applicable rules of law to determine the circumstances when notice might be required. (Compare article 9(5) and comments 13 to 15 to that article.)

5. *Comparison with Article 4A.* Article 4A-404 specifies the obligation of the beneficiary's bank to pay to the beneficiary the amount of an order it has accepted. If the United States were to adopt the Model Law, Article 4A-404 would be the applicable law referred to in article 9(1).

*Paragraphs (2) and (3)*

6. The restructuring of the text by the drafting group at the nineteenth and twentieth sessions of the Working Group led to the duplication in article 9(2), and (3) of the text of article 7(4) and (5) with appropriate changes in the references to the relevant banks. Therefore, the comments to those paragraphs, including the references to Article 4A, are relevant to the corresponding paragraphs of article 9.

7. The word "executed" is placed in square brackets because as defined in article 2(1) it is not applicable to the actions of the beneficiary's bank. In this context the words "acted upon" might be appropriate. Furthermore, as to the time when the notice must be given, see comment 11 below and article 10, comment 15.

*Misdirected payment orders*

8. The draft text of article 8 (current article 9) prior to the twenty-second session contained a provision on misdirected payment orders that was identical to article 7(3), except that the reference was to the beneficiary's bank. At the twenty-second session the paragraph was deleted (A/CN.9/344, para. 120). It was noted that, although the term "beneficiary's bank" was not defined, it could refer only to the bank of the person designated in the originator's payment order (see definition of "beneficiary" in article 2*(d)*). The view was taken that a bank to which a payment order was sent with an indication that it was the beneficiary's bank even though it was not in fact the bank of the beneficiary as defined in article 2*(d)* would have obligations as a receiving bank to which a payment order had been misdirected under article 7(3) but would have no obligations under article 9. For further discussion of the question whether a definition of beneficiary's bank would be useful, see article 2, comments 49 and 50; article 7, comment 8; articles 12 to 15, comment 2 and article 17, comments 4 to 6.

*Paragraph (4)*

9. Paragraph (4) applies only to a payment order received by the beneficiary's bank containing a discrepancy between the identification of the beneficiary in words and its identification in figures. There is no equivalent

provision in article 7 since no bank prior to the beneficiary's bank can be expected to have the information to be able to determine that such a discrepancy exists.

10. Any solution to the case envisaged presents substantial difficulties. While a discrepancy in the identification of the beneficiary may be the result of error, it may also be an indication of fraud. Rather than take the chance that the incorrect account would be credited, the Working Group decided that the transfer should be suspended and the beneficiary's bank should notify its sender and also the originator's bank, if they are identified on the payment order, of the discrepancy (A/CN.9/318, para. 64).

11. In order to reduce to a minimum the time during which the transfer is suspended, the notification to both the sender and the originator's bank must be done within the time specified in article 10(3), i.e., on or before the payment date. (For the meaning of "payment date" in this context, see article 10, comment 15.) It is anticipated that within a reasonable time the beneficiary's bank would receive further instructions as to the proper identification of the beneficiary, or an indication that the transfer was fraudulent.

12. *Comparison with Article 4A.* Article 4A-207 governs the problems covered in article 9(4). The provision is too complex to be summarized adequately here, but in general the beneficiary's bank is permitted to rely upon the number alone.

*Paragraph (5)*

13. Any duty to notify a beneficiary that had an account with the beneficiary's bank that a credit had been entered to its account could be left to their agreement or to the law applicable to the account relationship (comment 4). Although the originator or the sender may have an interest that the beneficiary's bank notify the beneficiary of the credit, that interest is not recognized in the Model Law (A/CN.9/329, para. 165).

14. However, there is unlikely to be a rule in the law applicable to the account relationship as to the obligation of the beneficiary's bank to notify a beneficiary who had no account relationship with the bank that the funds were available. Such a duty is set out in paragraph (5). The duty is owed to the sender and not to the beneficiary, since the Model Law does not in general enter into the relationship between the sender and the beneficiary (A/CN.9/329, paras. 165 and 166). Although paragraph (5) does not say so explicitly, the duty applies only if the beneficiary's bank has accepted the payment order. Furthermore, the duty applies only if the bank has sufficient information to give such notice. Contrary to the rule in article 10(3) in respect of the time when other required notices must be given, the notice specified in this paragraph must be given on the execution date (A/CN.9/329, para. 172). However, the words "execution date" are in square brackets since that date does not apply to a beneficiary's bank (A/CN.9/344, para. 116).

15. *Comparison with Article 4A.* Article 4A-404*(b)* provides that notice of receipt of a payment order instructing payment to an account of the beneficiary must be given by midnight of the next day but that "If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order." In both cases the obligation to give notice can be varied by agreement of the beneficiary or by a rule of a funds transfer system that is used in the transfer.

*Beneficiary's right to reject credit transfer*

16. At the twentieth session the Working Group decided that in principle the Model Law should provide that the beneficiary would have a right to reject the credit transfer (A/CN.9/329, para. 164). One of the participants was requested to prepare a text, which would deal with the time within which the beneficiary would be permitted to act and the costs of any credit transfer returning the funds. Although the participant did not submit a proposal, the Secretariat prepared the following provision for the consideration of the Working Group on the basis of an informal draft supplied by him. This proposal was not considered by the Working Group at either its twenty-first or twenty-second session. It is submitted for the possible consideration of the Commission.

> "The beneficiary has the right to reject a credit transfer [even though the beneficiary's bank has accepted the payment order and even though the transfer was made to an appropriate account of the beneficiary] by notice to the beneficiary's bank before the close of the banking day following the day when the bank accepted the payment order, if
>
> *(a)* the beneficiary's bank has not applied the credit in conformity with article 8(1)*(f)* or *(g)*,
>
> *(b)* the beneficiary's bank has not applied the credit to an obligation owed by the beneficiary to the bank,
>
> *(c)* when the beneficiary rejects the transfer, there is a credit balance in the account of an amount at least as much as the amount of the transfer, and
>
> *(d)* the beneficiary's bank is not precluded by reason of insolvency or otherwise from repaying the amount of the transfer to its sender."

17. The rejection of the credit by the beneficiary should take place as soon as is feasible so as to reduce the risk to the originator. The beginning of the period during which the beneficiary might be permitted to reject the credit could be when the beneficiary's bank accepts the payment order, when the beneficiary's bank credits the beneficiary's account or otherwise applies the credit, or when the beneficiary receives notice of the transfer. Although the most logical time from the point of view of the beneficiary would be when notice of the transfer is received, the Model Law does not require that notice be given and banking law and practice vary greatly as to when notice might be given, or even whether notice of credit to an account is given. The proposal suggests that the rejection should have to be given by the end of the banking day following the day the beneficiary bank accepts the payment order. That is a very long period of time for high-speed, high-value credit transfers, but it is difficult to decide what might be an appropriate shorter time.

18. The proposal places several limitations on the beneficiary's right to reject the credit. The credit must not already have been specifically applied. The credit must still be available in the sense that there is a sufficient credit balance in the account. There might be a sufficient credit balance in the account when the payment order is rejected even though there had earlier not been a sufficient balance because in the meantime other credits have been made to the account. Unless the credit has been specifically applied, the proposal does not attempt to trace the credit on a first-in, first-out or other such basis. The credit must still be available only in the sense that the beneficiary's bank is in a position to repay the amount of the transfer to the sender. (Compare article 5, comment 11 in respect of the use of first-in first-out.) The beneficiary should not be able to place on the originator the risk that the beneficiary's bank became insolvent after it accepted a payment order for the beneficiary's benefit or that the outbreak of war or similar event reduced the value of the credit to the beneficiary's account.

19. Under article 13 the beneficiary's bank, like all receiving banks in the chain of the failed credit transfer, will have to refund to its sender the funds received from its sender.

20. *Comparison with Article 4A.* Article 4A has no provision allowing the beneficiary to reject a payment order by notifying the beneficiary's bank. Compare Article 4A-406*(b)* on the right of the beneficiary to refuse payment from the originator when the payment was made by a means prohibited by the contract of the beneficiary with respect to the obligation.

*Obligation to make funds available on payment date*

21. At the twentieth session the Working Group considered, but did not decide, the issue of whether the beneficiary's bank should have a duty either to its sender or to the originator to make funds available on a payment date specified in the payment order (A/CN.9/329, para. 167). Such a provision might be appropriate in spite of the general position taken in the Model Law that it does not concern itself with the relationship between the beneficiary and the beneficiary's bank. The duty to place the funds at the disposal of the beneficiary on a payment date specified in the payment order would seem to be owed to the sender of the payment order rather than, or in addition to any duty owed, to the beneficiary. Compare the duty owed to the sender to give notice to a beneficiary that does not have an account at the beneficiary's bank that funds have arrived (article 9(5) and comment 14).

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

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

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

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

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

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

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

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

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

*Prior discussion*

A/CN.9/297, paras. 65 to 68 (sixteenth session, 1987)
A/CN.9/317, paras. 94 to 107 (seventeenth session, 1988)
A/CN.9/328, paras. 76 to 91 (nineteenth session, 1989)
A/CN.9/329, paras. 168 to 183 (twentieth session, 1989)
A/CN.9/344, paras. 117 to 119 (twenty-second session, 1990)

*Comments*

1. Following the discussion at the nineteenth session of the Working Group of the draft of prior article 7, which had been prepared by the Secretariat for the eighteenth session, a new draft was prepared by a small group (A/CN.9/328, para. 88). Following discussion of the draft late in the nineteenth session, the small group further revised the draft article for discussion at the twentieth session, taking into account the restructuring of the draft Model Law being undertaken by the drafting group (A/CN.9/328, paras. 89 to 91). Article 9 was further revised at the twentieth session (A/CN.9/329, paras. 168 to 183) and at the twenty-second session (A/CN.9/344, paras. 117 to 119).

*Title of article*

2. The word "execute" has been placed in square brackets because the article may refer to the actions to be taken by the beneficiary's bank to implement the payment order received (see comment 3).

*Purpose of paragraph (1)*

3. The purpose of paragraph (1) is to state the time within which a receiving bank must execute a payment order; it is not intended to state an obligation to execute the order. By use of the word "execute", paragraph (1) is restricted to stating a time limit for action by all receiving banks other than the beneficiary's bank. That may be

appropriate in view of article 9(1), which provides that the extent to which the beneficiary's bank has an obligation to place the funds at the disposal of the beneficiary is determined by the applicable law governing the relationship between the bank and the beneficiary. However, if the Commission were to decide that the Model Law should have a provision stating a duty of the beneficiary's bank to the sender to place the funds at the disposal of the beneficiary on a payment date specified on the payment order, as suggested in comment 21 to article 9, it might be appropriate for article 10 to have a provision in respect of the time limit within which the beneficiary's bank would have to act.

*Same day execution*

4. The general rule stated in the *chapeau* to paragraph (1) is that a payment order is to be executed on the day the payment order is received. The Working Group has at all times accepted the appropriateness of the general rule. Such a rule might not have been appropriate when credit transfers, including international credit transfers, were paper based. However, the vast majority of international credit transfers are currently transmitted by electronic means, and especially by on-line data transfer. In such an environment rapid execution by the receiving bank should normally be expected (A/CN.9/329, paras. 176 and 177). The appropriateness of this short period of time for execution of a payment order was again questioned at the twenty-second session where it was said that such a general rule would put an excessive burden on the banks. It was also stated that there might be good reasons why payment orders would not be executed on the day when they had been received, particularly in the case of paper-based payment orders. However, the general rule of same-day execution was maintained (A/CN.9/344, para. 117).

5. Nevertheless, the rule is strict and it is necessary that it be mitigated by several supplementary provisions. The first, found in paragraph (1) itself, is that the payment order may indicate that later execution is intended, either by specifying a later execution date or by specifying a payment date that indicates that later execution is appropriate.

6. The second is the general rule that a receiving bank is not required to execute any payment order it receives simply by virtue of its reception (article 6, comment 7). Therefore, the obligation to execute the payment order by a certain time arises only if the receiving bank has accepted the order pursuant to article 6(2) or, if a requirement to make the funds available on a payment date specified in the payment order received by the beneficiary's bank is included in the Model Law, pursuant to article 9(1). A particularly important application of this rule is that, since a bank does not accept a payment order for failure to give notice of rejection under article 6(2)*(a)* or 8(1)*(a)* until the bank has received payment from the sender (even though article 4(6) does not require the sender to pay the receiving bank for the payment order until the receiving bank accepts it), a receiving bank that receives sufficient funds on a day later than the day the order is received and executes the payment order on that day is not in breach of its obligations under article 10(1). It would be in breach of those obligations if it had agreed with the sender that it would execute payment orders from the sender upon receipt, since in such situations the receiving bank would have accepted the payment order when the order was received (articles 6(2)*(b)* and 8(1)*(b)*).

7. The third mitigating rule, which is found in paragraph (4), recognizes that banks establish cut-off times for the processing of payment orders for same-day execution. There may be different cut-off times for different types of payment orders, and a bank might establish its cut-off time for certain types of payment orders by adhering to the rules of a funds transfer system. Any order received after the cut-off time is treated as having been received the following day the bank executes that type of payment order. There is no limit on the discretion of a bank (or funds transfer system) in establishing a cut-off time, and it is not unusual for cut-off times to be as early as noon (A/CN.9/329, para. 178), and it might be as early as the opening of the funds transfer day. Such an early cut-off time might be reasonable where the bank's computer, or that of a funds transfer system, had been open all night to receive payment orders.

8. The fourth mitigating rule, which is found in paragraph (6), is that a branch or separate office of a bank, even if in the same State, is treated as being a separate bank for the purposes of article 10. Where the branches of a bank process payment orders on a decentralized basis, a payment order that is sent from one branch to a second branch might require the same amount of time to be executed at the branch as if the order was to be sent to a different bank (A/CN.9/328, para. 82).

9. Although the general rule requires the receiving bank to execute the payment order on the day it was received, subject to the mitigating rules mentioned above, there are two special cases in which the receiving bank is required to or permitted to execute the payment order on a different date. In the first case mentioned in paragraph (1)*(a)*, the payment order specifies a later date as the execution date. It should be noted that the provision is quite clear in saying that the payment order is to be executed on the date specified and not before that date, since the sender may have strong reasons for not wishing earlier execution (A/CN.9/328, para. 78). If the word "executed" continues to be used, the provision applies only to a receiving bank that is not the beneficiary's bank. However, it would seem that the rule in paragraph (1)*(a)* should also apply to the beneficiary's bank.

10. The second special case set forth in subparagraph (1)*(b)* is when a receiving bank that is not the beneficiary's bank receives a payment order specifying a payment date. That payment date tells the receiving bank how much time it has to be sure that the beneficiary's bank will receive the payment order in time to accept it and place the funds at the disposal of the beneficiary on the payment date. In some cases, the payment date may be so soon that it requires the receiving bank to take special care that the means of transmission of the payment order to the beneficiary's bank is such that the payment date can

be respected. In other cases the payment date will be far enough in the future that the receiving bank need not execute the order on the day it was received.

*Derogation by contract*

11. In response to a suggestion made at the twentieth session that the sender and the receiving bank should be able to derogate from the provisions of paragraph (1) by agreement, it was stated that such a possibility would make it impossible for orginator's banks to predict how long international credit transfers would take when they had to go through several intermediary banks (A/CN.9/329, para. 180). However, with the adoption of what is currently article 3 at the twenty-first session, the parties are free to derogate from any provision of article 10. Consequently, at the twenty-second session the same concern that the originator's bank could not know what agreements there might be between subsequent banks in the credit transfer chain derogating from the general rules stated in current article 10(1) led to a suggestion that the provisions of article 10(1) should be mandatory (A/CN.9/344, para. 119). Another suggestion was that derogation from the provisions of article 10(1) should be possible only between the originator and the originator's bank. Finally, however, no change was made in the general policy of freedom of contract as applied to article 10(1).

*Paragraphs (2) and (3)*

12. Prior to the twenty-second session, article 9(2) provided the general rule as to when all receiving banks, including the beneficiary's bank, had to give required notices; the notice had to be given the day the payment order was received.

13. Former article 9(2), as well as current article 10(2) and (3), made an exception for two cases: (i) the notice of rejection of a payment order required by current articles 6(3) and 8(2), and (ii) the notice by the beneficiary's bank to a beneficiary that does not maintain an account at the bank that the bank is holding funds for its benefit required by current article 9(5). Those provisions contain their own time limits.

14. At the twenty-second session the drafting group separated the former paragraph (2) into two provisions. The current paragraph (2) applies only to a receiving bank that is not the beneficiary's bank. The drafting group, implementing a decision of the Working Group, also changed the date when notices had to be given by such a receiving bank to "on or before the day the payment order is required to be executed". This change is particularly applicable when the payment order contains an execution date that is in the future, since the receiving bank should have no obligation to examine or process payment orders for the purpose of giving timely notice under the Model Law earlier than the bank would be obliged to examine or process those payment orders for the purpose of executing them (A/CN.9/344, para. 118).

15. In respect of the beneficiary's bank in paragraph (3), the same reasoning led the drafting group to make the deadline the "payment date". However, it is clear that the payment date as defined in article 2*(m)* is not the correct term to be used. Therefore, the Working Group left the term in square brackets.

*Paragraph (4)*

16. As noted in comment 7, banks often establish a cut-off time after which a payment order received is considered to have been received on the following day. The cut-off time may differ for different types of payment orders. They may be established by unilateral action by the bank or by interbank agreements, and especially by the rules of a clearing-house or other funds transfer system. Paragraph (4) places no limitation on how early in the day the cut-off time can be.

17. Since paragraph (4) is intended to apply to beneficiary's banks as well as to other receiving banks, the word "executes" is not appropriate. One possibility would be to substitute the words "acts upon".

*Paragraph (5)*

18. The use of the word "executes" is also not completely appropriate in paragraph (5), which is also intended to apply to beneficiary's banks. As in paragraph (4), it would be possible to use the correct grammatical form of the words "acts upon".

19. *Comparison with Article 4A.* Articles 4A-301*(b)* and 4A-302*(a)* in combination are substantially the same as paragraph (1). Since there are no notice requirements that are the equivalent of the ones referred to in paragraphs (2) and (3), there are no time limits equivalent to paragraphs (2) and (3). Article 4A-106 is substantially the same as paragraphs (4) and (5).

Article 11. *Revocation*

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

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

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

(4) A revocation order must be authenticated.

(5) A receiving bank other than the beneficiary's bank that executes or a beneficiary's bank that accepts a payment order that has been revoked is not entitled to payment for that payment order and, if the credit

transfer is completed in accordance with article 17(1), shall refund any payment received by it.

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

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

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

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

*Prior discussion*

A/CN.9/297, paras. 79 and 92 to 95 (sixteenth session, 1987)
A/CN.9/317, paras. 68 and 120 to 133 (seventeenth session, 1988)
A/CN.9/328, paras. 92 to 116 (nineteenth session, 1989)
A/CN.9/329, paras. 184 to 186 (twentieth session, 1989)
A/CN.9/344, paras. 86 to 101 (twenty-second session, 1990)

*Comments*

1. Article 11 provides a framework for the revocation of payment orders after they have been received by the receiving bank. At the nineteenth session of the Working Group it was suggested that, since international credit transfers are almost always sent by on-line telecommunications and are processed by computer, there would be little opportunity for the sender to revoke the payment order before the order was executed by the receiving bank and that it was, therefore, unnecessary to have any provision on the subject. The reply was given that a revocation that did not arrive in time because of the use of high-speed electronic systems would not be effective. That was not, however, considered to be sufficient reason to preclude the originator or other sender from having the opportunity to attempt to revoke the order (A/CN.9/328, paras. 93 and 94).

2. A further discussion took place at the twenty-second session as to whether, as a matter of principle, payment orders should be revocable or irrevocable (A/CN.9/344, paras. 86 and 87). Besides the arguments based on the ease or difficulty of operating a modern credit transfer system when payment orders were revocable, the Working Group considered certain legal effects of adopting one principle or the other. It noted that in either case a number of exceptions to the general principle would be necessary, rendering the practical results similar in the two cases. However, under several legal systems, exceptions to a general rule are construed restrictively by the courts. Furthermore, the general rule might determine, in the case of litigation, whether the sender of a revocation order or the receiving bank would bear the burden of proof as regards, for example, the time when the revocation order was received. At the end of the discussion the Working Group decided to adopt the principle of irrevocability, which is expressed by paragraphs (1) and (2) (A/CN.9/344, para. 89). At the end of its discussion of the entire article it noted that a new text of article 11 would be necessary in the light of the numerous decisions it had taken and referred the matter to the drafting group, which prepared the current text (A/CN.9/344, para. 99).

3. The text presented to the nineteenth session of the Working Group had one set of rules that covered both the revocation and the amendment of payment orders. At the nineteenth session it was noted that the amendment of payment orders might raise additional policy issues to those raised by the revocation of orders (A/CN.9/328, para. 100). As a result article 11 refers only to the revocation of payment orders and no provision is made for their amendment. The Working Group did not consider a suggestion made in the working paper submitted to the twenty-second session that the text was not clear that revocation of a part of a payment order would not be effective (A/CN.9/WG.IV/WP.49, article 10, comment 3).

4. At the twentieth session the Working Group took note of a proposal that would terminate the right to revoke a payment order once it had been received by the receiving bank, but which would also have permitted a receiving bank that was not the beneficiary's bank to cooperate with the request of the sender, regardless of whether or not the payment order had been accepted, and would have permitted a beneficiary's bank to so cooperate if it had not already accepted the payment order (A/CN.9/329, paras. 184 to 186). No action was taken at the twentieth session, since it had been agreed that the discussion of what is currently article 11 at that session was to be only exploratory. The proposal was resubmitted to the twenty-second session, but was rejected because it would have stated the principle of irrevocability of payment orders in a more radical manner than was desired (A/CN.9/344, para. 88).

*Paragraphs (1) and (2)*

5. Paragraphs (1) and (2) provide essentially the same rules for the revocation of a payment order sent to a receiving bank that is not a beneficiary's bank and to a receiving bank that is a beneficiary's bank. In both cases the revocation can be sent only by the sender of the payment order in question; neither the originator nor an earlier bank in the credit transfer chain can revoke the order even though it may be the party interested in having the order revoked.

6. In both cases the payment order can be revoked only if the revocation is received by the receiving bank in time. In the case of a receiving bank that is not the beneficiary's bank, the event that marks the termination of the right to revoke is the execution of the order by the receiving bank. While sending its own order would also constitute acceptance of the order received, other forms of acceptance under article 6(2) would not constitute execution of the order received. In the case of the beneficiary's bank, the

event that marks the termination of the right to revoke is the acceptance of the order by the bank in any of the ways described in article 8(1) (A/CN.9/344, para. 89).

7. The receiving bank is given a certain period of time to act upon the revocation received. This period must "afford the receiving bank a reasonable opportunity to act" before the cut-off event (A/CN.9/328, paras. 96 and 116; A/CN.9/344, para. 90). The length of the period as so defined is by its nature indefinite, since it depends on the ability of the receiving bank to act. The time required will vary from one bank to another, indeed from one branch of a bank to another, and depend on the nature of the payment order and the means of communication of the revocation.

8. A concern that had been expressed at the nineteenth and twentieth sessions, and that was repeated at the twenty-second session, was that a sender of a payment order with a future execution date should not lose any right of revocation that it might have by the premature execution of the payment order (A/CN.9/328, para. 78; A/CN.9/329, paras. 168 and 169; A/CN.9/344, para. 91). Therefore, in the revision of the article at the twenty-second session the cut-off event became the "later of the actual time of execution and the beginning of the execution date" in the case of a receiving bank that is not the beneficiary's bank and the "later of the time [the bank] accepts the payment order or the beginning of the payment date" in the case of the beneficiary's bank. In this case the term "payment order" is used as defined in article 2*(m)*.

*Paragraph (3)*

9. Paragraph (3) was introduced into the draft Model Law at the nineteenth session of the Working Group (A/CN.9/328, para. 98). Agreements restricting the right of a sender to revoke a payment order are common in multilateral payment arrangements, especially where there is delayed net settlement, and in batch processing systems where it may be difficult, if not impossible, to extract a single payment order from the batch. Paragraph (3) would apply to the rules of a clearing-house that prohibited revocation of a payment order once sent to the clearing-house if, under the applicable law, the rules of the clearing-house were considered to be an agreement between the sender and the receiving bank. Paragraph (3) does not apply to a restriction in a telecommunications message system, such as SWIFT, that prohibits the withdrawal of a message once sent. Even a telex cannot be withdrawn as a message from the public telecommunications system once it has been sent; however, the order contained in the message can be revoked under paragraph (1) or (2).

10. When paragraph (3) was introduced at the nineteenth session of the Working Group, what is currently article 11 contained a paragraph (4) that allowed a sender whose revocation had arrived too late to require its receiving bank to attempt to revoke the receiving bank's payment order sent in execution of the payment order received. The introduction of paragraph (3) caused concern since the originator might not know that there were agreements between particular banks through which the credit transfer might pass that made a payment order between those banks irrevocable (A/CN.9/328, para. 115). An agreement of a clearing-house, for example, through which the originator's bank sent the payment order to an intermediary bank that restricted the right to revoke the order would preclude the originator from revoking the credit transfer even though the beneficiary's bank had not yet accepted an order to carry out the transfer. Although former paragraph (4) was deleted at the twenty-second session, a receiving bank that received a late revocation could still endeavor to revoke its own payment order if it wished (A/CN.9/344, para. 94). Since an originator no longer has the right to have the different receiving banks in the credit transfer chain attempt to revoke their own payment orders until either a relevant payment order is revoked or until the beneficiary's bank accepts an order completing the credit transfer, the concern expressed at the nineteenth session in regard to paragraph (3) is currently of less importance.

11. At the twenty-first session the Working Group adopted what is currently article 3, which provides for a general freedom of contract "except as otherwise provided in this law". Although article 3 would seem to render paragraph (3) redundant, it was retained by the Working Group at the twenty-second session (A/CN.9/344, para. 93).

12. *Comparison with Article 4A.* Article 4A-211 permits cancellation of a payment order, as well as its amendment, until the order has been accepted. A receiving bank that is not the beneficiary's bank can agree to cancel or amend an order it has received even after it has accepted the order, or can be bound to do so by a funds transfer system rule, but the bank must be able to cancel any order it has issued in execution of the order it received. A beneficiary's bank can agree, or be required by a funds transfer system rule, to cancel or amend an order that was issued in execution of an unauthorized payment order or was issued as a result of one of several types of error by the sender. Article 4A-211*(h)* places a minor restriction on the general right to vary by agreement all rights and obligations, which is otherwise available under Article 4A-501. Article 4A-209*(d)* provides that a payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or until the execution date if the bank is not the beneficiary's bank; therefore, until the payment date or execution date, the payment order can be cancelled. Those provisions in Article 4A cover essentially the problems covered in paragraphs (1) to (3) of article 11.

*Paragraph (4)*

13. Prior to the twenty-second session paragraphs (1)*(c)* and 2*(c)* provided that the revocation had to be authenticated in the same manner as the payment order. That implied that the revocation had to be sent by the same means of communication as was the payment order. When that wording was questioned at the nineteenth session of the Working Group, citing the case of a paper-based payment order that was revoked by a tested telex, the reply was given that an attempt had been made to draft a requirement that the authentication had to be as good as or better than the authentication of the payment order being

revoked, but that it had not proven possible to do so (A/CN.9/328, para. 114).

14. At the twenty-second session the paragraph was changed to indicate simply that the revocation must be authenticated (A/CN.9/344, para. 95).

*Paragraph (5)*

15. Paragraph (5) provides that a sender who has sent a revocation that was or should have been effective is not obligated to pay for the payment order, as it would otherwise be under article 4(6), and is entitled to recover any funds paid. At the nineteenth session it was suggested that the sender should be entitled to receive back the original amount of the transfer less costs. This was said to be a question that arose in respect of the reimbursement of the funds in case of an unsuccessful credit transfer as well and that it would need to be addressed at a later stage (A/CN.9/328, para. 115; see article 13, comment 16 and article 17, comments 17 to 19). It may be thought that a sender who has a right to a refund under paragraph (5) should also have a right to interest on the funds for the period of time the sender was deprived of the use of those funds, as it would for a refund under article 13 (see article 13, comment 15).

16. At the twenty-second session a question was raised whether paragraph (5) was necessary since the sender would be refunded any payment it had already made to the receiving bank under article 13 (A/CN.9/344, para. 96). Although no reason was given in the report of the session for the retention of the paragraph, it may be noted that article 13(1) applies only if the credit transfer is not completed under article 17(1). The Working Group was of the view that the credit transfer is completed when the conditions of article 17(1) are met, even though an instruction to revoke one of the payment orders in the credit transfer chain was received in time but was not acted upon by the receiving bank (see paragraph (7)). Paragraph (5) was, therefore, necessary.

*Paragraph (6)*

17. Once it is decided that the refund arising out of a revocation under article 11 is not to be governed by article 13, it is also necessary to provide a mechanism to pass the benefit of the refund received under paragraph (5) to the previous sender and ultimately to the originator in those cases when the revoking sender of the payment order in question is not the originator.

18. The provisions of paragraph (6) cannot be applied where the sender revoked its payment order because it realized that it had made a mistake by sending the order to the incorrect bank or for the credit of an incorrect beneficiary. Assuming that the bank sent a second and correct payment order, it would be authorized to keep the refund it received under paragraph (5).

*Paragraph (7)*

19. In the normal case when a credit transfer is completed but a receiving bank has to make a refund to its sender under paragraph (5), the amount of the credit transfer should be recoverable from the beneficiary (A/CN.9/344, para. 97). The rightful claimant would be the bank that failed to act on the revocation order. That bank might be the beneficiary's bank or any prior receiving bank, including the originator's bank. However, there may be valid reasons why the beneficiary should be able to retain the funds received. One such reason might be that the originator owed the beneficiary an amount of money that the credit transfer was originally intended to discharge. Since the subject raises difficult questions that go beyond the law of credit transfers, and those questions are solved quite differently in various legal systems, paragraph (7) simply refers the receiving bank to "such rights to recover from the beneficiary the amount of the credit transfer as are otherwise provided by law" (compare articles 12 to 15, comment 27).

20. A receiving bank that has had to refund the amount of the credit transfer to its sender under paragraph (5) but is not able to recover the amount of the transfer from the beneficiary, may have a claim against its sender or the originator for reimbursement of the refund. That might especially be the case where the beneficiary was able to retain the credit in discharge of an obligation owed to it by the originator. However, the Model Law leaves any such questions to the rules of law outside the Model Law itself.

21. The word "executed" has been placed in square brackets because, in the light of paragraph (5), it seems clear that paragraph (7) is meant to apply to the beneficiary's bank as well. Paragraph (7) might be amended to be parallel to paragraph (5), i.e. "If the credit transfer is completed in accordance with article 17(1) but a receiving bank other than the beneficiary's bank executed or the beneficiary's bank accepted a payment order that had been revoked, the bank has such rights . . ."

22. To some degree paragraph (7) is a replacement for article 8(7) as it was adopted at the eighteenth session (A/CN.9/318, annex), which was subsequently deleted by the Working Group at its nineteenth session (A/CN.9/328, para. 106). That provision would have given the beneficiary's bank a right to reverse a credit entered to the beneficiary's account that met certain objective criteria of being the result of an error or fraud. For the origin of prior article 8 see A/CN.9/297, para. 79 and A/CN.9/317, para. 68. The current text of paragraph (7) is severely restricted in its field of application compared to the earlier provision.

23. *Comparison with Article 4A.* If the revocation is acted upon so that the credit transfer is not completed, Article 4A-402*(c)* and *(d)* (the equivalent of article 13 of the Model Law) requires the refund to the sender of any payment received. Article 4A-211*(c)*(2) provides that a beneficiary's bank that accepts a cancelled payment order is authorized "to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution", that is, the same reference to the law outside the statute governing the credit transfer is made in Article 4A as is made in the Model Law. No similar right seems to accrue to a receiving bank other than the beneficiary's bank if the credit transfer is

completed, although such a right may be available anyway under the "law governing mistake and restitution".

*Paragraph (8)*

24. In order to make the provision clearer and to assure that the word "bankruptcy" is not understood in a restricted sense (as in English law where it is restricted to personal insolvency), the second sentence was added at the twenty-second session. See the proposal of the United Kingdom in the working paper submitted to the twenty-second session, A/CN.9/WG.IV/WP.49, article 10, comments 28 and 29.

25. *Comparison with Article 4A.* Article 4A-211*(g)* provides as follows:

"A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order."

*Rejected proposal*

26. Former article 8(8) provided that a bank has no obligation to release the funds received if ordered by a competent court not to do so. When it deleted that paragraph at its nineteenth session the Working Group decided that it would consider a proposal that was to be presented authorizing courts to restrain a bank from acting on a payment order if proper cause was shown (A/CN.9/328, para. 109).

27. Such a proposal was originally presented to the nineteenth session but was considered and rejected only at the twenty-second session (A/CN.9/344, paras. 100 and 101). The proposal was as follows:

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

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

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

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

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

28. In support of the proposal, it was stated that considerable disruption of the banking system might result from the execution of court orders that attempted to affect a credit transfer in process. Therefore, it was considered important to restrict the possibility of executing a court order to the two ends of the credit transfer and to state that no action would be available against an intermediary bank. In reply it was stated that it would be improper for the Model Law to include rules governing judicial procedure. It was also stated that there was no reason why the sender of an unsuccessful revocation order should be prevented from using any means that might be available under the applicable law to stop the execution of the credit transfer.

29. *Comparison with Article 4A.* The proposal is identical to Article 4A-503, except for the last clause which is not found in article 4A.

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

Article 12. *Duty to assist*

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

Article 13. *Duty to refund*

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

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

Article 14. *Correction of underpayment*

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

Article 15. *Restitution of overpayment*

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

*Prior discussion*

A/CN.9/318, paras. 151 to 154 (eighteenth session, 1988)

A/CN.9/328, paras. 54 to 58 (nineteenth session, 1989)

A/CN.9/341, para. 56 (twenty-first session, 1990)
A/CN.9/344, paras. 44, 45 and 102 to 111 (twenty-second session, 1990)

*Comments*

1. Articles 12 to 15 set forth the basic obligations of a receiving bank to rectify the situation if problems arise in the implementation of a credit transfer. The original formulation of the obligations was set out in article 5(3)*(b)* and *(c)* as it was drafted during the eighteenth session (A/CN.9/318, para. 154). At the nineteenth session the text was transferred to article 11 (A/CN.9/328, annex). At the twenty-second session the original two paragraphs of article 11 were divided by the drafting group into four separate articles (A/CN.9/344, annex).

2. Articles 14 and 15 are applicable only if the credit transfer is completed in accordance with article 17(1) while articles 12 and 13 are applicable only if the credit transfer is not completed in accordance with article 17(1). Article 17(1) gives a clear rule as to when a credit transfer is completed in the normal case, i.e. when the beneficiary's bank accepts the payment order. Therefore article 17(1) also gives a clear rule in the normal case as to whether a credit transfer has not been completed. However, there are certain types of errors that can be committed by the originator or by one of the banks in the credit transfer chain that raise a question as to whether the payment order has been accepted by the "beneficiary's bank" (see article 17, comments 4 to 6) and, therefore, whether the credit transfer has been completed.

*Article 12*

3. The context of article 12 makes it clear that the duty to assist arises when the credit transfer has not yet been completed, although it should have been, and the originator still expects the transfer to be carried out.

4. The first obligation of a receiving bank when the credit transfer has not been successfully carried out is to take the necessary steps to cause it to be carried out. If the receiving bank is the cause of the difficulties, it would carry out its obligation under article 12 by taking the necessary actions itself, although in such a case resort to article 12 might not be necessary. For example, if a receiving bank had misdirected its own payment order, it would continue to be obligated under article 7(2) to send a payment order consistent with the order it had received (A/CN.9/344, para. 103). The receiving bank would fulfil that duty only by sending a new payment order. Article 12 on the other hand is primarily directed to the situation where the credit transfer has been delayed or an error has been made at another bank in the credit transfer chain and the originator or the sender have requested the assistance of the receiving bank. Article 12 might, for example, require the receiving bank to find out where the problem had occurred or to send new instructions to the subsequent bank.

5. An objection was raised at the twenty-second session that the duty the article sought to create was unclear in content and of uncertain utility since no remedy had been proposed by which the breach of the duty might be appropriately redressed (A/CN.9/344, para. 104). In reply it was said that even if the duty was not specifically enforceable by a clear sanction, it would establish a norm for conduct and might, in egregious cases, be enforced by a court's application of general principles of law concerning the breach of a statutory duty. (See, however, article 16(8), which provides that the remedies in article 16 are exclusive, with an exception that would not normally apply to the failure to act in accordance with article 12.)

6. *Comparison with Article 4A.* There is no equivalent provision in Article 4A.

*Article 13*

7. Article 13 sets forth one of the most important rules in the draft Model Law; if the credit transfer is not completed in accordance with article 17(1), the originator has a right to a refund of any payment it has made to the originator's bank under article 4(6). A consequential rule is that the originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank.

8. The context of article 13 makes it clear that the duty to refund arises only when it is evident that the credit transfer will never be completed.

9. The most typical reason a credit transfer is not completed is that one of the senders in the credit transfer chain has revoked the payment order under article 11 (A/CN.9/344, para. 96). Other reasons why a credit transfer is not completed successfully are (1) that the identification of the beneficiary or of the beneficiary's bank is incorrect on one of the payment orders in the credit transfer chain by reason of error or fraud, (2) that the imposition of currency restrictions prevents the transfer from being made, (3) that for some reason a transfer cannot be made to the beneficiary's bank or to the country where the beneficiary's bank is located, (4) that the beneficiary's bank refuses to accept the payment order addressed to it or (5) that the account of the beneficiary is no longer open to receive credit transfers. In most cases where the indication of the incorrect beneficiary or beneficiary's bank was the result of an error, it could be expected that the error would be corrected and the credit transfer would be carried out as directed, though perhaps late.

10. The obligation of the originator's bank to the originator and the obligation of each receiving bank to its sender to return the payment received if the credit transfer is not completed is absolute. At the eighteenth session the Working Group rejected a suggestion that the obligation of a receiving bank should be to assign to its sender the right of reimbursement it would have from its receiving bank (A/CN.9/318, para. 153). The result of that suggestion would have been to place on the originator the obligation to pursue its claim for reimbursement from a subsequent bank in the credit transfer chain and to bear the risk that the reimbursement could not be fully recovered. As it is, under article 13 if a credit transfer is not completed and any receiving bank is not able to reimburse its sending bank promptly, perhaps because of the

insolvency of the receiving bank or because of the cessation of payments between the two States concerned, the sending bank to that non-reimbursing receiving bank would bear the loss or suffer the delay in reimbursement. Such a non-reimbursing receiving bank would normally be an intermediary bank, and that is the case envisaged in article 13. It would be the beneficiary's bank only if the bank had received payment for the order from its sender but had not accepted the payment order, a situation that would rarely arise.

11. The policy that lies behind article 13 was reaffirmed at the twenty-second session after long discussion (A/CN.9/344, paras. 105 to 108). In opposition to the policy it was said that the risk that was placed on the originator's bank and on each intermediary bank in the credit transfer chain that it might have to reimburse its sender even though it could not get reimbursement from its receiving bank was a new risk for banks, since in certain countries it had been borne in the past by the customers. It was said that the new risk would not be overly burdensome to large banks with foreign branches; those banks would route most international credit transfers through their branches. The banks that would most often have to run the risk would be small and middle-sized banks that had to route international credit transfers through correspondent banks in foreign countries. It was said that this would be of particular concern for banks in developing countries.

12. It was also stated that the increased risk for an originator's bank might give rise to new concerns by banking regulators who were increasingly aware of, and interested in, reducing systemic risk. Examples given raised the possibility that deposit insurance or reserve requirements might be changed to address risks such as that which article 13 placed upon banks. It was also questioned whether banks might be required to provide capital support for that risk under the Basle Accord. In response, it was stated that at least one country that operated large value credit transfer systems had implemented a rule equivalent to article 13 without serious repercussions. The analysis carried out in that country by the bank supervisory authorities had led to the conclusion that the duty to refund to the originator did not raise issues under the Basle Accord, or serious risks of new contingent liabilities threatening the banks.

13. As a further argument in support of article 13, it was pointed out that the adoption of the provisions in article 5*(b)*(iv) recognizing bilateral and multilateral netting agreements, an action that had been taken earlier in the twenty-second session, would lead to a significant reduction in the credit risk that otherwise would exist in respect of those transactions (A/CN.9/344, para. 107). It was said that the reduction in risk that would result from the implementation of such agreements had been estimated to be between 50 and 80 per cent. As a result, even with the increased risk for banks that might arise out of article 13, the general effect of the Model Law would be to decrease risks to banks rather than to increase them.

14. At the close of the discussion, when the decision to maintain article 13 was taken, the Secretariat was requested to send a copy of the report of the twenty-second session of the Working Group to the Bank for International Settlements (BIS) for its information (A/CN.9/344, para. 108). The Secretariat has sent a copy of the report as requested.

15. Article 13 as adopted at the twenty-second session provides that the refund from the originator's bank to the originator and from a receiving bank to its sender shall be "with interest from the day of payment to the day of refund". The day of payment is the day the sender, whether originator or sending bank, paid its receiving bank. Similarly, the day of refund is the day the receiving bank, whether the originator's bank, an intermediary bank or the beneficiary's bank, refunded to its receiving bank. As a result, the interest received by a bank from its receiving bank will almost always be less than the interest it is obligated to refund to its sender. The difference between the two is the interest on the funds for the amount of time the funds were in the possession of that bank. This accords with the theory of the provisions in article 16 on the payment of interest for late payment, i.e. that neither the banking system as a whole nor any individual bank in the credit transfer chain should profit from the use of customer's funds arising from inefficiencies or from errors in that or in any other bank (A/CN.9/341, para. 118; A/CN.9/344, paras. 44 and 45).

16. At the nineteenth session a suggestion was made that the amount of the funds to be returned should be the original amount of the transfer less costs. It was said that this issue would have to be addressed at a later time (A/CN.9/328, para. 115). At the twenty-first session it was decided that current article 17 should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20; see article 17, comments 17 to 19). The issue as to whether the costs of the transfer and of the refund should be borne by the originator were not discussed at the twenty-second session when article 13 was adopted in its current form. However, the fact that the issue was before the twenty-second session of the Working Group in the working paper submitted by the Secretariat (A/CN.9/WG.IV/WP.49, article 11, comment 11) would suggest that the failure to discuss the question of costs was done knowingly.

*Paragraph (2)*

17. It was decided at the twenty-second session that the provisions of article 13 should be mandatory (A/CN.9/344, paras. 109 and 110). During the discussion leading to that decision the concerns that had previously been expressed about the very principle of article 13 were reiterated. In particular, it was pointed out that the originator might specify that the credit transfer was to be carried out through a particularly unreliable intermediary bank or a particularly unstable country. One suggestion was that, since the refund mechanism set forth in article 13 could be compared to insurance or a guarantee that the credit transfer would be completed, it would create a cost for the bank for which the bank should be able to charge. An originator might then wish to choose a less expensive method of transfer in which the risk that the credit transfer could not be completed and the principal amount of the transfer

could not be recovered would be knowingly borne by the originator. That suggestion, which would have been contrary to the principle that article 13 should be mandatory, was not implemented.

18. Another suggestion was that, where the originator specified that the credit transfer was to be carried out through a particularly unreliable intermediary bank or a particularly unstable country, the originator's bank should have the possibility to conclude a special agreement shifting the responsibility of the transfer to the originator (A/CN.9/344, para. 109). In reply it was stated that the Model Law should not allow easy derogation of the refund obligation, especially by means of a bank's standard terms of dealing.

19. Paragraph (2) as formulated by the drafting group at the twenty-second session, implementing the decision of the Working Group (A/CN.9/344, para. 110), states that the refund provided in paragraph (1) need not be made if the bank "is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund". The use of the word "directed" seems to cover every case in which the payment order received by the bank specified use of the intermediary bank in question.

20. Such an interpretation would seem to lead to the result that no refund need be given in some cases beyond those that had been envisaged in the Working Group. One such case would be where the choice of the intermediary bank that failed was contained in the originator's payment order but that bank had originally been chosen by the beneficiary's bank, which had informed the beneficiary of the bank to be used. The beneficiary's bank might have indicated the intermediary bank in question because it wished to receive all payment orders of a particular type through that bank or because it wished to receive credit at that bank (see article 7(6) and comments 19 and 20 to article 7). As far as article 13 would be concerned, no refund would be due to the originator, since the originator would have specified to the originator's bank the intermediary bank to be used. The originator would have to claim against the beneficiary, who in turn would have to claim against the beneficiary's bank as the original source of the decision to use the intermediary bank that failed.

21. The duty to make a refund might also be excluded in a case where an originator's bank systematically caused all or the majority of its customers to "direct" the bank as to the routing to be used to effect the credit transfer. There are a number of ways in which an originator's bank might act to cause its customers to give it directions systematically. Such a practice would seem to be against the policy expressed in the Working Group that a derogation from the obligation to make a refund should not be easy, especially by means of a bank's standard terms of dealing (A/CN.9/344, para. 109).

22. If the Commission is in agreement, it might wish to consider adding a new sentence between the second and third sentences of paragraph (2) as follows:

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

23. If relatively few of the payment orders that the bank receives from its customers designate an intermediary bank, the receiving bank would normally have carried its burden of proof. However, the bank may cause only certain customers, such as originators, to name the intermediary bank to be used or it may cause its senders to name the intermediary bank to be used only in respect of certain types of payment orders, such as those over a certain amount. If the sender claimed that the receiving bank systematically did so, under the proposed sentence the receiving bank would have to prove that it did not.

24. *Comparison with Article 4A.* Article 4A-402*(c)*, *(d)* and *(e)* are essentially equivalent to article 13.

*Article 14*

25. Articles 14 and 15 make it clear that at least in some cases a credit transfer can be completed under article 17(1) when a payment order is accepted by the beneficiary's bank even though the payment order is inconsistent with the originator's order in some respect. Article 14 deals with the situation where the payment order is for too small an amount. In such a case, the receiving bank where the error occurred is obligated to issue a payment order for the difference between the amounts of the two orders.

26. Article 14 does not provide that the bank is to pay interest to its receiving bank or to the beneficiary on the underpayment. Article 16(5) does provide for such interest, but only to the extent that the late payment "is caused by the receiving bank's improper action" (see article 16, comment 32).

*Article 15*

27. In most cases where the amount of the payment order accepted by the beneficiary's bank is greater than the amount of the originator's payment order, the beneficiary's bank will be authorized by the beneficiary to debit its account for the overpayment and to return the funds to the bank that made the error. Where the beneficiary does not authorize the debit to its account, article 15 gives the bank that made the error the right to recover from the beneficiary the difference between the amounts of the two payment orders. However, since the beneficiary may have valid reasons to keep the entire amount that was credited to its account, article 15 gives the bank the right to recover only as "otherwise provided by law" (compare article 11, comments 19 and 20).

Article 16. *Liability and damages*

(1) A receiving bank other than the beneficiary's bank is liable to the beneficiary for its failure to execute its sender's payment order in the time required by article 10(1), if the credit transfer is completed under article 17(1). The liability of the receiving bank shall

be to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure. Such liability may be discharged by payment to its receiving bank or by direct payment to the beneficiary.

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

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

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

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

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

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

(8) The remedies provided in this law do not depend on the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive, and no other remedy arising out of other doctrines of law shall be available except any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order *(a)* with the intent to cause loss, or *(b)* recklessly and with knowledge that loss might result.

*Prior discussion*

A/CN.9/297, paras. 55 to 63 and 70 to 72 (sixteenth session, 1987)

A/CN.9/317, paras. 137 to 150 (seventeenth session, 1988)

A/CN.9/328, paras. 66 to 74 and 117 to 144 (nineteenth session, 1989)

A/CN.9/329, paras. 187 and 188 (twentieth session, 1989)

A/CN.9/341, paras. 105 to 131 (twenty-first session, 1990)

A/CN.9/344, paras. 11 to 57 (twenty-second session, 1990)

*Comments*

1. Article 16 was completely redrafted at the twenty-second session on the basis of prior article 12 (A/CN.9/344, paras. 11 to 57). Prior article 12 was essentially the text as prepared by the Secretariat for the eighteenth session in A/CN.9/WG.IV/WP.39 on the basis of the discussion at the seventeenth session (A/CN.9/317). Certain amendments to the Secretariat's draft were introduced at the nineteenth session (A/CN.9/328). At the twentieth session a small group consisting of four delegations was asked to consider the liability provisions in general and to attempt to formulate an agreed position that might be considered by the Working Group, but they were unable to reach such an agreed position. Instead they identified four major issues and each of the delegations submitted their separate views for the consideration of the Working Group (A/CN.9/329, paras. 187 and 188).

2. At the twenty-first session the Working Group had before it a complete redraft of the article that had been proposed by the delegation of the United Kingdom in a communication to the Secretariat (A/CN.9/WG.IV/WP.46, comment 28 to article 12). However, "the Working Group decided that it would be a more appropriate procedure to discuss the original text of article 12, including paragraph (2), and to use the suggested redraft as a source of ideas for improving the text" (A/CN.9/341, para. 106). Certain changes were made in the text at the twenty-first session, and the consideration of the problem of liability continued at the twenty-second session, when the current text was adopted. While the current text is the result of the entire series of discussions, the extent of the redrafting at the twenty-second session makes it more difficult to follow the development of the ideas represented by the current text than it is for the majority of the other articles in the draft Model Law.

3. The general system of liability in the draft Model Law prior to the twenty-second session was that the originator could hold the originator's bank liable for the proper performance of the credit transfer. That meant that the bank would be responsible to the originator for loss wherever the loss occurred. The types and extent of the losses for which the originator's bank would be liable were those set forth in paragraph (5) of former article 12. In order to avoid liability, the originator's bank would have had to show that one of the exempting conditions in former article 13 was relevant, an article that was deleted at the twenty-second session as no longer necessary in the light of the changes in the general regime of liability at that session (A/CN.9/344, para. 58; comments 47 and 48, below). If the loss for which the originator's bank was liable to the originator had been caused by events that had occurred at a subsequent bank in the credit transfer chain,

the originator's bank would have been able to recover the loss from its receiving bank and each bank in turn would have been able to recover from its receiving bank until, under paragraph (3), a bank would have shown that the payment order received by the beneficiary's bank was consistent with the payment order received by the bank in question.

4. That system of liability was based on the idea that the originator's bank provided a service to the originator that depended on it having established correspondent relations with other banks. It is a system of liability that is well known in other similar types of economic activity, such as the international transport of goods, where it is common for the carriage to be effected by several different carriers. Under some, though not all, conventions on international carriage of goods the claim might be made either against the original contracting carrier or against the carrier where the damage occurred. The procedure envisaged by former paragraph (2), similar to the procedure used in those conventions, would have eased the procedural problems for the originator since he would not have had to claim against a bank in a foreign country with which he had no business relationship. At the same time, it would have allowed the originator's bank to have recourse against its receiving bank, a bank with which it normally had a continuing business relationship (A/CN.9/341, para. 111).

5. Against that system of liability was the concept that no one should be responsible for the errors of third parties. The originator's bank is not always in a position to know, much less to control, the route that an international credit transfer will take on its way to the beneficiary's bank. In some cases the originator specifies some or all of the intermediary banks to be used. In any case, when the originator requests its bank to transfer funds to a foreign country, it should know that its bank is likely to use independent intermediary banks (A/CN.9/341, para. 108).

6. At the twenty-first session there were contradictory statements as to the standard of care for which the originator's bank would be held liable when the loss occurred because of the acts of an intermediary bank in a foreign country. Under one view the originator's bank would be responsible if the intermediary bank did not act in accord with the performance standards of the Model Law. The example given was that the intermediary bank did not execute the payment order on the day it was received because the standard in that country was next day execution. Under another view, under what is currently article 18(1) the actions of the receiving bank, i.e. of the intermediary bank, and therefore the standard of care of the originator's bank, would be measured by the rules in force in the State of the receiving bank (A/CN.9/341, paras. 109 and 110). Therefore, the applicable standard of care would be that prescribed by the Model Law only if the State where the receiving bank was located had adopted the Model Law.

7. The types of damages that could be recovered under paragraph (5) of former article 12 were gradually reduced during the preparation of the Model Law (see A/CN.9/WG.IV/WP.49, comments 8 to 10). In particular, any recovery for indirect (consequential) damages was all but eliminated (see comments 41 to 46 below). By the time current article 16 was considered at the twenty-second session, the originator's bank was liable to the originator only for loss of interest and for expenses incurred for a new payment order, expenses that were considered to be of minor importance. Furthermore, it had already been decided that interest for delay should be passed to the beneficiary (see comments 13 to 21). Therefore, it was concluded that there was little justification left for holding the originator's bank liable to the originator for the proper completion of the credit transfer and the original system of liability was deleted from the Model Law (A/CN.9/344, para. 43).

*Relation of article 16 to other remedial provisions*

8. Article 16 is only one of several provisions that afford relief to a party when the credit transfer is not carried out as it should be. In particular, article 16 must be read in the light of articles 13 to 15, which provide a form of monetary relief, but which the Model Law does not treat as liability or damages provisions. Articles 12, 6(2)*(a)* and 8(1)*(a)* also specify certain consequences when the credit transfer has not been carried out properly or when certain obligations under the Model Law have not been fulfilled.

*Paragraphs (1) and (2)*

9. Paragraph (1), contains the core concept in respect of the liability of a receiving bank when there is a failure to execute its sender's payment order in the time required by article 10(1), i.e. "to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure". The payment of interest is also required in several other provisions (i.e. articles 11(5), 12(1), 16(3), (4) and (5)) where the circumstances are not considered to fall under paragraph (1). With the exception of the unlikely availability of consequential damages under paragraph (8), the extent of a bank's liability under the Model Law is limited to payment of the applicable amount of interest.

10. Interest losses may be suffered in several different ways as a result of a credit transfer that does not work as intended. If a receiving bank receives funds from its sender but delays execution of the payment order, the sender (who may be either the originator or a sending bank) may be said to have suffered a loss of interest because it has been deprived of funds earlier than was necessary for the bank to execute the payment order. If the receiving bank receives funds late from its sender but executes the order without waiting for the funds, the receiving bank suffers a loss of interest but no subsequent party, including the beneficiary, suffers any loss. If the result of a delay or error of any kind at a receiving bank is that the entire credit transfer is delayed, the beneficiary could be said to have suffered the loss of interest.

11. If the beneficiary (as creditor of the underlying obligation) could recover loss of interest from the originator (as debtor of the underlying obligation) because of late payment of the underlying obligation, the originator might claim for the interest it had paid to the beneficiary from the bank where the delay occurred or from the originator's

bank. In many cases the amount of interest the beneficiary could claim from the originator because of late payment of the underlying obligation would be more than the amount of interest due from the bank because of delayed performance of the credit transfer. At the twenty-first session, when it was suggested that the bank that had caused the delay should have to pay to the beneficiary or to the originator (if the originator had reimbursed the beneficiary) an additional amount equal to the interest due as a result of the late payment of the underlying obligation, less the amount already paid for the delay in the credit transfer, it was stated that such an additional amount was in the nature of indirect (consequential) damages and should be treated as such under the Model Law (A/CN.9/341, para. 120). Under the current text of article 16(8), the originator would almost assuredly be unable to pursue any such claim.

12. At the twenty-second session there was a discussion as to whether interest should be due merely because of a delay in the execution of a payment order or whether it should arise only if there was a delay in the completion of the credit transfer (A/CN.9/344, para. 54). A delay in the execution of a payment order, it was stated, should give no claim to the beneficiary if the delay was made up at a later point in the credit transfer chain and the credit transfer was completed by the payment date that had been stipulated. In reply it was said that a rule that relied on a delay in the completion of the credit transfer would be difficult to administer. Such a rule would mean that the intermediary bank would not know whether it was liable to pay interest until it had notice as to whether the credit transfer had been completed on time or not. It may also be said that it would be possible to complete a credit transfer by the payment date only when a payment date had been stipulated in the originator's payment order. Where no payment date has been stipulated, in all but the rarest of cases a delay in execution by any of the banks in the credit transfer chain will necessarily delay the completion of the credit transfer from the time when it would otherwise have been completed. Consequently, under paragraph (1) interest is due from a receiving bank by virtue of its delay in executing the payment order it has received without regard to whether that delay caused a delay in the completion of the credit transfer itself.

13. The most controversial question that arose during the preparation of what is currently article 16(1) was whether the originator or the beneficiary should receive the interest due for the delay. The original text of paragraph (1) provided that the originator was the party who had the right to damages when the credit transfer was not completed as required, including that it was completed late. Such a rule seemed to be logical, since it was the originator who gave the instructions that resulted in the credit transfer. Furthermore, whether or not the originator is seen to be in privity of contract with subsequent receiving banks, a question that the Working Group avoided because of the different doctrinal solutions to that question in various legal systems, it is evident that there is a contractual chain reaching from the originator to the receiving bank that caused the delay. No such contractual chain reaches back from the beneficiary to any bank prior to the beneficiary's bank. Finally, in the original draft of article 12, the predecessor to the current article 16, significant damages beyond the payment of interest were available. In most cases it was the originator that would have suffered the losses for which those damages could be claimed.

14. The question as to whether the originator or the beneficiary should receive the interest for delayed completion of a credit transfer was discussed by the Working Group at its nineteenth, twenty-first and twenty-second sessions (A/CN.9/328, paras. 122 to 131; A/CN.9/341, paras. 118 to 123; A/CN.9/344, paras. 44 to 57). The Working Group agreed that, in any case where the beneficiary had been credited later than it should have been because of a delay in the transfer, the receiving bank causing the delay should not benefit from the use of the funds during the period of the delay (A/CN.9/328, para. 122). It noted that it was current banking practice in many important banking centres for a bank at which a transfer was delayed to add an appropriate amount of interest to the amount being transferred. As a result, the bank that received the transfer late would automatically receive the interest. This was said to be efficient and expeditious, not requiring any inquiry into the facts of the underlying transaction but giving a remedy that would normally be approximately equal to the loss suffered, and a practice that the legal system should recognize (A/CN.9/328, para. 126).

15. At the conclusion of the discussion at the nineteenth session the Working Group decided that it would be useful to consider providing in the Model Law that the beneficiary would have a direct right to recover interest resulting from the delay against the bank that caused the delay. Since the proposal raised a number of questions that required consultation, the Working Group requested the Secretariat to prepare a draft of a provision for its consideration at a later session (A/CN.9/328, para. 131).

16. At the twenty-first session it was stated that where the credit transfer was not completed and the originator had the right to get its funds back under what is currently article 13, the originator should also be entitled to receive the interest (A/CN.9/341, para. 118; see article 13 and comments thereto). The relationship between the right of the originator to receive interest on the amount refunded under article 13 and the right of the beneficiary to receive interest on the amount of the credit transfer as damages for the period of any delay was noted at the twenty-second session (A/CN.9/344, paras. 44 and 45).

17. The Working Group also noted at the twenty-first session that the typical way in which banks compensated one another for interest due was to adjust the date of the credit to the account so that it showed "as of" the date on which the credit should have been entered (A/CN.9/341, para. 119; A/CN.9/344, para. 53). By changing the date of the credit, appropriate interest would normally be given automatically to the bank receiving the credit. It was stated that, in practice, delay in executing a payment order was almost always because the payment order had been executed improperly. As soon as the error was brought to the attention of the bank, it would immediately execute

the order correctly for the original amount. Interest adjustments would be made later, usually by way of an "as of" adjustment, although that method was less often used where the person receiving the adjustment did not maintain an account with the bank.

18. An interest rate adjustment between banks would automatically be at the interbank rate in the currency concerned when it was effected by means of an "as of" adjustment of the date on which the account was credited. An "as of" adjustment of the date of crediting a non-bank beneficiary's account would not have the same automatic effect. The effective amount of interest a non-bank beneficiary would receive would depend on whether the account was in debit or in credit during that period of time, since the rate charged on a debit balance is always higher than the rate the beneficiary would receive if the account was in credit.

19. As a result, even though it was suggested that the Model Law should indicate the appropriate rate of interest to be paid, and that the interest should be calculated at the interbank rate in the currency in which the payment order was expressed, the Working Group decided at its twenty-first session that it would provide only that interest was payable without indicating how that interest should be calculated (A/CN.9/341, paras. 121 and 123).

20. At the twenty-second session the question was raised whether the Model Law should specifically state that one way for a sending bank to pay interest to its receiving bank was to make an appropriate adjustment in the date of the credit (A/CN.9/344, para. 53). An objection was raised that the date of the credit might be adjusted in an account that did not bear interest, thereby being of no benefit to the receiving bank. As a consequence, paragraph (1) indicates only that interest is to be paid; an "as of" adjustment may be one way to pay the interest, but any other method that achieves the desired result is acceptable.

21. At the twenty-second session it was decided that the beneficiary should have a direct right to recover the interest against the receiving bank that had delayed the credit transfer even though there was no contractual relationship between the beneficiary and the bank where the delay occurred (A/CN.9/344, paras. 49 and 50). Furthermore, it was decided that the beneficiary's right should be only against the bank where the delay occurred. That decision, reflected in the language of paragraph (1), was in line with the general decision taken at the twenty-second session that a bank should be liable only for the consequences of its own acts (see comment 7).

22. In the light of the discussion as to how banks often reimbursed one another for a delay, it was decided to provide in paragraph (1) that the receiving bank could discharge its obligation to the beneficiary by payment of the amount of the interest to its receiving bank. In order to ensure that the benefit of the interest is passed on to the beneficiary, paragraph (2) requires the receiving bank that receives the interest to pass it on to the next receiving bank. The last receiving bank in the credit transfer chain, which is the beneficiary's bank, is then required to pass it on to the beneficiary. This is one of the few occasions in the Model Law where the relationship between the beneficiary and the beneficiary's bank is regulated. The result of paragraphs (1) and (2) taken together is that the beneficiary is expected to receive the interest for delay in the credit transfer from the beneficiary's bank, even though the beneficiary's only right to recover arising out of the delay itself is against the bank where the delay occurred. Naturally, the beneficiary would also have a right against a bank that did not pass on the interest it received from a prior bank; that right is implicit in paragraph (2), which speaks of the obligation of the receiving bank to pass on the interest, but does not state to whom that duty is owed.

23. It should be pointed out that paragraphs (1) and (2) govern only the situation where a receiving bank has delayed executing the payment order received. According to article 2(l), "'Execution' means . . . the issue of a payment order intended to carry out the payment order received by the receiving bank." At the twenty-second session it was suggested that it should be clear in the Model Law that the failure of a sending bank to furnish cover to its receiving bank, as a result of which the receiving bank delayed its execution of the payment order, was one failure for which the sending bank should be liable for interest (A/CN.9/344, para. 48). In reply it was said that the duties of the sending bank, in its capacity as receiving bank of the order it had received, should be set forth in article 7 and not in article 16. In any case, its obligation as a sending bank under article 4(6) was to pay its receiving bank for the payment order when that receiving bank accepted it. It was agreed that further study of the question was needed.

24. In most cases a receiving bank will accept and execute a payment order received from another bank (or if it is the beneficiary's bank, it will accept the payment order received and credit the beneficiary's account) without verifying that it has received payment. Where that occurs, there is no delay in the credit transfer arising out of the fact that payment has not yet been made, and paragraph (1) does not apply. Where a sending bank does delay making the payment called for by article 4(6), the sending bank will pay interest to the receiving bank for the delay in payment, either directly or in the form of an "as of" adjustment as described in comments 17 and 18. Such interest for delay in payment is not covered by any provision in article 16, and paragraph (8) might be considered to preclude the application of any doctrine outside of the Model Law to enforce the obligations of article 4(6) (see comment 39). Banks could, however, agree under paragraph (7) to make such payments of interest to one another. Since the delay in paying for the payment order as required by article 4(6) is not a delay in executing a payment order, the bank that receives the interest would not be obligated by paragraph (2) to pass it on to the next receiving bank.

25. The suggestion was made at the twenty-second session that, even if the beneficiary would have the primary right to receive interest for a delayed transfer, the originator should have a residual right to recover the interest (A/CN.9/344, para. 47). The example was given of a beneficiary that did not receive the interest due from the delay in the transfer and that, as a result, recovered

interest from the originator because of a delay in payment of the underlying obligation. The reply was given that, although the originator should undoubtedly be able to recover the interest in such a case, such a right should not be available under the Model Law. Instead, it was said, the originator's right to exercise the claim of the beneficiary should be left to the otherwise applicable law of subrogation or other appropriate doctrine. It should be noted again, however, that article 16(8) says that the remedies in this law are "exclusive, and no other remedy arising out of other doctrines of law shall be available . . ."

26. Another suggestion made at the twenty-second session was that where a bank was obligated to pay interest to its sender or to its receiving bank for which the bank had a right of reimbursement from a third party, but the bank could not recover the reimbursement because the third party had become insolvent, the bank should be entitled to recover the reimbursement from any other party that itself had an obligation to reimburse the insolvent bank (A/CN.9/344, paras. 56 and 57; see A/CN.9/WG.IV/WP.49, article 12, comment 49). The suggestion was rejected on the grounds that, although such a rule appeared on first analysis to be a fair rule, a thorough economic analysis would show that it was incompatible with a bilateral or multilateral netting scheme such as that recognized by article 5*(b)*(iv). The Working Group did not consider the question as to whether it would be appropriate to have such a rule for those credit transfers that were carried out completely by correspondent banking relations or whether the importance for international credit transfers of such netting schemes as CHAPS in London and CHIPS in New York would render inappropriate any such a rule for correspondent banking alone.

*Paragraphs (3) and (4)*

27. When the Working Group adopted the provision requiring a receiving bank to notify its sender of a misdirected payment order, current article 7(3), it noted that the harm suffered might not always be easy to measure. Nevertheless, it was of the view that there should be a sanction for a bank's failure to notify the sender where that failure to notify delayed the transfer (A/CN.9/318, para. 122; A/CN.9/344, paras. 26 to 29). Therefore, from the eighteenth to the twenty-first sessions draft article 12(6) provided that if a receiving bank failed to notify of a misdirected payment order, and the credit transfer was delayed, the bank was liable:

> "*(a)* if there are funds available, for interest on the funds that are available for the time they are available to the receiving bank, or
>
> *(b)* if there are no funds available, for interest on the amount of the payment order for an appropriate period of time, not to exceed 30 days."

28. At the twenty-second session the sanctions under what are currently paragraphs (3) and (4) were extended to a failure to give any of the notices required by the Model Law, except for the failure to give notice of rejection (A/CN.9/344, paras. 30 to 32). The reason for the exclusion of the failure to give a required notice of rejection from the operation of article 16(3) and (4) is that the consequence of such a failure, when payment has been made to the receiving bank, is that the payment order is accepted under article 6(2)*(a)* or 8(1)*(a)* (A/CN.9/344, para. 31). At the same time that it was decided to extend the liability for interest to a failure to give any of the other required notices, it was decided that the duty to pay interest would arise only if the receiving bank that failed to give the notice had been paid for the payment order (A/CN.9/344, paras. 30, 32 and 33).

29. Paragraphs (3) and (4) both provide that the interest is to be paid to the sender. In effect, the payment of interest by the receiving bank to the sender because of the failure to give notice reimburses the sender a portion of the interest it owes to the beneficiary for the delay in the credit transfer caused by the sender's (i) misdirection of the payment order, (ii) sending of a payment order that cannot be executed or (iii) sending of a payment order that contains an inconsistency between the words and figures that describe the amount of money to be paid. It was noted at the twenty-second session that where the receiving bank had received funds with the misdirected payment order, article 13 would require it to return the funds with interest (A/CN.9/344, para. 29). However the Working Group decided that article 16 should contain a provision in respect of misdirected payment orders so as to prevent unjustified enrichment of the receiving bank.

*Paragraph (5)*

30. Paragraph (5), requiring interest on the amount of an underpayment, was added to the text of the Model Law by the drafting group at the twenty-second session (A/CN.9/344). There was no discussion in the Working Group as a whole in regard to this issue.

31. Paragraph (5) should be read in conjunction with article 14, which requires a receiving bank that has executed the payment order it received by issuing its own payment order, but for a smaller amount, "to issue a payment order for the difference between the amounts of the payment orders". Article 14 does not require the payment of any interest on the amount of the underpayment; that is left to article 16(5).

32. Paragraph (5) requires the payment of interest "only to the extent that the late payment [of the deficiency] is caused by the receiving bank's improper action". (The Commission may wish to add the words "of the deficiency" to make the provision clearer.) It is unclear why this limitation was added to paragraph (5), since it does not appear in either paragraph (1) or in articles 13 or 15. In all those provisions the receiving bank that had funds for a period of time because the credit transfer had not been completed correctly is required to pay interest on those funds whether or not the bank had acted improperly.

*Paragraph (6)*

33. The beneficiary's bank might cause loss to the beneficiary by such actions as failing to fulfil its obligations under article 9(4), by failing to accept a payment order it is obligated by contract with the beneficiary to

accept or by accepting a payment order the beneficiary has instructed it not to accept.

34. It is a matter of judgment whether the Model Law should contain provisions covering such losses. On the one hand the losses would arise out of the failure in respect of the credit transfer. On the other hand it may be thought that it is not necessary to establish rules on the liability of the beneficiary's bank to the beneficiary, especially when those rules might differ from the domestic rules governing liability for an otherwise identical failure by the bank. Paragraph (6) takes a middle position by referring to the existence of such liability but leaves the substance of the rules governing the liability to the law that governs the relationship between the beneficiary and the bank.

35. For the drafting history of paragraph (6) prior to the twenty-second session, see A/CN.9/WG.IV/WP.49, article 12, comments 16 to 22. There was no discussion of the problem by the Working Group at the twenty-second session and the current draft was prepared by the drafting group in its general revision of article 16.

*Paragraph (7)*

36. Paragraph (7) provides an important rule setting forth the extent to which the provisions of this article can be varied by agreement of the parties. The provision was contained in article 9(6) of the draft of the Model Law prepared by the Secretariat for the eighteenth session of the Working Group (A/CN.9/WG.IV/WP.39). It was not discussed by the Working Group until the twenty-second session (A/CN.9/344, paras. 36 to 39). Between the drafting of the original provision and the discussion at the twenty-second session, the Working Group at its twenty-first session had adopted what is currently article 3, giving a general freedom to the parties to vary their rights and obligations by agreement (A/CN.9/341, para. 52).

37. Paragraph (7) constitutes a limitation on the general right of the parties under article 3 to vary their rights and obligations by contract. Deletion of paragraph (7) was proposed at the twenty-second session on the grounds that the Model Law should not attempt to give special protection to bank customers, since their bargaining power might well be equal or superior to that of the banks. The Working Group was of the view that there existed a need to set a minimum standard in regard to the liability of a bank for the protection of bank customers. Therefore, paragraph (7) provides that, while two banks can agree to any modification of the liability regime between themselves and a bank can agree to a greater measure of liability to a non-bank customer than is provided in the Model Law, a bank cannot reduce its liability to a non-bank customer by agreement.

38. Since paragraph (7) permits an agreement of non-responsibility of one bank to another, it was decided at the twenty-second session that it should be stated clearly that any such agreement could be contained in a bank's standard terms (A/CN.9/344, para. 39). This was considered necessary because in certain States it is not possible to modify the legal regime of responsibility except by an express contract and clauses of non-responsibility found in standard form contracts are not enforceable. The location of the sentence makes it clear that the Model Law contains no rule as to whether a bank can undertake a higher level of liability to non-bank customers by means of its general conditions or whether such an undertaking would have to be in a special contract.

*Paragraph (8)*

39. Paragraph (8), making the liability provisions of this law not dependent on a contractual relationship and making them exclusive, was added at the suggestion of the Working Group at its seventeenth session (A/CN.9/317, para. 119). Without such a provision some legal systems might permit other remedies based on general theories of obligation, thereby destroying the uniformity of law the Model Law seeks to achieve.

40. In several comments throughout this report mention has been made of arguments raised in the Working Group that would either call for additional remedies to be added to the text of article 16 or that would call for the application of remedies generally available in the legal system (see article 4, comment 29; article 12, comment 5 and article 16, comments 24 and 25). The Commission may wish to consider how those issues might best be solved.

41. The last clause of the second sentence of paragraph (8) makes an exception to the exclusivity of the liability provisions of this law "when a bank has improperly executed a payment order or failed to execute a payment order *(a)* with the intent to cause loss, or *(b)* recklessly and with knowledge that loss might result". When such a situation exists, any remedy arising out of doctrines of law other than the Model Law may be applied, if any such remedy exists in the legal system. This clause was introduced at the twenty-second session (A/CN.9/344, paras. 11 to 22). It was the result of a long discussion lasting several sessions of the Working Group as to whether the Model Law should provide that a receiving bank might be liable for indirect (consequential) damages.

42. The Working Group decided at its seventeenth session that, in exchange for a relatively strict regime of liability, the bank liable would not be responsible for indirect losses unless more stringent requirements were met than for the other elements of loss (A/CN.9/317, paras. 115 to 117). That decision was reaffirmed in another context at the eighteenth session of the Working Group (A/CN.9/318, paras. 146 to 150). As suggested at the seventeenth session the formula used in article 12(5)*(d)* from the eighteenth to the twenty-second session provided that the claimant would have to prove the intent or the reckless behaviour of the bank.

43. At the nineteenth session retention of the essence of the provision was again reaffirmed (A/CN.9/328, paras. 140 to 143). However, the formulation of the subparagraph was criticized as being imprecise. It was said that the subparagraph was not clear as to the types of losses that were to be covered or that those losses should have been the direct consequence of the failure on the part of the bank. The formula used for limiting the right to

recover, which had been taken from article 8 of the Hamburg Rules, was said not to reflect properly the problems of making credit transfers (A/CN.9/328, para. 142). After discussion the Working Group decided to place square brackets around the words "any other loss" and around the words taken from the Hamburg Rules to indicate its intention to redraft the provision.

44. At the twentieth session three of the four delegations that were asked to formulate an agreed position on the general liability regime of the Model Law (see comment 1) were in favour of retaining the provision in one form or another, while one delegation was in favour of deleting it (A/CN.9/329, para. 188, question 3).

45. At the twenty-first session the Working Group decided to limit the application of the provision so that only the receiving bank that had committed the error that caused those losses could be held responsible to the originator or to its sender (A/CN.9/341, para. 114 and 126). Following that decision the Working Group considered at length whether the provision should be retained at all (A/CN.9/341, paras. 127 to 131). At the end of the discussion a suggestion was made to delete both any provision on indirect (consequential) damages and paragraph (8). Under that proposal the Model Law would not provide for consequential damages under any circumstances, but a party would not be precluded from relying on other doctrines of law that might be available in the relevant legal system to claim such damages. A similar suggestion was that the two provisions might be combined so that banks would be subject to other relevant doctrines of law when they acted in the ways described in the then current text of article 12(5)*(d)*. The Working Group decided that it would need more time to study the implications of the suggestions that had been made.

46. At the twenty-second session the Working Group considered three possibilities:

*(a)* The Model Law should state that indirect (consequential) damages should be available and set the conditions under which they would be awarded. That was the system proposed in the original draft of article 12(5)*(d)*.

*(b)* The Model Law should state that indirect (consequential) damages should never be available (A/CN.9/344, para. 14). In support of that suggestion it was said at the twenty-second session that any provision allowing for such damages would imply that in case of litigation an attempt would be made to determine whether the bank intended the harm that occurred. It was also said that in some legal systems a party was deemed to have intended the consequences of its acts. In those systems it would be at least a question for the trier of fact, which might be a jury of ordinary citizens, whether the bank intended the harm when harm resulted from a failure by a bank to act with due care. It was said that an attempt to determine the intent of the bank would not be compatible with the operation of automated high-value, high-speed funds transfer systems.

*(c)* The Model Law should leave the matter to national law outside the Model Law. It was noted that this last policy could be implemented either by deleting both article 12(5)*(d)* as it then existed and paragraph (8) from the Model Law or by deleting article 12(5)*(d)* and rewording paragraph (8) in the manner finally adopted. Retention of some possibility to recover from a bank that acted so willfully was said to be appropriate because under many national laws parties to a contract could not validly agree to exclude liability for their own intentional misconduct (A/CN.9/344, paras. 13 and 18). The choice between those two alternatives, which were recognized to be technically all but identical in respect of the right to recover indirect (consequential) damages, lay between the desire to have no mention of such a possibility in the Model Law and the desire to have the possibility mentioned. The latter solution also preserved the general rule of exclusivity for all other cases.

Finally, the Working Group decided to adopt the last of those alternatives (A/CN./344, para. 21).

*Exemptions from liability*

47. The first draft of the Model Law prepared by the Secretariat for the seventeenth session contained a provision exempting the bank that was otherwise liable for damages from paying those damages under certain circumstances. See A/CN.9/297, para. 60 for the policy decision and A/CN.9/WG.IV/WP.37, article 15 for the first draft. That provision was an integral part of the scheme that made the originator's bank liable to the originator for the consequences arising out of the non-completion of the credit transfer as originally instructed, including the indirect (consequential) damages that might have been suffered. The Secretariat draft was considered at the seventeenth session (A/CN.9/317, paras. 151 to 156) and a revised draft was prepared for the eighteenth session (A/CN.9/WG.IV/WP.39, article 10). While the provision was subsequently renumbered as article 13 in the continuing preparation of the Model Law, it was not considered again until the twenty-second session. At the twenty-second session the Working Group deleted the provision on the ground that there was no need to maintain a rule on exemptions in the light of the prior decisions limiting liability to the payment of interest (A/CN.9/344, para. 58).

48. *Comparison with Article 4A.* Article 4A-305 provides that a receiving bank is liable for its late or improper execution or failure to execute a payment order. In the case of late completion the bank "is obliged to pay interest to either the originator or the beneficiary . . .". In the case of other types of improper or non-execution, the bank "is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses . . . resulting from the improper execution." "If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute." In all cases additional "damages, including consequential damages, are recoverable [only] to the extent provided in an express written agreement of the receiving bank".

## CHAPTER IV. COMPLETION OF CREDIT TRANSFER AND DISCHARGE OF OBLIGATION

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

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

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

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

*Prior discussion*

A/CN.9/317, paras. 157 to 164 (seventeenth session, 1988)
A/CN.9/328, paras. 37 to 43 (nineteenth session, 1989)
A/CN.9/329, paras. 189 to 192 (twentieth session, 1989)
A/CN.9/341, paras. 11 to 23 (twenty-first session, 1990)
A/CN.9/344, paras. 138 and 139 (twenty-second session, 1990)

*Comments*

*Paragraph (1)*

1. Although earlier versions of the draft Model Law had implied that the credit transfer was completed when the beneficiary's bank accepted the payment order, a specific rule as to when the credit transfer was completed was first introduced into the draft Model Law at the twentieth session when it was placed in the definition of "credit transfer" in article 2*(a)* (A/CN.9/329, paras. 31 to 33). At the twenty-first session it was moved to article 14(2 *bis*)—(A/CN.9/341, para. 17). At the twenty-second session at the same time the name of the article was changed the provision was moved again, this time to article 17(1) (A/CN.9/344, paras. 138 and 139). As had previously been the case, the credit transfer is completed when the beneficiary's bank accepts the payment order.

2. At the twenty-first session the Working Group noted that by its adoption of what are currently paragraphs (1) and (2), it had decided that the point of time when the credit transfer was completed with the legal consequences that followed was when the beneficiary's bank accepted the payment order addressed to it. Consequently, the Working Group did not exclude the possibility that it would reconsider the issue of acceptance of a payment order as it was set forth in current articles 6 and 8 (A/CN.9/341, para. 17). Although a proposal for amending paragraph (1) was contained in the working paper submitted to the twenty-second session (A/CN.9/WG.IV/WP.49, article 14, comment 14), it was not considered at that session.

3. Among the consequences arising out of the completion of the credit transfer are that its completion can no longer be stopped by revocation of a payment order (article 11(2)) and that the risk for any bank in the credit transfer chain that it may have to refund the amount of payment to its sender comes to an end (article 13). Another consequence arises out of the fact that, although the general policy of the Model Law is not to enter into the relationship between the beneficiary and the beneficiary's bank (comment 3 to article 9), paragraph (1) also provides that when the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it. However, the provision does not state when or how the beneficiary's bank must make the funds available to the beneficiary or the extent to which the beneficiary's bank can charge the beneficiary a fee for receiving and processing the transfer. Those are questions to be settled by the law applicable to the account relationship. Finally, if the credit transfer was for the purpose of discharging an obligation, article 17(2) provides that the beneficiary's claim against the originator/debtor is discharged at the same moment and to the same extent that the beneficiary's claim arises against the beneficiary's bank.

4. Paragraph (1) gives a clear rule as to the time when a credit transfer is completed in the normal case; it is completed upon acceptance of a payment order by the "beneficiary's bank". Although the term "beneficiary's bank" is not defined in article 2, it has always been assumed to be the bank of the beneficiary as indicated in the originator's payment order (article 9, comment 8 and A/CN.9/344, para. 120). Therefore, acceptance of a payment order by a bank named as the beneficiary's bank because of a mistake by one of the banks in the credit transfer chain would not be acceptance by the beneficiary's bank. Instead, the bank would be obligated under article 7(3) to give notice to the sender that the payment order had been misdirected.

5. The Model Law may not give the same result if it was the originator that designated the incorrect beneficiary's bank, even though the bank would be equally unable to credit the beneficiary's account. It would seem that in this case as well the bank should have the obligations of article 7(3) to give notice to its sender that the payment order was misdirected.

6. A variant of the problem arises if the beneficiary's bank has been properly indicated but the beneficiary has been improperly indicated, either by the originator or by an error of one of the banks in the credit transfer chain. While article 17(1) would suggest that the credit transfer was completed, it would still seem appropriate that the bank should be obligated to notify the sender of the problem under article 7(3), since all that the bank knows

is that it cannot identify the beneficiary. As far as the bank can tell, the payment order has been misdirected. Compare comment 13 in regard to paragraph (2).

7. The Model Law recognizes that acceptance of the payment order by the beneficiary's bank is completion of the credit transfer even if the payment order is for an amount larger or smaller than the amount in the payment order from the originator to the originator's bank. That result is specifically stated in paragraph (3) for cases in which the reason for the deficiency in amount is that one or more banks in the credit transfer chain deducted its fees from the amount of the transfer. It is also recognized for the general case by article 14, which obligates the bank that has sent its own payment order for an amount less than the amount of the payment order received by it to issue a payment order for the difference between the amounts of the payment orders, and by article 15, which provides that the overpayment can be recovered from the beneficiary "as . . . otherwise provided by law".

8. *Comparison with Article 4A.* Article 4A-104*(a)* provides that "A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order." The acts of acceptance of a payment order by the beneficiary's bank are somewhat different in Article 4A-209*(b)* from those in article 8.

*Paragraph (2)*

9. The first draft of the Model Law prepared by the Secretariat for the seventeenth session contained a provision that authorized payment of an obligation by a credit transfer (A/CN.9/WG.IV/WP.37, article 16(1). The provision was redrafted for the eighteenth session (A/CN.9/WG.IV/WP.39, article 11(1)) following the decision of the Working Group at the seventeenth session that it would be appropriate to have such a provision (A/CN.9/317, para. 158). The paragraph was deleted at the twenty-first session (A/CN.9/341, para. 12). The reasons given were that, while many legal systems already recognized credit transfers as an acceptable method of making payment, it was a matter of the policy of each State to decide whether a monetary obligation could be discharged by a credit transfer and that it might be contrary to the monetary policy of some States to consider credit in an account in a bank as having the same legal significance as money issued by a central bank.

10. Prior to the twenty-first session paragraph (2) provided that the obligation of the debtor was discharged when the beneficiary's bank accepted the payment order. The beneficiary's bank became indebted to the beneficiary at the same time. The drafting history of that prior provision is set forth in A/CN.9/WG.IV/WP.46, comments 5 to 9 to article 14. The current text was adopted at the twenty-first session (A/CN.9/341, paras. 13 to 17).

11. Although there was a widespread feeling in the Working Group that the Model Law should neither provide that a debtor had a right to discharge an obligation by transferring funds to the credit of the creditor in his bank account nor provide that if such a transfer was made the obligation would be discharged to the extent of the payment order received, there was a recognition that it would be useful to provide a rule that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, it was thought to be useful for the Model Law to indicate the time when such a discharge took place.

12. Paragraph (2) applies only if the transfer was for the purpose of discharging an obligation of the originator/debtor to the beneficiary/creditor and if that obligation could be discharged by credit transfer to the account indicated by the originator. Although it is unlikely that any State has a general prohibition against credit transfers, and especially international credit transfers, it is possible that certain obligations can be discharged only by payment in cash or by some other specified means. What is more likely is that in a given State an obligation is discharged by credit transfer to an account of the beneficiary only if the transfer is done with his consent. It may be that the consent need not be specific, that it could be implied from the very fact of having a particular type of account, from the indication of the bank account numbers on an invoice or from other similar circumstances.

13. Paragraph (2) provides that the obligation is discharged when the beneficiary bank accepts the payment order. Although not specifically so stated in paragraph (2), the payment order accepted by the beneficiary's bank must have directed credit to the proper account (see comment 6 in regard to paragraph 1). If the payment order was addressed to the proper account but the beneficiary's bank failed to credit the account or credited the wrong account, the obligation from the originator to the beneficiary is discharged and if the beneficiary suffered loss as a result of the misapplication of the credit, he must look to his bank for reparation under the law applicable to the account relationship.

14. Paragraph (2) provides that the obligation is discharged to the extent that it would be discharged by payment of the same amount in cash. The amount in question is the amount of the payment order accepted by the beneficiary's bank. If the beneficiary's bank charges a fee for receiving and processing the payment order, the fee is at the cost of the beneficiary. However, if the payment order accepted by the beneficiary's bank is for an amount less than the amount in the payment order sent by the originator's bank as a result of fees charged by intermediary banks, the originator is not discharged of his obligation to the beneficiary to the extent of those fees. Compare paragraph (3) and comment 18.

15. In most cases when less than the full amount of the obligation is paid, the obligation is discharged to the extent of the payment. However, in some cases the obligation is indivisible and payment of less than the full amount does not operate as a discharge of any of the obligation (A/CN.9/328, para. 39). Those are questions that are settled by doctrines outside the law of credit transfers. However, in order to know the effect of a transfer of a sum that is less than the entire obligation, paragraph (2) provides that the obligation is discharged to the

extent that it would be discharged by payment of the same amount in cash.

16. *Comparison with Article 4A.* Article 4A-406 has substantially the same rule in respect of time of discharge, subject to the qualification that the acts of acceptance of a payment order by a beneficiary's bank are slightly different in Article 4A-209*(b)* from those in article 8. Article 4A-406*(c)* provides that the extent of the discharge is the amount of the originator's payment order "unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges".

*Paragraph (3)*

17. Paragraph (3) is concerned with a problem that is difficult when credit transfers pass through several banks, even though the problem does not involve a significant amount of money. It could be expected that the originator would be responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international credit transfer, it cannot provide for that eventuality.

18. At the twenty-first session the Working Group decided that paragraph (3) should be redrafted to state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20). That decision was implemented at the twenty-second session by the current text of paragraph (3) (A/CN.9/344, paras. 139).

19. The last sentence in article 17(3) has the effect of countering a possible interpretation of article 14 that banks are prohibited from deducting their charges. Such an interpretation would arise out of the fact that article 14 provides that every receiving bank that executes a payment order for less than the amount of the payment order it accepted is obligated to issue a payment order for the difference between the amounts of the two payment orders.

20. A provision that the originator's bank has fulfilled its obligations to the originator when the credit transfer is completed has not been included in paragraph (3), since it would seem to be a natural consequence of completion of the transfer.

21. *Comparison with Article 4A.* Article 4A-302*(d)* contains a prohibition on the collection of charges "by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges . . ." unless instructed by the sender to do so. Such a quasi regulatory provision could not be included in the text of the Model Law, but it could be included by any State when enacting the Model Law if that seemed desirable. Article 4A-406*(c)* provides that if charges of one or more receiving bank have been deducted (perhaps by a foreign bank) "payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charge".

## CHAPTER V. CONFLICT OF LAWS

Article 18. *Conflict of laws*

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

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

(3) For the purposes of this article,

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

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

*Prior discussion*

A/CN.9/297, paras. 34 to 36 (sixteenth session, 1987)
A/CN.9/317, para. 165 (seventeenth session, 1988)
A/CN.9/WG.IV/WP.42, paras. 69 to 80 (nineteenth session)
A/CN.9/341, paras. 24 to 49 (twenty-first session, 1990)
A/CN.9/344, paras. 112 to 114 and 140 (twenty-second session, 1990)

*Comments*

1. The Working Group at its seventeenth session requested the Secretariat to prepare a draft provision on conflict of laws (A/CN.9/317, para. 165). The draft provision was prepared for the eighteenth session of the Working Group (A/CN.9/WG.IV/WP.39, article 12). The problem of conflict of laws was considered in more detail in the report of the Secretary-General to the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80. That report considered the issues especially in light of the decisions of the Working Group at its eighteenth session that the text under preparation should be in the form of a model law for adoption by national legislative bodies and that it should be restricted to international credit transfers. At the twenty-first session the Working Group made a number of policy decisions

(A/CN.9/341, paras. 24 to 49) that were incorporated into the text at the twenty-second session (A/CN.9/344, para. 140).

*Inclusion of conflict of laws provisions in the Model Law*

2. At the twenty-first session there was a long discussion as to whether the Model Law should retain any provision on conflict of laws (A/CN.9/341, paras. 33 to 37). One objection to retaining any provision was that a certain number of States were already parties to bilateral or multilateral conventions on conflict of laws, and in particular to the Rome Convention on the Law applicable to Contractual Obligations between the member States of the European Communities, and that it would be difficult for those States to adopt any conflict of laws provisions that might be in the Model Law. A second objection was that no single conflicts rule would be appropriate for both high speed electronic transfers and paper-based transfers. A third objection was that, considering the complexity of the issues involved, the text before the twenty-first session did not have the degree of refinement that would make it acceptable to most States.

3. The Working Group decided to retain a provision on conflict of laws, primarily on the grounds that it could not be anticipated that the law governing international credit transfers would be uniform in the entire world by virtue of all States having adopted the Model Law in its entirety. Therefore, it was necessary for parties in States that had adopted the Model Law to know what law would govern the various relationships in an international credit transfer. Although it was possible that some States that would adopt the Model Law might have difficulties in adopting the conflict of laws provisions because of bilateral or multilateral conventions to which they might be a party, that was considered to be no more of a reason not to include such provisions in the Model Law than the existence of national provisions on the substance of the law governing credit transfers would be a reason not to include equivalent substantive provisions in the Model Law (see also A/CN.9/344, para. 114).

*Paragraph (1)*

4. One of the primary difficulties that the Working Group faced in preparing a legal regime for international credit transfers is the dichotomy between the point of view of the originator and beneficiary of the credit transfer (particularly when neither of those parties is a bank) and that of the implementing banks. From the point of view of the originator and the beneficiary, the transfer is a single operation in which their rights and obligations in respect of the transfer itself should be governed by a single law. From the viewpoint of the banks an international credit transfer is effectuated by a series of individual payment orders giving rise to rights and obligations of the sender and the receiving bank. From that point of view, each bilateral relationship in the credit transfer chain is a separate banking transaction. Being a separate banking transaction, the law applicable to that relationship might be different from the law applicable to the other bilateral relationships that taken together constitute the credit transfer chain. That, however, is unsatisfactory in that the smooth implementation of international credit transfers requires that the rights and obligations of all parties are consistent with one another.

5. The following proposal was made at the twenty-first session to overcome those difficulties:

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

6. In support of the proposal it was stated that it was particularly important that one set of rules govern the rights and obligations of all the parties when the transfer was a high-speed transfer (A/CN.9/341, paras. 24 to 32). It was said that, unless there was a means for the parties to elect the application of a single law as was here proposed, the general rules of choice of law reflected in what was then article 15(1) would lead to the result that the law of different States would apply to the different segments of the credit transfer and that there would be no single law that would govern the entire credit transfer. It was pointed out that the technique suggested had already been implemented by CHIPS in its new rule 3 and the law of the state of New York had been chosen to govern the entire transfer if any part of it passed through CHIPS. (The CHIPS rule is set out in A/CN.9/WG.IV/WP.47.)

7. The proposal was rejected by the Working Group on the grounds that, even if it might be reasonable when restricted to the relationships between the banks, the proposal was excessive when it attempted to impose a law upon non-bank originators and beneficiaries that was different from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen (A/CN.9/341, para. 29). The proposal would have given the funds transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds transfer system might choose a law that was particularly favourable to the banks and unfavourable to the non-bank originators and beneficiaries.

8. At the twenty-first session the Working Group tried to find other rules that would also have led to the application of a single law to the entire transaction. One suggestion was that the substantive provisions of the Model Law applicable to the relations between the originator and the originator's bank should be governed by the law of the originator's bank but that the rest of the credit transfer should be governed by the law of the beneficiary's bank (A/CN.9/341, para. 38). Finally, it was decided that the only way to ensure that the Model Law might become applicable to the entire credit transfer was by its adoption by the several States concerned (A/CN.9/341, para. 39).

9. While the Working Group had not been willing to allow any group of banks to decide that the Model Law

or any other law would apply to parties to the transfer that were not parties to the choice-of-law agreement, the Working Group was in favour of permitting the parties to choose any law they wished to govern their relationship (A/CN.9/341, paras. 44 and 45).

10. The Working Group decided that, in the absence of a choice of law by the parties, the law of the receiving bank should apply to that segment of the transfer (A/CN.9/341, paras. 46 and 47). The only exception was that it should be made clear that the Model Law did not purport to determine what law would determine the authority of the actual sender to bind the purported sender under article 4(1). This decision was implemented at the twenty-second session without debate in the Working Group by the current text of paragraph (1) (A/CN.9/344, para. 140).

*Paragraph (2)*

11. The Working Group noted at its twenty-first session that the question as to whether an actual sender had the authority to bind the purported sender under article 4(1) raised complicated questions of conflict of laws that were not unique to credit transfers. It decided, therefore, that the Model Law should not attempt to solve the question as to which law should apply (A/CN.9/341, para. 46).

12. *Comparison with Article 4A.* Article 4A-507 is generally consistent with paragraphs (1) and (2), except that Article 4A would apparently apply the law of the receiving bank to the question whether an actual sender was authorized to send a payment order. Article 4A-507*(c)* is a slightly more complicated version of the provision set out in comment 5 that was rejected by the Working Group at the twenty-first session.

## B. Model Law on International Credit Transfers: compilation of comments by Governments and international organizations (A/CN.9/347 and Add.1)

**[Original: English/French/Spanish]**

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