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]**

CONTENTS

[A/CN.9/347]

## INTRODUCTION

1. The Commission, at its twenty-third sesion in 1990, requested the Working Group on International Payments to present to it at its twenty-fourth session in 1991 a draft of the Model Law on International Credit Transfers.[1] The Working Group, at its twenty-second session (Vienna, 26 November—7 December 1990) adopted a text of the draft Model Law and presented it to the Commission for its consideration (A/CN.9/344, para. 142).

2. The text of the draft Model Law as adopted by the Working Group was sent to all Governments and to interested international organizations for comment. The comments received as of 26 April 1991 from 15 Governments and three international organizations are reproduced below.

## ANNEX

### Compilation of comments

*States*

### BANGLADESH

*[Original: English]*

The Government of Bangladesh expressed its agreement with the draft Model Law.

### CANADA

*[Original: English/French]*

Canada expresses general satisfaction with the improvements to the draft effected by the work of the Working Group on International Payments at its twenty-second session. Canada considers the basic structure and scope of the draft to be satisfactory. Our proposals for change are largely of an editorial nature, offered in the spirit of supporting the draft and in the hopes of improving it on a technical level. Some of our proposals are merely to move existing text to more logical positions within the draft Model Law. One possibly more significant change seeks to clarify the terminology of the Model Law in dealing with the responsibilities of banks. Canada proposes a new term "to act" with reference to the duty of a receiving bank upon receiving a payment order, and a new term, "to pay", with reference to the duty of the beneficiary's bank. In the new usage a receiving bank that receives a payment order must *act* on it. It may either *accept* or *reject*. If it is an intermediary bank, and it *accepts*, then it must *execute* within the required time. If it is the beneficiary's bank, and it *accepts*, then it must *pay*, except that if the beneficiary does not have an account with the beneficiary's bank, its duty is to notify the beneficiary and to place the funds at his or her disposal.

We have organized our comments in the order that the points arise in the draft approved on 7 December, 1990 (A/CN.9/344, annex).

1. In paragraph (2)*(a)*, the definition of "credit transfer" expresses the purpose of a credit transfer as being the "placing [of] funds at the disposal of a beneficiary". Canada objects to this on both practical and technical grounds. As a practical matter, it appears to us that most credit transfers are made for the purpose of making a payment to the beneficiary. On a technical level, it appears to us that if article 5 is generally acceptable in stipulating what may be payment to a receiving bank, then the Model Law ought to be able to prescribe a similar rule providing that the deposit by the beneficiary's bank of the sum payable under the payment order to the account of the beneficiary is payment to the beneficiary. In fact, where the credit transfer was completed in ECU or SDR (as contemplated, by the definition of *money)* some such provision would probably be required to supplement national legal tender statutes. Some qualifications of that general proposition may be necessary in order to accommodate local law. We address those subsequently. For the purposes of this comment on the definition of "credit transfer", it is sufficient to note that if the words "placing funds at the disposal of a" were deleted and replaced by the words "making a payment to", the definition would be improved.

At paragraph 15 *infra*, Canada gives its reasons for suggesting a significant simplification of article 7, paragraph (2). Part of that proposal is that the words "that contains the instructions necessary to implement the credit transfer in an appropriate manner" be deleted from article 7, paragraph (2) and added to the definition of "credit transfer". Canada also proposes to use the term "executed" so that the definition would conclude with the sentence.

> "The term includes any payment order executed by the originator's bank or any intermediary bank that is intended to implement the originator's payment order."

Canada proposes the deletion from the Model Law of the verb "to issue" when used in connection with payment orders, and the substitution therefor of the verb "to send". The proposed usage is illustrated in the foregoing proposed amendment to article 2, paragraph *(a)*.

[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-third session, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17* (A/45/17), para. 25.

In the law of negotiable instruments in many common law countries, the term "issue" has been given a technical meaning that may prove to be inconvenient if transferred by the courts to its usage in the Model Law. That technical meaning includes an element of mental volition to transfer as well as a physical element of transfer of possession or delivery. It may also require a completed communication to the receiving bank in order to constitute a completed "issue". Canada believes that the policy promoted by the common law usage of the verb "to issue" would not be properly applied to the use of that verb in the Model Law. Canada proposes the substitution of a neutral term for that potentially misleading technical term. The verb "to send" would raise no risk that the unwanted technical meanings of "to issue" might be applied in the context of the Model Law. The use of "send" also would clarify the intention of the Model Law text that the sender fulfils its obligation at the moment it dispatches a message containing a payment order. There would be no need to consider what other steps might be necessary to comprise an "issue" of a payment order nor any implied requirement that the payment order must be received by the receiving bank in order to be properly "issued".

Canada supports the deletion of the square brackets and the retention of the text now contained in square brackets as the last sentence of article 2, paragraph *(a)*, the definition of "credit transfer".

II. In article 2, paragraph *(b)*, Canada proposes the deletion of the words "by a sender" from the first line of the definition of "payment order". The definition of "sender" in article 2, paragraph *(e)* leaves no doubt as to the designation of the person who sends a payment order. The inclusion of the words "by a sender" in the present definition of "payment order" gives rise to interpretational difficulties in those portions of articles 7 and 9 dealing with unauthorized, misdirected and incomplete payment orders.

III. In article 2, paragraph *(c)*, Canada proposes to substitute the word "sender" for the word "issuer" in the definition of "originator".

IV. In article 2, paragraph *(e)*, Canada proposes to substitute the word "sends" for the word "issues" in the definition of "sender".

V. In article 2, paragraph *(f)*, Canada proposes to narrow the definition of "bank" and, to relate it more closely to the functions that the Model Law text now contemplates being performed by the entities it designates as banks. The Model Law now contains frequent references to accounts of various parties with receiving banks and of the beneficiary with the beneficiary's bank. On a plain reading of the text of the Model Law, it is now apparent that the account-holding function of the entities described as "banks" is at least as important as the "payment order executing" functions emphasized in the definition to the exclusion of all other considerations. Canada believes that the definition now places its emphasis on the wrong function. Canada suggests that the important function should be that an institution designated as a bank for the purposes of the Model Law should,

> "as an ordinary part of its business, receive money from the public that is repayable by it on demand and make payments therefrom in accordance with instructions received from its customers."

Canada would prefer to substitute the quoted text for the words "in executing payment orders". If that solution is accepted by the Commission, it will not be necessary to retain the second sentence of the definition. If that solution is not acceptable, as a compromise, Canada would propose to *add* its quoted text to the existing text as an additional element of the definition, so that an entity would have to satisfy both the existing and the proposed test in order to qualify as a bank.

VI. In article 2, paragraph *(j)*, Canada proposes to enlarge the definition of "authentication" by re-expressing the existing requirement that the procedure be able to confirm the identity of the sender, and adding words to extend the meaning of the term to include procedures to detect error, omission or alteration in the text of the payment order, and erroneous duplication of a payment order, now addressed separately in paragraph (5) of article 4. Canada also proposes to add words to the definition to indicate that the agreement must be between a bank and its customer. The definition proposed also avoids the use of the word "issued" and substitutes the word "sent" therefor. Canada's proposals would produce a draft in the following terms:

> "'Authentication' means a procedure established by agreement between a bank and its customer for one or both of the following purposes:
>
> *(a)* to determine whether a payment order or a revocation of a payment order is sent by the person indicated as its sender;
>
> *(b)* to detect error, omission or alteration in the content of a payment order or revocation of a payment order, or erroneous duplication thereof."

VII. In article 2, paragraph *(k)*, Canada proposes to delete the word "when" and to substitute therefor the words "on which".

VIII. In article 2, paragraph *(l)*, Canada proposes to use the new term "act on" instead of "carry out" for reasons given in paragraph XX and to add to the definition of "execution" the words in the final clause of article 7, paragraph (2) (which Canada proposes to delete) so that the definition would read

> "'Execution' means, with respect to a receiving bank other than the beneficiary's bank, the sending of a payment order intended to act on the payment order received by it and containing instructions necessary to implement the credit transfer in an appropriate manner."

IX. In article 2, paragraph *(m)*, Canada proposes to delete the words "placed at the disposal of" and to substitute therefor the words "paid to" in the definition of "payment date".

X. In article 4, paragraph (1), Canada proposes to delete the word "purported" as a modifier of sender. On our analysis, it appears that the application of the rule in this paragraph constitutes the identified person as the sender of the payment order both as a matter of fact and of law. There is, therefore, no need to describe that person as merely "purported sender". The use of the modifier "purported" in paragraph (4) of article 4 is, however, appropriate, and should be retained.

In the same paragraph Canada also proposes to change the word "issued" in the second line to the word "sent".

Canada notes the incongruity of providing that "a sender is *bound*" by a payment order upon the conditions described in the paragraph when it is clear from paragraph (5) of article 4 that the sender will not be bound if the receiving bank rejects the payment order. A more appropriate concept would appear to be that the sender is *potentially* bound or *committed* by the payment order *if* it subsequently becomes a binding obligation as a result of the acceptance by the receiving bank. Alternatively, the concept might be expressed as the sender being "responsible for" the payment order in the sense that it is his communication.

XI. Canada proposes to delete the word "provided" in the first line of subparagraph *(a)* of paragraph (2) of article 4 as superfluous.

XII. Canada proposes to re-express paragraph (3) of article 4 so as to clarify its presumed intent: that is, the parties may not, by their agreement, preclude a court from reaching its own conclusion as to whether an authentication is a commercially reasonable method of security. If it is agreed that is the policy intent of the paragraph, Canada proposes that it be expressed

"(3) The parties may not, by their agreement, preclude a court from determining whether an authentication is commercially reasonable."

XIII. Canada proposes that, in the English language version of the Model Law, the masculine pronoun ("he") be used uniformly throughout the Model Law to refer to parties designated as *originator, sender* or *beneficiary;* and that the impersonal pronoun ("it") be used to designate banks. The current usage is divided between "he" and "it" for the former.

Canada suggests that the references to "present or former *employee* of the purported sender" in paragraph (4) of article 4 is undesirably narrow since it might exclude a director, officer or other person whose relations with the purported sender might have enabled him or her to obtain improper access to the authentication or other operations of the purported sender, or are such that the purported sender is legally responsible for his or her actions. Canada proposes that the existing section be reviewed from the perspective of the policy reflected in its scope. Canada does not propose any specific language extending that scope until there is agreement in principle to do so.

XIV. The scope of paragraph (5) of article 4 should be expanded to include a revocation of a payment order.

If Canada's suggestion in paragraph 6 of this memorandum is adopted, Canada sees no reason to have a separate rule for erroneous duplication and errors in payment orders. The rule dealing with authentication generally appears to operate satisfactorily, and the definition may easily be expanded to include erroneous duplication and error. Canada's proposal would also include erroneous data omission within the scope of the rule. At present, erroneous data omission appears not to be covered.

XV. Canada proposes to move the first paragraph of article 10 so that it becomes a new article 4 *bis,* following article 4. Article 4, paragraph (6) refers to the acceptance of the payment order by the receiving bank. Article 5 refers to what flows from that. It seems logical to defer dealing with the time for acceptance to article 10. That treatment requires complicated forward references in provisions such as article 6, paragraph (2)*(a)* and article 8, paragraph (1)*(a)*. A person reading the Model Law provisions in numerical order would, we submit, expect to find the provisions on time of execution dealt with before the consequences of execution.

XVI. Canada proposes that the present article 5 be relocated after article 9 and before article 10 as a new article 9 *bis.* It seems illogical to deal with the sender's obligation to the receiving bank following acceptance until after the provisions defining acceptance have been introduced.

XVII. Canada proposes to amend clause (i) of subparagraph *(b)* of article 5 to substitute the words "deposit of funds" for the words "enter a credit". In practice, only funds are entered into accounts. There is a risk of confusion if the word *credit* is used to mean both the act of depositing funds and in the sense of *available credit.*

Canada also proposes to add words to the clause to emphasize that the funds must be used by the receiving bank in order to attract the application of the rule.

The two changes proposed by Canada would result in the clause reading as follows:

"(i) when funds that the sender causes to be deposited to an account of the receiving bank with the sender are used by the receiving bank, or if not used, on the business day following the day on which the funds are available for use and the receiving bank learns of that fact; or"

Canada proposes conforming changes to clause (ii) in the same subparagraph so that it would read:

"(ii) when funds that the sender causes to be deposited in an account of the receiving bank in another bank are used by the receiving bank or, if not used, on the business day following the day on which the funds are available for use and the receiving bank learns of that fact; or"

XVIII. Canada proposes to add a provision to old article 5 (new article 9 *bis*) to make it clear that for the purposes of applying clause (iii) of subparagraph *(b)* of the article, separate branches or offices of a bank, even if located in the same State, are separate banks.

XIX. Canada proposes to delete from the last line of subclause *(a)* in clause (iv) of subparagraph *(b)* of old article 5 (new article 9 *bis*) the words "applicable law and". The Model Law can safely assume that the rules of any funds transfer system that would be acceptable to banks as a means of making final settlement would be operated in accordance with the law of the State in which the funds transfer system is located and operating. Any additional reference to applicable law, particularly where the reference is conjunctive, merely serves to introduce an undesirable element of uncertainty concerning the enforceability of the rule set out in the subclause. It might be thought, for example, that the final settlement had to be in accordance with some law applicable to the participants (by reason of their state of incorporation or location of the receiving branch) *as well as* the law in accordance with which the rules of the funds transfer system operated.

XX. Canada proposes to separate the first paragraph of article 10 and to make it into a new article 4 *bis* and to amend the text: (i) to create a new term "to act" which comprises both *execution* and *acceptance;* and (ii) to clarify the exceptions to the duties to execute and to accept promptly.

The draft proposed by Canada is as follows:

["4 *bis* (1) A receiving bank shall act on each payment order on the day it receives it.

(2) If the receiving bank is not the beneficiary's bank, such action shall be to execute the payment order unless

*(a)* it rejects the payment order in accordance with paragraph (3) of article 6; or

*(b)* a later date is specified in the payment order, in which case the receiving bank shall execute the payment order on that date; or

*(c)* the payment order specifies a payment date and that date indicates that later execution is appropriate in order for the beneficiary's bank to be able to accept a payment order and to pay the beneficiary on the payment date, in which case the receiving bank shall execute the payment order on such later appropriate date.

(3) If the receiving bank is the beneficiary's bank, such action shall be to accept the payment order unless

*(a)* it rejects the payment order in accordance with paragraph (2) of article 8; or

(*b*) the payment order specifies a payment date, in which case the beneficiary's bank shall either reject the payment order in accordance with article 8(2) before the payment date or accept the payment order on the payment date.]

XXI. In accordance with Canada's recommendation to move the text of paragraph (1) of article 10 to become a new article 4 *bis*, Canada recommends a conforming change to amend all references to article 10.

XXII. In subparagraph *(d)* of paragraph (2) of article 6, Canada recommends substituting the words "executes it" for the words "issues a payment order intended to carry out the payment order received".

XXIII. In paragraph (3) of article 6, Canada recommends deleting the word "sender" from the first line and amending the words "that sender" in the second and third lines to read "the sender".

XXIV. Canada recommends deleting most of paragraph (2) of article 7 so that it shall read:

"A receiving bank that accepts a payment order is obligated to execute it."

This change has been made possible by changes recommended by Canada to the definitions of "credit transfer" and "execution" in article 2, paragraphs *(a)* and *(l)* respectively.

XXV. In the last sentence of paragraph (5) of article 7, Canada proposes to change the words "would rely" to "may rely".

XXVI. Canada proposes to delete from subparagraph *(a)* of paragraph (1) of article 8 the term "execution" and the words "under article 10" and to substitute therefor the words "action under article 4 *bis*" and to re-express the remainder so that the first two lines of the subparagraph would read:

"When the time for action under article 4 *bis* has elapsed without action having been taken, provided that . . ."

XXVII. In subparagraph *(b)* of paragraph (1) of article 8, Canada proposes to delete the square bracketed word "execute" and to substitute therefor the word "accept".

XXVIII. In subparagraph *(d)* of paragraph (1) of article 8, Canada proposes to delete the words "places the funds at the disposal of" and to substitute therefor the word "pays".

XXIX. In paragraph (2) of article 8, Canada proposes to delete the square brackets and to retain the reference to the execution date.

XXX. In paragraph (1) of article 9, Canada proposes to delete the words "place the funds at the disposal of" and to substitute therefor the word "pay".

XXXI. In paragraph (2) of article 9, Canada proposes to delete the word "executed" in square brackets and to substitute therefor the word "accepted" and to change the reference to article 10 to "article 4 *bis*".

XXXII. In paragraph (4) of article 9, the last sentence, Canada proposes to delete the verb "would" and to substitute therefor the word "may", and to change the reference to article 10 to "article 4 *bis*".

XXXIII. In paragraph (4) of article 9, Canada proposes to change the reference to article 10 to "article 4 *bis*".

XXXIV. In paragraph (5) of article 9, Canada proposes to delete the words "execution date" in the square brackets and to substitute therefor the words "acceptance date".

XXXV. Canada proposes to move the text of paragraph (1) of article 10 to form a new article 4 *bis*. See paragraph 20 of this memorandum.

XXXVI. In paragraph (3) of article 10, Canada proposes to delete the square brackets around the term "payment date" and to retain that term.

XXXVII. In paragraph (4) of article 10, Canada proposes to delete the word "following" and to substitute therefor the word "next"; to delete the square-bracketed word "executes" and to substitute therefor the words "deals with"; and to add to the end of the sentence the words "in the ordinary course of its business", so that the predicate of the paragraph would read:

"is entitled to treat the order as having been received on the next day the bank deals with that type of payment order in the ordinary course of its business."

XXXVIII. In paragraph (5) of article 10, Canada proposes to delete the word "execution" in square brackets and the preposition following it, and to substitute therefor a reference to "that type of business"; to delete the word "following" and to substitute therefor the word "next"; to delete the word "executes" and the square brackets and to substitute therefor the words "deals with"; to add to the end of the sentence the words "in the ordinary course of its business", so that the paragraph (with conforming grammatical changes) would read:

"If a receiving bank is required to take action on a day when it is not open for that type of business, it must take the required action on the next day it deals with such matters in the ordinary course of its business."

XXXIX. In paragraph (1) of article 11, Canada proposes to clarify the meaning by moving the reference to "the receiving bank" so that it immediately follows the reference to the payment order at the beginning of the sentence and reads:

"A payment order sent to a receiving bank other than the beneficiary's bank may not be revoked by the sender unless the revocation order is received at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act . . ."

XL. In paragraph (2) of article 11, an editorial change similar to that suggested by Canada for paragraph (1) appears to be desirable to clarify the meaning so that the sentence would begin:

"A payment order sent to a beneficiary's bank may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner . . ."

Canada also proposes to change the word "or" in the last line of paragraph (2) to "and". This is merely a grammatical change.

XLI. In paragraph (4) of article 11, the requirement that a revocation order always be authenticated is more strict than the requirement of paragraph (2) of article 4 with respect to payment orders themselves. If authentication is optional in the case of a payment order, it should be optional in the case of a revocation order as well. Canada proposes to amend the paragraph so that it reads:

"A revocation order must be authenticated if the payment order was subject to authentication."

XLII. In paragraph (5) of article 11, it should not be necessary to retain the words "other than the beneficiary's bank" in the first line, since the reference to a receiving bank *"executing"* a payment order is sufficient to exclude the beneficiary's bank.

XLIII. In paragraph (6) of article 11, the provision for refunds does not clearly appear to operate repeatedly with respect to each recipient in order to ensure that the refund will be returned to the originator. That intended meaning would be clarified if the reference to a refund under paragraph (5) were expanded to include a reference to a refund under paragraph (6) as well. In addition, Canada proposes to add the word "credit" before transfer to conform to the usage in other parts of the Model Law.

XLIV. In paragraph (8) of article 11, it appears to be desirable to expand upon the saving effect of the text so that all receiving banks that act to complete the credit transfer retain their authority notwithstanding the loss of the originator's capacity or the capacity of any intermediate sender. Canada proposes to amend the first sentence so that it reads:

> "The death, bankruptcy or incapacity of the sender or the originator does not of itself operate to revoke a payment order or to terminate the authority of the sender or the originator or of any receiving bank to act to complete the credit transfers."

XLV. In article 12, Canada proposes to delete the words "the next" and to substitute therefor "its".

XLVI. In addition, Canada proposes to add a provision protecting the text of article 12 from variation by agreement between the parties in terms such as "The provisions of this article may not be varied by agreement".

XLVII. In paragraph (2) of article 13, Canada proposes to add, immediately following each reference to the intermediary bank, the words "or funds transfer system". The policy that shifts to the sender the risk of the failure of an intermediary bank should extend to cover as well the risk of failure of a designated funds transfer system.

XLVIII. In article 14, Canada proposes to conform the verb to the usage of the Model Law by deleting the words "is obligated to" and substituting therefor the word "shall".

XLIX. In article 15, the policy ought to extend to a payment order accepted by the beneficiary's bank. Canada proposes to add, after the reference to the payment order executed by a receiving bank in the second line, the words "or accepted by the beneficiary's bank".

L. In paragraph (3) of article 16, there should be a reference to a specific payment order in order to give a clear meaning to the term "sender". Canada proposes to add the words "with respect to a payment order" immediately following the reference to paragraph (5) of article 7 in the second line of paragraph (3). Canada proposes a similar amendment to the second line of paragraph (4) of article 16.

LI. In paragraph (5) of article 16, Canada proposes changes to implement its proposal that the verb "issues" be replaced throughout the Model Law by the verb "sends" and that references to "placing funds at the disposal of" the beneficiary be replaced by the words "paid to".

In the same paragraph, Canada proposes to modify the term "improper action" so that it reads "improper execution". This change should make it clear that any discrepancy between the payment order received and the implementing payment order executed may be a source of interest liability for the receiving bank when the circumstances of paragraph (5) are satisfied.

LII. In paragraph (8) of article 16, Canada proposes to delete the verb "to execute" in the fifth line and to substitute therefor the verb "to act upon", applying the new terminology suggested by Canada in proposed new article 4 *bis*.

LIII. In paragraph (2) of article 17, it appears to be an error to purport to discharge the obligation as soon as the beneficiary's bank *accepts* the payment order. Acceptance may occur at a time significantly before the time that the beneficiary actually receives payment from the beneficiary's bank. This could occur, for example, if the conditions of subparagraph (1)*(a)* of article 8 applied. Similarly, the conditions in subparagraphs (1)*(c)*, *(d)* and *(e)* of the same article appear to be inappropriate events to create a discharge. Canada proposes to delete the verb "accepts" and to substitute therefor the words "pays the amount of the payment order to the beneficiary". Expressing the condition of discharge in terms of traditional *payment* emphasizes the bilateral nature of the necessary action (i.e. the funds must be both given and received with the intention of discharging the obligation) and protects the beneficiary from unwanted payments or having his contractual rights against the originator affected without his consent.

LIV. In paragraph (2) of article 18, Canada proposes a conforming amendment to delete reference to the purported sender, if its proposal to amend paragraph (1) of article 4 has been accepted. The provision should read:

> ". . . shall not affect the determination of which law governs the question whether the sender is bound by the payment order for the purposes of article 4(1)."

## CZECHOSLOVAKIA

*[Original: English]*

*Article 7(5)*

In essence, we have no objections to the contents of this paragraph. We, however, submit to your consideration whether the answer to the problem of a possible difference between the verbal and numerical expression of data in a payment order corresponds with the banking practice developed over many years. Moreover, the Geneva Conventions on Bills of Exchange and Promissory Notes unambiguously endorse the conclusion that, in the event of a difference between the numerical and the verbal expression, the verbal expression has priority.

*Article 9(3)*—see comments above.

*Article 10(4)*

We assume that the receiving bank's cut-off time will be an individual matter of the individual banks, because the "same date execution" might cause practical problems in a number of countries, viz. with regard to the fact that not only banks but also clients possess sophisticated computer technology.

*Article 11(8)*

It is our opinion that the specification of the respective facts should not be understood to be enumerative. This is why we would suggest to include in the text an expression like "similar circumstance" or a like expression to make it more explicit that an enumerative specification is not meant.

*Article 13*

In our opinion this is one of the most complicated questions in the draft of the Model Law. Duty to refund conceived as money back guarantee seems too severe to us, viz. in spite of a certain limitation of this duty, which ensues from paragraph 2 of this article. We explain that, by virtue of the duty thus conceived, the behaviour of the banking system could be affected adversely, and payment orders might possibly be refused, which so far is not happening, on the part of the individual banks. Not only does the payment order enter in the bank's balance sheet but, in a number of countries, it would burden also the "risk asset ratio" of the banks, which is usually a binding indicator set by central banks. As opposed to the issuance of the banking guarantee, opening of a letter of credit etc., there would often be involved an unintentional, involuntary conduct with which the question of "contingent liabilities" would be connected.

*Article 16*

We submit to your consideration whether it would be appropriate to state in the text words to the effect ". . . to pay interest on the amount of the payment order in the currency involved . . .", not in order that the rate be set directly, but to make it unambiguous that the interest rate should be related to the pertinent currency.

*Article 16(8)*

We take into consideration that the present document has the form of a Model Law, viz. that it would be embodied by means of domestic regulations. We agree to the variant that the Model Law itself does not specify "consequential damages" but, to this effect, only defines the pre-conditions under which these damages would be compensated, if the applicable law recognizes such damage.

The question remains, however, what pre-conditions the Model Law itself should set.

Maybe it is usual and in the practice of the individual countries it will cause no problems to define the expression "intention" as a form of "culpa". A major problem would in our opinion cause the interpretation of the Anglo-American term "recklessness" dealt with in the continental law, without this expression being defined for the purpose of the Model Law. According to our information the term "recklessness" has more meanings and is not interpreted uniformly even in the common law itself. This expression would namely cover both the "dolus eventualis" "indirect intention"/ as well as "gross negligence", which would obviously cause big problems in the continental practice in the application of these rules. This is why we suggest deletion of the expression "recklessness" from the draft of the Model Law, or to try and express the objective in another more customary manner.

## EL SALVADOR

*[Original: Spanish]*

We have examined the approach contained in the draft in question and it appears to be consistent in several respects with our legislation. Nevertheless, we can suggest that other concepts should be taken into account, such as the following:

*(a)* the credit transfer must be made in favour of a definite person;

*(b)* each operation must be for a fixed quantity;

*(c)* the transfer document must not be negotiable.

In addition, we can suggest in Chapter I of the draft a different wording for article 1, as follows:

"The present law has as its purpose the legal regulation applicable to credit transfers between customers of banks located in different States."

For the purposes of this law, branches and offices of a bank that are separate from their central office are considered to be separate banks, if they are to be found in different States, that is, in territories that do not have the same legal order.

## FINLAND

*[Original: English]*

### 1. *General comments*

The Government of Finland welcomes the effort by UNCITRAL towards a harmonization of the law governing international credit transfers. The task undertaken by UNCITRAL is a difficult one, both because it raises a large number of policy issues and because the subject matter is very complicated. A Model Law must, in order to be acceptable, strike a reasonable balance between the interests of all the parties. It is necessary to take into account the conditions under which payment services are operated and must be operated in order to cope with large volumes of transactions, in terms of both number and value, and in order to meet the requirements and expectations of speedy processing. It is obvious that a Model Law on international credit transfers will largely deal with interbank relationships. At the same time, it is of special importance that the position of originators and beneficiaries that are not banks is adequately safeguarded. These parties depend and rely on the banking system for efficient and professional payment services, and even if the present project is focused on commercial payments and not on consumer protection, an essential function of the law in this field must be to provide bank customers with adequate rights and remedies in case their reasonable expectations on the professional payment services of the banking system are not fulfilled. The adoption of a law governing international credit transfers could hardly be justified unless the interests of bank customers were adequately taken care of.

While the draft Model Law provides a good basis for consideration, it is suggested that a number of improvements could be made, with regard to both substance and drafting and in order to achieve better coordination and clarity in the relationship between different parts of the text.

The draft Model Law also raises the question as to what the status of the text should be. It is subject to doubt whether the rules could work properly irrespective of whether all or only some of the banks involved in the transfer are subject to the same rules. Thus, the question arises whether it is appropriate to present the rules as a Model Law, applicable to all international credit transfers, rather than as a convention. Especially the liability rules envisaged in the draft would seem better fit for a convention than a Model Law.

### 2. *Specific comments*

Article 2. *Definitions*

*(a) "Credit transfer"*

In principle, there does not seem to be any particular reason to exclude transfers effected through point-of-sale payment systems from the scope of the Model Law, even though it is disputable whether they should be classified as credit transfers or debit transfers. Consumer transactions and consumer oriented payment systems are not generally excluded, even if the footnote under article 1 makes it clear that the Model Law has been drafted without special consideration to consumer protection and is not intended to thwart separate legislation in that field. Thus, the last sentence should either be deleted or modified to state the opposite.

*(e) "Sender"*

The definition might be modified as follows: "Sender" means the person who issues a payment order or who is bound by a payment order under article 4, paragraphs (1) to (4). The term includes the originator and any sending bank.

*(f) "Bank"*

Taking into account the definition of the term "execution" in paragraph (1) the second sentence of paragraph *(f)* seems superfluous.

*(j) "Authentication"*

The term authentication is used in article 4, paragraphs (2) to (4). The problem is that the definition is broad enough to encompass even comparison of a signature with a specimen; this can also be described as a "procedure established by agreement to determine whether all or part of a payment order or a revocation of a payment order was issued by the purported sender". Comparison of a signature with a specimen is, however, not intended to be covered by the provisions of article 4, paragraphs (2) to (4). The cases where a payment order is authenticated by signature should be governed by article 4, paragraph (1) only. Thus, for the purpose of the Model Law, the definition of authentication needs to be modified accordingly. The following addition to paragraph *(j)* is suggested: "The term does not include comparison of a signature with a specimen." Another possibility would be to indicate this limitation in article 4, paragraph (2).

*(l) "Execution"*

The definition needs to be completed as regards execution by the beneficiary's bank. The following might be considered: "With respect to the beneficiary's bank, 'execution' means the action necessary in order to place the funds at the disposal of the beneficiary."

Article 4. *Obligations of sender*

*Paragraph (2), subparagraph* (a)

Taking into account the definition of authentication as an agreed procedure, a more appropriate expression than "authentication provided" would seem to be "authentication used".

The basic standard of commercial reasonableness is vague. Some guidelines concerning the factors to be taken into account in assessing whether an authentication procedure meets the standard should be given. The following formulation is suggested:

> "the authentication used is a commercially reasonable method of security against unauthorized payment orders, taking into account the amounts and the frequency of payment orders normally issued by the sender to the receiving bank, the method of transmission used between them as well as other circumstances".

*Paragraph (2), subparagraph* (b)

This provision does not seem to provide a clear answer to the allocation of risk in cases where the authentication result is incorrect due to a technical malfunction. It is uncertain how the words "complied with" should be interpreted in this context. The problem arises if, due to a technical malfunction in the authentication mechanism, a payment order passes as authenticated even if it shouldn't have passed (the computer "accepts" a false authentication code, for instance). If the words "comply with" are taken to mean that it is enough that the receiving bank has taken the steps required in order to comply with the authentication procedure, this would mean that the sender would bear the risk of falsely positive authentication results that are due to technical malfunctions. That would not be fair in cases where the technical problem arose in the computer system of the receiving bank; in such cases the loss should be borne by the receiving bank and not by the sender. The provision should be worded so that a proper risk allocation is ensured. The following amendment is suggested:

> "*(b)* the receiving bank performed properly with respect to the authentication."

*Paragraph (5)*

The following wording of the first sentence of this paragraph would seem to be appropriate:

> "Subject to the preceding paragraphs, a sender is bound by the terms of a payment order as received by the receiving bank. . . ."

Article 5. *Payment to receiving bank*

This article, which was introduced at the final session of the Working Group, raises a number of problems. The very purpose of the article is rather obscure. It is not clear what the provisions are intended to achieve and what their scope is intended to be. In the Model Law, the time of payment is of direct relevance in the context of deemed acceptance only, and some of the provisions in article 5 have been formulated with a view to that specific purpose. However, the solutions provided in article 5 do not seem to be satisfactory from the point of view of article 6. Moreover, the wording of article 5 does not indicate that the function of its provisions was limited to such a narrow purpose only. Rather, the wording suggests that the article is intended to pinpoint the time of payment for more general purposes. Some of the provisions included are, however, not appropriate for such a broader function, while others merely refer the issue to applicable law (and funds transfer system rules).

The following comments focus first on *subparagraphs* (b)*(i) and* (b)*(ii)*, because they highlight the problems involved.

With respect to the duties of the receiving bank, the two basic questions relating to time are (1) when does acceptance occur and (2) when is the receiving bank required to execute the payment order. One of the main concerns in the drafting of the rules on acceptance has been to make sure that so-called deemed acceptance does not occur until the receiving bank has received good cover for the payment order. The drafting of subparagraphs *(b)*(i) and *(b)*(ii) of article 5 was determined by some of the problems that arise in the context of deemed acceptance, particularly by the need to afford the receiving bank an adequate possibility to make a credit judgment with respect to the credit provided by the sender. Thus, the draft seems to confuse the question of when payment occurs with the question of when the receiving bank is in a position to determine whether the credit provided constitutes acceptable cover. For the purpose of a regulation of the duties of the receiving bank, the question of when payment occurs is, as such, not necessary to deal with at all; the important issues relate to the time of acceptance and the time of execution, and should be dealt with under those headings.

*Subparagraph* (b)*(i)* deals with the situation where the receiving bank has an account with the sender. It states that payment is deemed to occur when the credit is used or, if not used, on the business day following the day on which the credit is available for use and the receiving bank learns of that fact. Article 6(2)*(a)*, as well as 8(1)*(a)*, deals with deemed acceptance. That provision states that acceptance occurs when the time for execution has elapsed without notice of rejection having been given, i.e. at the end of the day on which the payment order was received, assuming that no other execution date and no payment date was indicated. However, acceptance does not occur until payment has been received, i.e. not until the credit is used or "on the business day following the day on which the credit is available for use and the receiving bank learns of that fact". The latter rule is not very precise, and it is not clear why the time of deemed acceptance must be deferred to the day following the day on which the credit became available. With respect to the time of execution in the latter case, the draft Model Law fails to provide an explicit answer. The present text indicates that deemed acceptance in some cases takes place after the time for execution under article 10 has lapsed, which means that execution following deemed acceptance would always be late.

In contexts outside articles 6(2) and 8(1), it may cause problems to state generally that where the sender credits an account of the receiving bank with the sender, "payment" by the sender to the receiving bank "occurs" on the day following the day on which the credit became available. Even the credit in the account basically amounts to a claim against the sender.

*Subparagraph* (b)*(ii)* raises similar objections: the time of deemed acceptance can better be dealt with in articles 6 and 8 exclusively, and the rules proposed are not appropriate for the purpose of determining the time of payment for other purposes.

If, as the wording suggests, article 5 purports not only to relate to the time of deemed acceptance under articles 6(2)*(a)* and 8(1)*(a)* but to lay down a general rule on the time of payment, the situation becomes very peculiar. Let us assume that a sending bank (A) issued a payment order to the receiving bank (B) on day 1 and that the order was received and executed on day 1. Let us further assume that on day 1 the third bank (C) credited the account of bank (B) with the amount required to cover the payment order from (A) to (B), and that at the end of day 1 the receiving bank files for bankruptcy. The question then arises whether the amount already credited to B's account at bank (C) belongs to the assets of the sending bank (A) or to the assets of the receiving bank (B). Normally, it would be deemed to belong to the receiving bank (B). Under the principle in article 5*(b)*(ii), payment would not be deemed to occur until the following day, day 2, which means that the amount already credited would not have been part of the receiving bank's assets at the time of the bankruptcy. Instead, there would only be a claim against the sending bank. Such a result would be odd.

The reasons that have been advanced for the "following day" rule have no bearing on the question of when payment should be deemed to occur for purposes other than those arising in articles 6, 8 and 10, and there is no reason to introduce such a deviation from general principles to govern the time of payment in interbank relationships.

The subparagraph is strange also because it is inconsistent with the principles contained in article 17. Subparagraph *(b)*(ii) deals with a situation where the sender pays the receiving bank through a third bank: the sender (bank A) issues a payment order to the receiving bank (bank B) and a covering payment order to the third bank (bank C) for the benefit of bank (B). Such a cover transfer is also governed by the draft Model Law (nothing indicates the opposite). The beneficiary of the covering payment order is bank (B), and bank (C) is both the originator's bank and the beneficiary's bank. Under article 17, the covering transfer is completed when bank (C) accepts the covering payment order issued by bank (A), and this is the time when payment from (A) to (B) would be deemed to occur under the principle contained in article 17(2). There seems to be no valid reason for deviating from that principle in cases where the purpose of the transfer is to discharge (A) from an obligation to provide cover for a payment order issued by (A) to (B).

Articles 6 and 8 can be drafted without resorting to a construction now found in article 5. Therefore, article 5 should be deleted and necessary elements from it should be incorporated into articles 6 and 8. A suggested redrafting of article 6 is presented below.

Other comments:

The *chapeau* of the article refers to "payment of the sender's obligation under article 4(6)". According to article 4(6), that obligation does not arise until the payment order has been accepted by the receiving bank. However, in article 6(2)*(a)* and 8(1)*(a)* the time at which payment occurs is used as a criterion for defining when acceptance occurs. Thus, the wording of the *chapeau* introduces an unnecessary circularity in the text.

*Subparagraph (iv)* is very ambiguous. It is unclear what its effect would be if adopted in a particular legal system. Especially the reference to applicable law in (iv)a. is very obscure. It is not clear whether the reference to applicable law means the law applicable to the payment obligation or the law applicable to the funds transfer system. In the first case the provision does not seem to say more than that payment occurs when final settlement takes place in accordance with the rules of the system, provided that the law applicable to the payment obligation in question recognizes that time as conclusive. Such a provision is hardly very useful. In the second case the provision is also of questionable value since it seems quite unclear what the law applicable to the funds transfer system might be. If it is not possible to elaborate and reach consensus on rules that would really ensure the legal effect of settlements made through netting arrangements, it is doubtful whether the Model Law could address these issues in some less controversial manner that would still be useful.

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

The following restructuring and redrafting of article 6 is suggested:

"(1) This article applies to a receiving bank other than the beneficiary's bank.

"(2) If a receiving bank does not accept a sender's payment order, it shall give notice to the sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than on the execution date. Failure to give notice of rejection results in acceptance under the conditions and at the time laid down in subparagraph (3)*(b)*. A payment order which has been accepted by the receiving bank can no longer be rejected by the bank.

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

*(a)* when it executes the payment order received;

*(b)* when it gives notice to the sender of acceptance;

*(c)* when the bank receives the payment order, provided that the sender and the receiving bank have agreed that the

bank will execute payment orders from the sender upon receipt;

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

*(e)* at the end of the day on which the payment order was received or at the end of the execution date indicated in the payment order, if later, provided that:

(i) where payment is to be made by debiting an account of the sender with the receiving bank, acceptance shall not occur until there are funds available in the account sufficient to cover the amount of the payment order; or

(ii) where payment is to be made by crediting an account of the receiving bank with the sender, acceptance shall not occur until the earlier of the following:

— when the credit is used, or

— at the end of the day on which the credit became available for use and the receiving bank learned of that fact; or

(iii) where payment is to be made by credit to an account of the receiving bank in another bank, acceptance shall not occur until the earlier of the following:

— when the credit is used, or

— at the end of the day on which the credit was made and the receiving bank learned of that fact; or

(iv) where payment is to be made through the central bank of the State where the receiving bank is located, acceptance shall not occur until final settlement is made in favour of the receiving bank; or

(v) where payment is to be made through a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally, acceptance shall not occur until

— final settlement is made in favour of the receiving bank in accordance with [applicable law and] the rules of the system; or

— final settlement is made in favour of the receiving bank in accordance with a bilateral netting agreement with the sender; or

(vi) where none of the subparagraphs (i)-(v) apply, acceptance shall not occur until the receiving bank receives payment for the payment order as provided by applicable law."

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

*Paragraph (2)*

Under this provision, the obligation of the receiving bank that has accepted a payment order is only to issue an appropriate payment order of its own to the beneficiary's bank or to an intermediary bank. Nothing is said about an obligation to provide cover for the payment order. However, the provision of cover is equally important in order to make the credit transfer work. The obligation of a bank as sender to pay for the payment order arises when the payment order is accepted. Such a provision, which only takes account of the relationship between a sender and its receiving bank, is not enough with a view to the credit transfer as a whole, because without cover acceptance will often not take place: failure by a bank to make covering funds available is likely either to result in a rejection of its payment order by the next receiving bank or to defer acceptance by the next bank so that completion of the credit transfer is delayed. A Model Law on credit transfers which could be properly complied with merely by transmitting payment orders, without a timely provision of funds, would be odd. Under the present draft, however, neither the originator nor the beneficiary would have any remedy available in cases where the completion of the credit transfer was delayed because of a delay by one or more receiving banks in making cover available to the next receiving bank. That is not acceptable. The following amendment is suggested:

"(2) A receiving bank that accepts a payment order is obligated under that payment order

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

*(b)* to take the appropriate steps in order to provide or make available sufficient cover for the payment order issued under subparagraph *(a)*."

*Paragraph (3)*

The paragraph should be deleted. The problem of misdirected payment orders does not merit regulation in the Model Law. It appears from article 16(3) that a failure to give notice of a misdirection will have consequences only when payment was received also. Firstly, it is probably an unlikely occurrence that both a payment order and covering funds are mistakenly delivered to the wrong bank. Secondly, should this happen, it is possible and perhaps most likely that the misdirection is not detected and the payment order will be executed. In that case, it seems that from the point of view of the draft Model Law there is no problem; no liability of any kind arises. Thirdly, if the misdirection is in fact detected, it is unlikely that the bank would not notify the sender. Fourthly, the draft does not provide that the rules concerning deemed acceptance would not apply in cases where a payment order comes in but is misdirected. This means that the receiving bank would be required to give a notice of rejection, provided that cover was received also.

*Paragraph (5)*

It is not clear how this provision relates to the provisions of articles 6 and 16. If a bank has failed to notify the sender of an inconsistency between the words and figures that describe the amount of the payment order, this may be due to the fact that the inconsistency was not detected and the payment order was executed in either amount. The liability provided for in article 16(3)—the payment of interest to the sender—does not seem to make sense in cases where execution has taken place. Paragraph (5) of article 7 is, however, not limited to situations where the inconsistency was in fact detected and the payment order was not executed.

For example: The amount in words was a hundred thousand and the amount in figures 10000. The bank executed by sending a payment order for 10000. The draft does not make it clear how such a situation is to be assessed. Has there—through execution—been acceptance and if so, in what amount? In other words, can the receiving bank be liable under article 16(5)?

It seems that the problem of inconsistency in words and figures describing the amount of the payment order can be properly solved only by establishing a rule as to which description shall govern.

*Paragraph (6)*

This paragraph is directly related to paragraph (2) and should be placed after it; in other words, paragraph (6) should become paragraph (3).

Article 8

This article should be restructured in the same manner as article 6.

Article 9

*Paragraph (3)*

See comments to article 7(5).

*Paragraph (4)*

This paragraph also lays down a duty of notification. It is not clear what the implications of a failure to give the required notice would be and how the provision relates to situations where the beneficiary's bank has executed the payment order on the basis of either the words or the figures. If the name and the account number identify different persons and the beneficiary's bank pays one of them, who turns out not to be the intended beneficiary, the Model Law does not seem to provide an answer as to what the consequences are. Presumably, the duty to refund (article 13) would apply, provided that the inconsistency did not originate from the originator's payment order. The bank that caused the error would also be entitled to a refund, and the beneficiary's bank would be the one to recover the funds from the person who received them. Paragraph (4) does not seem to affect this situation in any way. If, on the other hand, the inconsistency originated from the originator's payment order, i.e. from an error of the originator himself, the question arises whether paragraph (4) would be of some significance for determining the allocation of loss between the originator and the beneficiary's bank.

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

The provisions on deemed acceptance give rise to problems in the context of article 10. If a payment order is received on day 1 but payment is not received until day 2, deemed acceptance would, under articles 6 and 8, take place once the payment is received. Thus, it seems necessary to introduce a special provision on the time of execution for such cases. The following is suggested:

"(1) A receiving bank is required to execute the payment order on the day it is received or, in cases referred to in article 6(3)*(e)* and 8(2)*(g)*, on the day following acceptance, unless . . ."

Article 11. *Revocation*

This article is based on the principle that a revocation of a payment order is effective only if received by the receiving bank so early that execution of the order can still be prevented. A receiving bank that has received a revocation at a later point of time is under no obligation to revoke its own payment order. Thus, the article limits the possibility for an originator to interrupt a credit transfer. Such a possibility can be of great importance to the originator (for instance in cases of fraud or the beneficiary's breach of contract or insolvency), while a requirement that the receiving bank would have to revoke a payment order already issued would not always be unreasonable. If, at the same time, it is recognized that it should be possible for payment systems to be based on the principle of irrevocability and that adequate provision must be made for such a possibility, a more balanced solution could be found. The draft in the UNCITRAL Working Group's Working Paper A/CN.9/WG.IV/WP.49 p. 54-55 represents a better basis for a regulation of revocation than does the present draft.

Articles 12-15 and 17(1); general remarks

Articles 12-15 all start with a reference to the completion of the credit transfer "in accordance with article 17(1)"; Article 17(1) states that a credit transfer is completed when the beneficiary's bank accepts "the payment order". This leaves open at least one important question: if the payment order accepted by the beneficiary's bank was not consistent with the originator's payment order with respect to the identification of the beneficiary, it is not clear whether the Model Law treats the transfer as completed or not completed and which of the provisions in Chapter III would apply. It seems obvious that article 17(1) needs to be qualified so that a credit transfer is deemed to be completed "when the beneficiary's bank accepts a payment order to the benefit of the beneficiary designated in the originator's payment order".

Article 12. *Duty to assist*

The logic on which the provisions of this chapter are based does not seem quite unequivocal. On the one hand, the draft Model Law could be understood so that as long as the credit transfer is not completed, it follows from article 7(2)—which lays down the obligations of a receiving bank that has accepted a payment order—that the bank must, if necessary, make several attempts at execution (unless the refund provisions in article 13 are invoked). If a problem arises—the next receiving bank rejects the payment order or the execution was erroneous with respect to the identification of the beneficiary or with respect to the amount (it was too small)—the receiving bank's basic obligation is that it has a duty to try again by issuing a new payment order, possibly to another bank (in the case of rejection). On the basis of such a reasoning, the duty to assist provided for in article 12 could be understood to impose "new" obligations only on receiving banks other than the one where the execution problem actually arose. However, it is not clear whether this is the correct interpretation. Thus, the question arises—for example—whether the duty of a receiving bank to issue a new payment order in cases where it has made an error in the identification of the beneficiary would be derived from article 7(2) or from article 12.

The point is that a Model Law could reasonably be expected to be more specific with respect to the duty of a receiving bank to correct an erroneous execution—without additional cost to the sender or the originator. It should also be made clear that the assistance referred to in article 12 may not involve additional cost to the sender or the originator.

Article 14 deals with correction of overpayment. That provision could be incorporated into article 12, which could be amended as follows:

Article 12. *Duty to correct erroneous execution and duty to assist*

"(1) If the credit transfer has not been completed in accordance with article 17(1) because a receiving bank has issued a payment order in which the identification of the beneficiary did not correspond to the payment order it accepted, the receiving bank is obligated to issue, without additional charge, a new payment order containing the correct identification.

"(2) If the credit transfer is completed in accordance with article 17(1), but the amount of the payment order issued by a receiving bank is less than the amount of the payment order it accepted, the receiving bank is obligated to issue, without additional charge, a payment order for the difference between the amounts of the payment orders.

"(3) If the credit transfer is not completed in accordance with article 17(1) or if it has been completed in an amount less than the amount of the originator's payment order, each receiving bank is obligated to assist, at its own cost, the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the credit transfer in accordance with the originator's payment order."

Article 13. *Duty to refund*

The principle contained in this article is of fundamental importance, even if the situations in which it would need to be invoked will probably, and hopefully, not be very frequent. The policy that the sender of a payment order does not risk losing the principal sum even if, due to later events, the credit transfer is not properly completed, represents a basic safeguard of the sender's and especially the originator's legal position.

The amendment suggested above for article 17(1) would make it clear that the duty to refund would apply also in cases where the payment order accepted by the beneficiary's bank was—because of fraud or error—to the benefit of a person other than that designated by the originator. However, in such a case the right to the return of funds from the next receiving bank should not extend to the receiving bank that had issued a payment order that was inconsistent with the payment order accepted by it. Therefore, an amendment of paragraph (1) to that effect seems necessary. The following redraft of article 13(1), second sentence, is suggested:

"The originator's bank and each subsequent receiving bank, with the exception of a receiving bank that has issued a payment order inconsistent with the payment order accepted by it, is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund."

An alternative would be to add the following sentence at the end of the paragraph: "However, a receiving bank that has issued a payment order inconsistent with the payment order accepted by it is not entitled to a return of funds from its receiving bank."

Article 14. *Correction of underpayment*

It has been suggested above that this provision should be placed in article 12.

Article 15. *Restitution of overpayment*

This provision deals with a situation where the beneficiary has received more money than he should have. The article does not attempt to regulate the right of a bank to recover such overpayment from the beneficiary but contains only a reference to relevant rules of law. Since there are other situations in which a need for restitution of payment may arise in connection with credit transfers—for instance where an error by some bank has resulted in payment to the wrong person—it is not easy to see a justification for including an express provision on one particular case while others are not dealt with.

Article 16. *Liability and damages*

This article involves a number of problems.

1. The article is based on the principle that if a delay by one receiving bank results in delayed completion of the credit transfer, the receiving bank that caused the delay is liable to the beneficiary for interest. The bank can discharge its liability by paying the interest to the next receiving bank, which in turn is obligated to pass the interest forward.

The principle that the beneficiary should be entitled to interest compensation in the case of delayed completion of the credit transfer is, as such, a good principle. However, the liability rules set out in the draft Model Law contain a major flaw because they can function properly only on the condition that all the receiving banks involved in the credit transfer are subject to the Model Law (or rules similar to it). Yet, the Model Law would be recommended to States as a statute that they are expected to make applicable to all international credit transfers, regardless of whether all the receiving banks involved are governed by the same rules. The kind of liability system that the draft contains would seem to require that the rules are given the form of a convention instead of a Model Law.

The problem can be illustrated by the following example: The originator and his bank are located in State A, which has adopted the Model Law, and the beneficiary and his bank in State B. The transfer goes through two intermediary banks in States C and D. If the intermediary bank in State D causes a delay, but State D has not adopted the Model Law, the beneficiary may have no claim against the intermediary bank under the applicable law, or there may be a great deal of legal uncertainty and practical problems involved in trying to pursue such a claim. Even if the beneficiary might have a claim under the law of State D, it is unlikely that the intermediary bank would on its own initiative forward any interest to the next receiving bank that is not the holder of the claim, unless the applicable law clearly recognizes such a procedure. Thus, if the credit transfer passes through a legal system not based on the Model Law, the beneficiary is not likely to receive interest as envisaged in article 16(1) and 16(2). In that case, the beneficiary is likely to claim against the originator (provided that there has been a delay with respect to the terms of the underlying obligations also). Given that State A has adopted the Model Law, the originator would have no possibility of recovering from the banking system any interest paid to the beneficiary.

It would not be a justifiable policy to recommend to States the adoption of liability rules which in many cases would either leave the beneficiary without compensation or let the originator bear the ultimate loss for delays that arise in the banking system.

If the draft is to be presented as a Model Law and not as a convention applicable when each receiving bank involved is subject to its provisions, the liability rules require modification in order to ensure a fair allocation of losses. The Model Law must provide a right of recourse for the originator in order to safeguard the originator against situations where the basic liability scheme does not work due to the fact that the system presupposes that every receiving bank is governed by uniform rules without making sure that this is the case.

2. Under article 16(1), the liability of a receiving bank arises if it fails to execute its sender's payment order in the time required by article 10(1). This language is all too narrow. According to article 2(1), execution means the issue of a payment order "intended to carry out the payment order received by the receiving bank". Thus, it seems that no liability would arise if the receiving bank causes a delay by issuing a payment order that is not consistent with the payment order accepted by it; it would be enough that the receiving bank managed to issue, within the time required by article 10, a payment order "intended" to carry

out the order it accepted. Obviously, the receiving bank must be liable if it causes a delay by erroneous execution and not only for failure to execute at all. If, for example, the payment order issued by the receiving bank erroneously instructed payment to the wrong beneficiary and this resulted in a delay in the completion of the credit transfer, article 16(1) must apply. The provision needs to be formulated by reference to a failure of a receiving bank to fulfil its obligations under article 7(2).

3. It has been pointed out in connection with article 7(2) that a receiving bank must also be liable for delays caused by the bank's failure to make cover available to the next bank so that the latter is put in a position to accept the payment order. If article 16(1) is amended so that reference is made to article 7(2) and article 7(2) is amended as suggested, this problem would be solved.

4. Paragraph (5) of article 16 contains a puzzling special provision on the liability of a receiving bank in the case of underpayment. According to this paragraph, interest would be payable only in case a payment date had been specified and there has been a delay in relation to that date.

The provision introduces a peculiar distinction between situations where the whole amount to be transferred has been delayed and situations where there has been a partial delay. Under article 16(1), the beneficiary is entitled to interest if the credit transfer has been completed later than it should have in the normal course of events. It is not required that a payment date has been specified and passed. This has been one of the basic considerations behind article 16(1). It seems odd and quite unjustified to deviate from that policy in the case of underpayment. The paragraph also contains a second sentence in which reference is made to "improper action" by a receiving bank. It is very unclear what that means and why liability should arise only on such a condition.

Paragraph (5) should be deleted. Instead, it should be made clear in article 16(1) that it applies regardless of whether there has been a delay with respect to the whole or to only part of the amount specified in the payment order accepted by the receiving bank in question.

5. According to article 16(1), a receiving bank may discharge its liability to the beneficiary by payment to the next receiving bank or by direct payment to the beneficiary. While it is important to encourage procedures that would make the interest compensation flow to the beneficiary automatically, this may not always happen in practice (even if the receiving banks in question were subject to the Model Law). If this is the case, it may often be difficult for the beneficiary to find out which bank is liable or, if that bank has discharged itself by payment to the next bank, which of the subsequent banks has failed to pass on the interest. Therefore, a duty for the receiving banks to assist the beneficiary in the necessary fact finding should be considered.

The following amendments to article 16 are suggested:

Article 16. *Liability for interest and other loss*

"(1) If the completion of a credit transfer in accordance with article 17(1) has been delayed due to the failure of a receiving bank other than the beneficiary's bank to fulfil its obligations under article 7(2), the receiving bank is liable to the beneficiary. The liability of the receiving bank shall be to pay interest on the amount of the payment order accepted by it for the period of the delay caused by the receiving bank's failure. If the delay concerns only part of the amount of the payment order accepted by the receiving bank, the liability shall be to pay interest on the amount that has been delayed.

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

"(3) Each receiving bank is, upon request, obligated to give the beneficiary reasonable assistance in ascertaining the facts necessary for pursuing his claim for interest under paragraphs (1) and (2).

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

(5) [Liability of a receiving bank for failure to give notices (if needed).]

(6)-(8) As in the draft Model Law.

## GERMANY

*[Original: English]*

1. A Working Group of UNCITRAL has been dealing for some time with the drawing up of a Model Law on international credit transfers.

2. We feel that the work done so far deserves great praise, particularly the efforts to reappraise the problems involved in international transfers and the endeavour to solve these problems in a draft Model Law. Exercising the required caution *vis-à-vis* the undoubtedly carefully drafted proposals, however, we have a few reservations relating to their underlying concept, which we shall explain in the following comments.

3. At the same time, our comments are made in the belief that the General Assembly is the right place to discuss the draft in detail. In this light, we have taken up some fundamental reservations, of which we wish to mention already here the misgivings against article 10—principle of same-day execution—and against article 13—money-back guarantee.

I. *Necessity*

4. In our experience, international credit transfers are currently handled relatively smoothly in practice. In fact, the banking industry has proven that it is able, through the creation of complex systems, to efficiently handle international payments, taking into account satisfactory contractual bases as well; let us recall the SWIFT system.

5. The German delegation therefore initially felt that there was no need for a Model Law on international credit transfers. However, if the international community holds the view that legislation on international credit transfers requires harmonizing, we shall not close our eyes to this undertaking. Nevertheless, a Model Law makes sense only

— if it is based on the fundamental principles of international commercial law;

— if it takes account of actual practice in international credit transfer payments;

— if it promotes harmonization, i.e. if the Model Law really has a chance of being adopted internationally.

6. When any harmonization of legislation is undertaken, it may of course be necessary, for the common good, to abandon established concepts of national law. In this event, however, the regulatory concept adopted must be convincing. We believe that this is not the case with regard to some points:

— the restriction on freedom of contract is unsatisfactory;

— the sphere of application of the provisions also meets with misgivings on our part, and we wonder whether the draft Model Law really serves to promote harmonization or is not more likely to encourage a further fragmentation of legislation;

— a number of dogmatic breaks are unsatisfactory;

— also unsatisfactory are a number of provisions on the distribution of risk between the contracting parties;

— a number of provisions in the draft are unrealistic in the light of current actual practice;

— the regulations dealing with the effects on the "underlying obligations" do not appear convincing;

— in addition to this, we have a number of reservations about individual provisions contained in the draft.

## II. *Restriction on freedom of contract*

7. Article 3 of the Model Law does state that the principle of freedom of contract applies. The rights and obligations of the parties listed in the Model Law may be varied by agreement.

8. This principle is, however, breached in key places, particularly article 11, paragraph (3), article 13, paragraph (2) and article 16, paragraph (7). There is no reason for the mandatory nature of these provisions and the resulting restriction of freedom of contract. Mandatory provisions are justified whenever these are required to ensure the due orderliness of payment transactions or to protect certain interests, e.g. of consumers. Neither is the case here. Neither the due orderliness of payment transactions is in question nor are there any recognizable interests in need of mandatory protection. The Model Law applies not only to credit transfers by firms but also to those made by consumers. Yet it is definitely not a law dealing with the protection of consumers (see footnote to article 1). UNCITRAL's task is in fact the harmonization of international commercial law. In trade and commerce, however, there is no reason to deprive the contracting parties of the opportunity to arrange their contractual relations at their own discretion. Neither the due orderliness of payments transactions nor the protection of a contracting party thus justify deviation from this fundamental principle of contract law:

— The idea that the mandatory provisions establish the characteristic obligations and risks of banks is incorrect, since banks can be both originator and receiving bank in a credit transfer transaction.

— Incorrect is the idea that an orderly return of faulty credit transfers requires more extensive liability on the part of a receiving bank, e.g. the "money-back guarantee" stipulated in article 13, since it is possible to find alternative arrangements that take into account the interests of the contracting parties in the same way. The shape of such arrangements should, however, be left to the contracting parties.

— Incorrect is also the idea that retail payments must be organized on a uniform legal basis, since it is precisely in the case of large-scale payments, on which the Model Law also focuses, that individual arrangements may be appropriate.

9. Restricting freedom of contract also limits competition. On the one hand, this puts small and medium-sized banks at a disadvantage (see VI *(c)* below) and, on the other, deprives banks of the opportunity to develop different offers for payments and to fix prices for handling payments in accordance with the different types of agreement available.

10. The unrestricted importance of freedom of contract can, moreover, not be overestimated, since during a possible "adaptation phase" of the Model Law this law will exist in international payments only as a particular additional legislation, such as all other national laws (which have not yet been modified). Moreover, future, especially technical, developments will force an adaptability, as extensive as possible, of international payments to the needs of the parties involved, which is not to be impeded but rather enhanced by international efforts to harmonize legislation.

11. Particularly problematic is, finally, the fact that restricting freedom of contract may lead to banks no longer accepting certain payment orders because the risk involved is out of all proportion to the price. Take, for example, payment transfers to countries where, as a result of acts of war or similar circumstances, there is no guarantee that the amount will actually be credited to the beneficiary's account.

12. It is therefore proposed that all provisions entailing a restriction of freedom of contract be deleted.

## III. *Sphere of application*

13. The Model Law defines payment orders as unconditional orders. A point of doubt is thus, firstly, what legal consequences arise when the payment order is issued subject to a condition. Although such cases are untypical in practice, they cannot be ruled out. It must in particular also be borne in mind that new forms of payment transactions will be developed in the future involving a conditional payment order.

14. It could be assumed that payment orders issued subject to a condition are to be treated in the same way as unconditional payment orders. The Model Law does not seem to have adopted this approach in our view. However, this would have to be stressed more clearly.

15. If it is assumed, secondly, that conditional payment orders are not, as a rule, covered by the Model Law, these payment orders thus remain subject to the current legal arrangements. For the future, this could mean that a state of "new disorder" will be created.

— In the case of cross-border transfers between countries that have adopted the Model Law, legislation on payments will be harmonized.

— This will not, however, apply to payments by consumers, since in this respect the national consumer protection legislation will take effect.

— The Model Law is not to apply to conditional payment orders either, so that the old legal arrangements will remain in force.

— Furthermore, the old legal arrangements will also remain in force, and will apply to all payment orders, if the Model Law is not adopted by a country.

— The system is further complicated by the fact that the Model Law is to apply when the payment order is issued subject to a condition and the condition subsequently comes into play (article 2*(b)*, paragraph 2).

IV. *Dogmatic breaks*

16. If there is default in the execution of a credit transfer, e.g. if payment orders are not forwarded in due time by a correspondent bank, certain methods may well have developed in practice to deal with the resulting loss. However, it is not the task of the legislator to merely incorporate standard practice in a law drafted along the lines of a manual of operational rules. His task is in fact to take the contractual arrangements as the starting point. What is required is a reasonable balance of interests. This does not rule out a legal basis for claims also being embodied in a Model Law on international credit transfers. However, such a legally defined basis for claims then requires special justification.

17. This careful distinction between a contractual basis and a legal basis for claims is disregarded in several places. The following provisions of the draft Model Law appear to us to pose particular problems in this respect:

*(a)* Under article 16, paragraph (1), a receiving bank is liable to the beneficiary of a credit transfer if it has failed to execute the payment order within the period stipulated in article 10 and provided that the credit transfer was accepted by the beneficiary's bank in accordance with article 17. Article 16 therefore justifies claims by the beneficiary on intermediary banks although no contractual relationship exists between these parties.

What remains unclear is, *firstly,* whether such a claim only exists when the bank is responsible for the delay, i.e. when it is, in particular, guilty of wilful negligence. The present proposal implies that such claims exist irrespective of fault. This provision appears all the more problematic as the principle of an execution on the day the order is received (article 10) cannot be ensured; detailed comments on this point will be made under VI.

*Secondly,* article 16, paragraph (8) makes clear that a legal basis for claims is envisaged. Such an arrangement is justified by arguing that this is in conformity with banking practice in many countries and that existing practice—which is also economic in terms of costs—should thus be incorporated in a legal provision. This reasoning fails to convince. It blends a contractual basis and a legal basis for claims and produces inconsistent results. It is, for example, unclear how the beneficiary's claim stands in relation to the claim by the contracting party who issues the payment order to the bank which is responsible for the delay in forwarding the payment order. Are the types of claims implied under article 16, paragraph (8) to be ruled out, or are such claims to continue to exist, and how is a balance of interests to be achieved, if necessary, between the parties? In this light, this "interest-forward guarantee" appears unconvincing to us. Our proposal is that, when the execution of a payment order is delayed as a result of negligence, only the sending contracting party of the bank which forwards the payment order with a delay due to negligence on its part . . .

*(b)* The draft contains dogmatic breaks also in article 17. As a fundamental problem is involved this will be dealt with in more detail under VIII.

V. *Unrealistic obligations*

18. The Model Law must make allowance for the different types of payment systems. Credit transfers are partly electronic, partly paper-based, some are routine cases, some are transfers to beneficiaries involving special preliminary work to determine the transfer route. However, as the provisions of the Model Law are broad in scope and intended to cover all types of transfers, these special cases must also be taken into account. The banks must also be able to depict the discharge of obligations in practice. In this light, article 10 with its periods for the execution of payment orders cannot be depicted in practice. At least with regard to orders in foreign currency, it has to be pointed out that the bank can transmit amounts in foreign currency only if the corresponding amount has been put at its disposal abroad. However, in accordance with the present execution procedures in foreign exchange transactions, this is the case only one or two days after the bank has received the order. This two-days-rule is also acknowledged in the EC Commissions's recommendation of February 14, 1990 on the transparency of banking conditions relating to cross-border transactions (see no. 4).

VI. *Reservations regarding individual provisions*

19. Notwithstanding the general reservations regarding the underlying concept of the provisions, specific arrangements also meet with misgivings.

20. Article 6, paragraph (2)*(a)* in conjunction with paragraph 3 of the Model Law could be understood to mean that a receiving bank is to be treated, even if no cover is available, as if it has accepted the payment order on condition that it does not reject the order on the execution date. If it fails to give notice of the rejection in time, i.e. in an extremely short period, the receiving bank is consequently forced into a contractual relationship, even if it does not wish to be. This "sanction" would be undue and inappropriate, since a claim for damages (especially a claim for interest as of receipt of cover) would, in doubt, exist under general provisions of private law.

21. Such claims for damage result from article 7, paragraphs (3), (4) or (5) in conjunction with article 16, paragraph (3) and article 9, paragraphs (2) or (3) in conjunction with article 16, paragraph (4) if, in practice, extremely short periods are not observed by the receiving bank or beneficiary's bank with regard to interest to be paid on amounts received, although the respective cause for not executing the order was given by the relevant sending bank. The reduction of damages is made more difficult for the receiving bank on account of the fact that the handling of payment orders and account management are dealt with by two separate bank departments and the obligation to pay interest is to exist until the amount is returned.

## GREECE

*[Original: English]*

The views of the Greek authorities concerning the "Draft UNCITRAL Model Law on International Credit Transfers" are reflected in the comments submitted by the Commission of the European Communities.

## ISLAMIC REPUBLIC OF IRAN

*[Original: English]*

On the basis of our examination of the matter, we wish to inform you as follows:

Article 16 stipulates that in case of any delay in the payment of the transferred sum, the incurred interest shall belong to the beneficiary. But, since the transfer of the sum takes place in accordance with a contract existing between the applicant and the beneficiary, and since such a contract has its own terms and conditions, e.g. price validity, duration, etc., a delay in the payment of the transferred sum may invalidate the contract, in which case the payment of compensation for an invalid contract does not seem to be logical. Besides, so long as the sum is not given to the beneficiary, it in fact belongs to the applicant. It, therefore, seems to be more appropriate that the compensation for the delayed payment be paid to the applicant and not the beneficiary.

## JAPAN

*[Original: English]*

The Government of Japan sincerely appreciates the long and assiduous efforts of the Working Group on International Payments of UNCITRAL towards the completion of the Draft Model Law on International Credit Transfers and considers that the Draft Model Law will serve as a sound basis for the discussion at the 24th plenary session of UNCITRAL. In order to further improve the Draft Model Law, however, it seems appropriate to make the following comments.

The following comments are submitted without prejudice to any final position to be taken by the Japanese Government at the plenary session.

1. *Article 2*(a)

According to the records of deliberations at the Working Group on the definition of the terms "Credit transfer" and "Intermediary bank", there seems to be an understanding at the Working Group that a reimbursing bank shall also be considered to an intermediary bank and a payment order issued for the purpose of reimbursement of an original payment order shall constitute a part of the original credit transfer chain (A/CN.9/WG.IV/WP.49, p. 8, para. 10, p. 18, para. 44). But this understanding not only gives rise to results contrary to an anticipation of a party as pointed out in the Secretariat Commentary (supra p. 8, para. 10), but also contradicts the common usage in banking practice and may bring about unnecessary confusion in the Model Law. Reimbursement relationships should be considered to be, not a part of the original credit transfer, but separate from the original credit transfer.

We propose, therefore, to delete the second sentence of article 2*(a)* and to insert a phrase *"that receives and issues payment orders"* at the end of article 2*(h)*, which defines "intermediary bank".

2. The third sentence of article 2*(a)* in square brackets refers to a point-of-sale payment system. This reference to a specific payment system or specific technology seems to be inappropriate in view of the rapid development of technology in this field. It would be sufficient if we make a clarification on this point at the plenary session.

The third sentence of article 2*(a)*, therefore, should be deleted.

3. *Article 2(l)*

This provision, which defines "Execution" only with respect to a receiving bank other than the beneficiary's bank, seems to imply that there is no such concept for the beneficiary's bank. This definition results in unexpected and unacceptable interpretations that the same-day requirement of article 10(1) shall not be applied to the beneficiary's bank and that the beneficiary's bank shall not be considered as a "Bank" in the definition of article 2*(f)*.

We propose, therefore, to insert at the end of article 2(1) a phrase *", and with respect to the beneficiary's bank, receiving a payment order and placing funds at the disposal of beneficiary"* in order to avoid the above-mentioned problem.

4. *Article 3*

We think that the phrase "agreement of the affected party" is an inappropriate expression which is rarely used and should be replaced by a common expression *"agreement of the parties"*.

5. *Article 4(1) and (5)*

The provisions of article 4 need some clarification with respect to a question whether they should be applied to a case where the terms of an authorized payment order are altered by an unauthorized person. Although it can be interpreted that the provisions of article 4 covers the case of unauthorized alteration, express reference might be helpful.

We propose to delete the first sentence of article 4(5) and to make the following amendments to article 4(1):

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

6. *Article 4(3)*

There is no restriction for the parties to alter the provisions of article 4(4) by agreement. But it would unfairly prejudice the position of the sender to allow the receiving bank to be exempted from its liability by agreement even in a case where the actual sender of a payment order is a present or former employee of the receiving bank who might have gained access to customers' information while he was working in the bank.

We, therefore, propose to amend article 4(3) as follows:

> "The parties are not permitted to agree that paragraph (2) shall apply if the authentication is not commercially reasonable, *nor are they permitted to agree that the same paragraph shall apply if it is proved that the payment order as received by the receiving bank resulted from the actions of a present or former employee of the receiving bank."*

7. *Article 5* chapeau

Although a practical purpose of article 5 is to determine the point of time when the deemed acceptance set out in article 6(2) and article 8(1)*(a)* shall occur, the present wording of the provisions may allow an interpretation that it also determines the time when a payment occurs in a case where the bank has suspended payment. We consider that this interpretation should be expressly avoided since careful consideration is required in that case.

We therefore propose to insert a phrase *"For the purpose of Article 6(2)*(a) *and Article 8(1)*(a)," at the beginning of article 5.

8. *Article 5*(b)*(i) and (ii)*

The provisions of article 5*(b)*(i) and (ii) provide that the payment by a sending bank occurs when a credit in an account of the receiving bank is used. The determination of the time of payment in these provisions, with which the deemed acceptance would take effect in the context of article 6(2)*(a)* and article 8(1)*(a)*, is inappropriate in view of the fact that, in banking practice, the receiving bank might use a credit in its account without any knowledge of its origin or purpose.

We, therefore, propose to insert a phrase *"with the knowledge that the credit is paid as the payment of the payment* *order*" after the word "used" in each provision of article 5*(b)*(i) and (ii).

9. *Article 5*(b)*(iv)*

We consider that this provision, which deals with settlement through bilateral or multilateral netting schemes, actually contains little substance, and that the provisions of article 5*(b)*(i) through (iii) would provide sufficient substitutes.

The provisions of article 5*(b)*(iv), therefore, should be deleted.

10. *Article 7(5) and article 9(3)*

The second sentences of article 7(5) and article 9(3) have become self-evident and unnecessary in light of article 3.

We propose to delete these sentences.

11. *Article 10(1)*

The provision of article 10(1) provides two exceptions to the same-day requirement of execution of a payment order. This requirement should not be imposed in a case where a sender does not make necessary payment.

The following new subparagraph *(c)* should be added to article 10(1).

"(c) *the sender does not make payment in accordance with the provisions of Article 5. In this case the order shall be executed on the day the payment is made.*"

12. *Article 12*

If the credit transfer is not completed, it is indispensable to collect information such as whereabouts of the funds or the cause of the failure. This information is also helpful for a prompt refund in accordance with article 13. It would be appropriate, therefore, to add the duty to gather necessary information in the article.

We propose to insert the phrase "*in particular by offering and gathering necessary information such as the whereabouts of the funds,*" before the terms "in completing the credit transfer" of article 12.

13. *Article 13(2)*

The thrust of this provision is that, although the duty to refund should be basically a mandatory obligation, there is a case where the originator's bank should not be held liable, in particular, when its customer has designated an intermediary bank and thereby assumed the risk.

There must be other cases where this mandatory obligation is inappropriate in view of varied legal frameworks and practices of each State, and a State would have some discretion in dealing with these cases when it adopts the Model Law. Necessary amendments to this provision or clarification to this effect in records of the plenary session should be made in order to reflect this consideration.

14. *Article 14 and article 16(5)*

The provisions of article 14 and article 16(5) seem to contradict the provisions of article 17(3) by assuming that a credit transfer may be completed even though the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted. Article 14 and article 16(5) should be aligned with the provisions of article 17(3), since there is no need to permit partial completion of a payment order except in the case of article 17(3).

Therefore, the clause "the credit transfer is completed in accordance with article 17(1), but" in article 14 and the clause in article 16(5) "if the credit transfer is completed under article 17(1)" should be deleted.

15. *Article 16*

Although the liability of a receiving bank is limited to paying interest in the current provisions of article 16, there was no such understanding in the consideration of the twenty-second session of the Working Group that the provisions on compensation for expenses incurred for a new payment order and for reasonable costs of legal representation should be deleted. As there is substantial ground to provide for such compensation, liability of a receiving bank should be extended to cover those expenses and costs.

16. *Article 16(4)*

While the provisions of article 16(4) refer to a notice requirement under article 9(2) and (3), they do not refer to the requirement under article 9(4). Since there is no reason to exclude article 9(4) in the application of article 16(4), reference to article 9(4) should be added to article 16(4).

17. *Article 17(1)*

Since there is no need to permit partial completion of a payment order except in the case of article 17(3), as we have already mentioned in the comment 14, this article should clearly prescribe that a credit transfer is completed when the beneficiary's bank accepts the payment order whose amount is equivalent to that of the originator's payment order except in the case of article 17(3).

18. *Article 17(2)*

These provisions clearly interfere with transactions between the originator and beneficiary, and this interference is not acceptable for us. The relationship between the originator and beneficiary should be governed by the applicable law designated by rules of conflict of laws and should be excluded from the scope of this Model Law. Not only have the provisions little merit, but they also cause serious confusion, especially in the case where a payment order accepted before the payment date is revoked.

These provisions should therefore be deleted.

19. *Article 18*

This article should be deleted as we can see no need to include in this uniform law these sorts of conflict of laws provisions.

## MALAYSIA

*[Original: English]*

*Article 2. Definition*

*"Credit Transfer"*

It is suggested that the words "and of which the beneficiary has a claim against the beneficiary bank" be added after the words "disposal of a beneficiary" at line 3.

In our view, the word "funds" gives a very wide meaning to credit transfer and it is suggested that the word "credit" be used instead.

*"Beneficiary"*

As in the definition of "credit transfer" above, the definition of beneficiary should be a person who has a claim against a bank as a result of a funds transfer.

*"Bank"*

The words "not to be taken as" should be amended to read "not deemed to be engaged in" so as to make the sentence more comprehensible.

*"Authentication"*

It is possible in such high volume electronic system to authenticate part of a payment order.

A payment order is either authentic or not authentic.

*Paragraph (1)*

The phrase "carry out the payment order . . . receiving bank" on lines 2 and 3 should be substituted for the phrase "be carried out by the receiving bank which received the payment order".

*"Payment date"*

Again, it is suggested that the payment date should be the day when the beneficiary has a claim for payment from the beneficiary bank. See 1 and 2 above.

*Article 4(1)*

The purported sender is bound only if the agent of the purported sender is expressly authorized to bind the purported sender. The agency rule of ostensible or apparent authority is clearly not applicable under this provision.

Is this the intention of the Model Law? If this is not so, then we suggest that in place of the words "had the authority to bind the purported sender" on line 3 should be substituted the phrase "has been expressly or impliedly authorized by the purported sender to do so".

*Article 4(4)*

This paragraph relates to the burden of proof. The purported sender merely has to prove that the payment order received by the receiving bank arose from actions of a person (the third party) other than a present or former employee of the purported sender and it would not be bound under paragraph (2). The burden of proof then shifts to the receiving bank to prove that:

*(a)* the actions of the third party are the actions of the present or former employee of the purported sender, especially in the situation where it was the employee of the purported sender who disclosed the authenticated procedure to the third party; or

*(b)* the third party had gained access to the authentication procedure due to the fault of the purported sender.

As can be seen, the burden of proof is more burdensome on the receiving bank. Is this the intention of the Model Law?

*Article 6(2)*(d)

It is suggested that the phrase "carry out the payment order received" on lines 1 and 2 should be amended to read "be carried out by it on receipt of such payment order", to render the subparagraph more comprehensible.

*Article 7(5)*

It is our opinion that it may be difficult to implement paragraph (5). In an environment where payment orders are being executed in a millisecond by machines that read numeric data in the order and make appropriate entries, having such a provision would force the receiving banks to abandon their high speed electronic operation and review each payment for inconsistency between the numeric amount and the alphabetic amount.

It will make more sense if only numeric information is applied.

*Article 8(2)*

The notice of rejection should be authenticated.

*Article 9(3)*

Again as in article 7(5) above, it is suggested that the numerical description should be accepted as the amount on the payment order in the event of any inconsistency in a payment order between the words and figures. In effect it would mean only the numerical figure would be applied.

*Article 9(5)*

It is necessary for notice to be given to a beneficiary who does not maintain an account at the bank.

It is suggested that the beneficiary should receive a cheque rather than a notice as this would cut down the costs of administration and record keeping.

*Article 11(1), (2), (5) and (7)*

It is suggested that clarifications should be obtained for the above four paragraphs.

*Article 16(5)*

The word late payment should be "payment of less than the amount of the payment order" since in effect it is not a late payment.

Also, what is meant by "improper action"? The meaning can be very wide.

## MEXICO

*[Original: Spanish]*

The Government of Mexico considers that the draft UNCITRAL Model Law on international credit transfers, prepared by the Working Group on International Payments, fills a gap in legislation on the subject in question. It is also of the opinion that the draft offers a comprehensive regulation of credit transfers, which balances the needs of institutions engaged in providing transfer services and those of their users. The Government of Mexico hopes that UNCITRAL will adopt the draft in its next session and ask the General Assembly to recommend its adoption to Member States.

The following suggestions are offered with the aim of contributing to improving the Model Law.

## Chapter I. General provisions

Article 2. *Definitions*

*(b) Definition of "payment order"*

Conditional payment orders are excluded from the sphere of application of the Model Law.

When the point was discussed during the twenty-first session, consideration was given to the hypothesis of a bank receiving a conditional instruction and executing it as if it were a straightforward payment. Such a transfer would not fall within the sphere of application of the Model Law. Consequently, if the transfer was not correctly executed, the parties would not have the rights or obligations derived from the Model Law, even though the cause of the error had nothing to do with whether the condition was or was not satisfied.

It was decided that such an effect was not desirable and that, without ceasing to exclude conditional payment orders from the sphere of application of the Model Law, provision should be made that in the hypothesis contemplated the effects of the condition between the bank in question and the sender would not be governed by the Model Law; the payment order would be treated as if it were straightforward (A/CN.9/341, paras. 73-75).

With the final section of subparagraph *(b)* as it stands, this result is achieved only if the condition is satisfied, and not in the opposite case. Furthermore, the hypothesis will as a rule only arise in respect of the originator's bank, for which reason an alternative text is proposed in square brackets. The following text is suggested:

> "When an instruction is not a payment order because it is issued subject to a condition, if the receiving bank [originator's bank] executes it, for the purposes of this law the condition will be deemed not to have been made."

*Additional article*

Taking account of the international character of the operations to be regulated by the Model Law, and of the conclusion reached by the Working Group at its sixteenth session (A/CN.9/297, para. 33), we propose the addition of an article concerning uniform interpretation. What is proposed is the typical formulation which appears in the most recent conventions drafted by UNCITRAL and there is nothing to prevent its inclusion in a law. This text will be of particular importance in interpreting the final sentence of paragraph (8) of article 16.

The proposed text reads:

*Article X. Interpretation*

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

Article 4. *Obligations of sender*

*Paragraphs (2) and (3)*

Paragraphs (2) and (3) require that the authentication procedure agreed between the parties should be "a commercially reasonable method of security". In the interests of uniformity of interpretation, the word "commercially" should be deleted.

The criterion of "reasonable", which has become established in international trade law documents, has been criticized somewhat by those who maintain that there is no international jurisprudence which gives it meaning. It is a term of Anglo-Saxon origin. The word "commercially", included by the Working Group, adds little: if the criterion of reasonableness is invoked in an international trade instrument, "reasonable" must be "commercially reasonable" in the context of the branch of trade in question. Besides, if it is kept it will mean that international jurisprudence must define not only what is "reasonable" but also what is "commercially reasonable".

The deletion of the word "commercially" in paragraphs (2) and (3) is suggested.

## Chapter III. Consequences of failed, erroneous or delayed credit transfers

Article 16. *Liability and damages*

The obligation to pay interest, provided for in paragraph (1) of article 13 and in article 16, leaves two problems unresolved:

1. The rate of interest. During the session of the Working Group when this subject was discussed, delegations were not yet aware of the publication of the *Guidelines on International Interbank Funds Transfer and Compensation* of the International Chamber of Commerce, whose article 18 is the basis of the paragraph (2) proposed below.

2. When a bank corrects an error by crediting an account of the sender on the correct date. In this second hypothesis it may happen that the bank chooses to credit an account of the sender which does not give rise to interest or gives rise to lower interest. Differences in interest rates may be due to several causes; the most common are: the currency in which the different accounts are maintained or the different situation arising when there are debit or credit balances. The receiving bank must make the credit to the correct account and not the one which best suits it.

The addition of the following article is proposed:

*Article X. Calculation of interest*

"1. By interest is understood the time value of the transaction amount in the country of the currency involved. Interest shall be calculated at the rate and on the basis customarily accepted by the local banking community of such country.

"2. When a receiving bank fulfils the obligation to pay interest under paragraph (1) of article 13 and paragraphs (1), (3), (4) and (5) of article 16, crediting an account of the sender on the date on which it should have executed the act whose omission rendered it liable, it must make the credit to the account in which it received the payment [in accordance with article 7].

"3. The period for which interest shall be payable shall start on the [date of execution] and end with the day before the day on which correction is made, that day being included."

## Chapter IV. Preclusion and prescription

It is proposed to add a chapter with an article on preclusion (estoppel) on grounds of acquiescence, of the right to claim any amount, and another article on prescription (limitation of actions). It is not appropriate that the legal certainty of the debits, payments and liabilities arising from operations regulated by the Model Law should be suspended during the normal term of general rules on obligations and contracts. A shorter time limit is desirable. Nevertheless, to establish a short limitation period is inappropriate when international operations are involved, thus a short time limit is proposed for giving notice of disagreement and, when notice has been given, a longer time limit before actions are time-barred.

*Article X. Obligation to notify disagreement with debits and payments. Preclusion of actions*

"(1) When one of the parties to a transfer has an action derived from this law, he must notify the party against whom he has the action of the matter which is the grounds for his action within a period not exceeding two months from the date when the transfer was completed or should have been completed according to the payment order of the originator.

"(2) If a party receives a notice from which it arises that his sender or receiving bank may be bound or liable, he has the obligation to inform that bank within two days of receiving the notice.

"(3) If a party does not give the notice mentioned in paragraphs (1) and (2) of this article, he may not subsequently initiate any action against any of the parties to the transfer."

*Article Y. Limitation of actions*

"(1) Any action under this law is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

"(2) The limitation period commences on the day when the transfer was completed or should have been completed according to the payment order of the originator.

"(3) The day on which the limitation period commences is not included in the period.

"(4) The party bound or liable may at any time during the running of the limitation period extend the period by a declaration in writing to the claimant. The period may be further extended by another declaration or other declarations.

"(5) A recourse action by one party against his sender, receiving bank or any other party may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the party who is going to institute the action has been held liable in an action against himself, or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim, against the party who is going to institute the action, that may result in a recourse action, notice of the filing of such a claim has been given to such sender, receiving bank or other party."

## THE NETHERLANDS

*[Original: English]*

Add in article 9, paragraph 4 the sentence: "This paragraph does not apply if the sender and the bank have agreed that the bank would rely upon either the words or the figures, as the case may be".

Add in article 16 between paragraph (2) and paragraph (3) a new paragraph:

"(2 *bis*) Paragraphs (1) and (2) apply *mutatis mutandis* if a delay is caused by the failure of a sending bank

(i) where payment is to be made by debiting its account with its receiving bank, to put funds available in the account to be debited sufficient to cover the amount of the payment order, or

(ii) where payment is to be made by other means, to pay its receiving bank in accordance with article 5*(b)* or *(c)*."

## SWEDEN

*[Original: English]*

Article 4. *Obligations of sender*

*Paragraph (2), Subparagraph* (a)

The text should contain a demand for a safe method of authentication—not only the vague standard "commercially reasonable". For example:

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

Article 5. *Payment to receiving bank*

This article was introduced at the final session of the Working Group. However, it is rather unclear what is the purpose of the rules contained in this article. The reasons for having the rules of this article have to be more clarified at the session of UNCITRAL. Unless this is done, the article should be left out.

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

*Paragraph (3)*

According to this paragraph the receiving bank has to give notice of its rejection of a payment order - not later than on the execution date. The paragraph should state that the notice should be given as soon as possible but not later than on the execution date:

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

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

*Paragraph (2)*

According to the present draft, a receiving bank that accepts a payment order is obligated only to issue its own payment order but there is no obligation on the receiving bank under this provision to provide cover for the payment order it has issued. The obligation under article 4 paragraph (6) to pay the receiving bank for the payment order when the receiving bank accepts it only refers to the relationship between the sender and the receiving bank. It's therefore important that article 7 contains a provision on cover for the payment order, because without cover, the payment order will probably often be rejected by the receiving bank. The following amendment might be appropriate:

(2) A receiving bank that accepts a payment order is obligated under that payment order,

*(a)* to issue a payment order, within the time required by article 10, either to the beneficiary's bank or to an

appropriate intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner, and

*(b) to take the appropriate steps in order to provide or make available sufficient cover for the payment order issued under subparagraph* (a).

*Paragraph (5)*

This provision is not restricted to situations where the inconsistency between the words and figures in fact was detected and the payment order therefore was not executed. Hence, it is not clear how this provision relates to articles 6 and 16. The liability under article 16, paragraph (3)—to pay interest to the sender— does not make sense in cases when the inconsistency was not detected and the payment order was executed. The problem of inconsistency between words and figures describing the amount of the payment order can probably be properly solved only by establishing a rule as to which description shall govern.

If UNCITRAL decides to keep the rule as it stands, we interpret the words "if the sender and the bank have agreed" in the last sentence of the paragraph to mean both a standard agreement and a contractual agreement.

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

*Paragraph (1), subparagraph* (g)

According to the draft the beneficiary's bank is entitled to accept the payment order by applying the credit to a debt of the beneficiary owed to it. This is not acceptable. When the beneficiary's bank accepts a payment order it has an obligation to transmit the credit for the disposal of the beneficiary. The bank cannot, without the beneficiary's permission, be entitled to use the funds to settle its differences with the beneficiary. Therefore this paragraph should be amended as follows. But there is also a need for another amendment. Legal demands for the credit can be given not only by a court. This should be reflected in the wording. The paragraph should read:

"*(g)* when the bank applies the credit in conformity with an order of a court *or another competent legal authority*."

*Paragraph (2)*

In the last sentence of paragraph 2 there should be the same amendments as in article 6, paragraph (3):

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

Article 11. *Revocation*

The current drafting lays down the general principle of irrevocability. If a revocation order is given too late to be effective under paragraph (1), the originator has no prospect of interrupting the credit transfer. That possibility can be of such a great importance to the originator that a requirement on the receiving bank to revoke its own payment order already issued, would be legitimate. The provision under paragraph (4) of article 10 in the Working Group's previous draft should therefore be adopted (A/CN.9/341, annex).

Article 16. *Liability and damages*

This article is based on the principle that if a delay by one receiving bank results in delayed completion of the credit transfer, the receiving bank that caused the delay is liable to the beneficiary for interest. The bank can discharge its liability by paying the interest to the next receiving bank, which in turn is obligated to pass on the interest. However, this liability rule functions properly only when all the receiving banks involved are subject to the same or similar rules. If the credit transfer passes a legal system that does not recognize a similar procedure, the beneficiary is not likely to receive interest according to the liability rules of the Model Law. If the originator must compensate the beneficiary for the loss of interest as a result of the delay, the beneficiary would have no possibility under the Model Law to recover the expenses from the banking system. It is not acceptable if the result of the rules on liability in some cases would be that the beneficiary is left without compensation or the originator has to bear in the end losses for delays in the banking system. The following amendments to article 16 might solve the problem:

"(3) Each receiving bank is, upon request, obligated to give the beneficiary reasonable assistance in ascertaining the facts necessary for pursuing his claim for interest under paragraphs (1) and (2)."

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

*Paragraph (5)*

Under article 16 paragraph (1), the beneficiary is entitled to interest when the credit transfer has been delayed. In case of underpayment however, paragraph (5) introduces a contradictory rule, saying that interest would be payable only if a payment date has been specified and there is a delay in relation to that date. The provision in paragraph (1) should apply regardless of whether there has been a delay with respect to the whole or only part of the amount specified in the payment order accepted by the receiving bank. Furthermore, it is unclear why the bank's liability should apply only in case of "improper action" by the receiving bank. Paragraph (5) should be deleted.

*Paragraph (7)*

In accordance with the general rule on freedom of contract in article 3, the wording of paragraph (7) should be:

"(7) The provisions of this article may not be varied to reduce the liability to an originator or a beneficiary that is not a bank."

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

*Paragraph (2)*

Paragraph (2) contains a rule which seems to deal with the legal relationship between the originator and the beneficiary. According to the rule an obligation of the originator to the beneficiary is discharged when the beneficiary's bank accepts the payment order. In cases where the beneficiary has had no influence on the choice of bank to be the beneficiary's bank this rule seems improper. It should be deleted.

## SWITZERLAND

*[Original: French]*

### A. *Preliminary remarks*

The present draft Model Law on international credit transfers reflects an in-depth approach to and analysis of international payments processes and the legal problems that arise therefrom. The Working Group has undoubtedly succeeded in presenting a draft whose structure and order are convincing. It also proposes in many provisions satisfactory solutions which take into consideration in an appropriate manner the interests of the parties involved in an international credit transfer. However, not all the rules have our unreserved agreement. Indeed, our delegation, during the sessions of the Working Group which have taken place up to the present, has expressed its doubts and reservations of principle on the subject of various rules contained in the Model Law. We shall return to these in detail in due course (cf. C).

### B. *Need for and appropriateness of a model law*

Concerning the question whether it is necessary or desirable to draft a Model Law on international credit transfers, there is in principle, in the view of Switzerland, no need to establish uniform rules at international level. The business of foreign payments generally proceeds without any particular problems. Firstly, existing payments systems have proved efficient and, secondly, current legislation is adequate to ensure that payments are made smoothly both nationally and internationally. However, various factors justify a re-examination today of this position in respect of certain issues. The very rapid evolution of cross-border payments techniques should be taken into account. The new methods and services in the telecommunications area or "high speed/low cost" transactions illustrate this phenomenon. This gives rise to problems of liability on the juridical plane, and also problems in regard to identifying and authenticating originators of orders in electronic transfer systems. Technical errors in the course of significant payments can lead to complicated and endless discussions at both national and international level. In the above-mentioned areas, international provisions would permit the standardization of legal relations and thus increase legal certainty.

A Model Law of the kind presented here is thus justified, to this limited extent, and the drafting of international norms can be approved from this angle. It should, however, be pointed out that such regulation only makes sense and can only lead to the desired harmonization at international level to the extent that it is accepted by the majority of States concerned and incorporated in national law. This objective can be achieved only if solutions that are theoretically convincing and can be put into practice are proposed for discussion. This does not seem to us to be the case in various provisions of the Model Law, particularly as regards the assigning of risk in the event of error or omission in the transfer, the right to claim damages and interest, the restriction of freedom of contract and the consequences of the payment order for the legal act underlying the transfer.

### C. *Comments on the various articles of the model law*

#### Article 1 *(sphere of application)*

There are grounds for approving in principle the proposal that the draft Model Law should also encompass interbank payments in its article 1. This will avoid a proliferation of standards. However, conflict of laws is inevitable when a banking operation involving several States leads to payments effected through the intermediary of banking establishments in different countries. Such difficulties can be considerably reduced if the parties agree on the applicable law, but they cannot be completely eliminated.

The extension of the law to interbank payments may thus lead to complications due to the fact that the rules of national systems relating to payments (e.g. SIC, CHIPS, FEDWIRE) are in partial contradiction to the solutions envisaged in the Model Law.

The rule contained in paragraph (2) of article 1, under which the foreign branches of a bank must be considered as separate banks, will cause problems; in reality, one and the same legal entity is involved and it is difficult to see how, in the case of internal transfers, the matter of mutual rights and obligations is to be regulated and under what conditions it will be possible to make these prevail.

#### Article 2. *Definitions*

The definition of the concept of "payment order" contained in subparagraph *(b)* of this article expressly applies only to unconditional orders; consequently, a payment order made subject to a condition does not constitute a payment order in the meaning of the Model Law. Given that in practice one comes across conditional payments orders—even if they are not very common—which are admissible in the eyes of a large number of States, we consider it, to say the least, surprising that they cannot be treated here as payment orders. The legal consequences of this provision appear even graver when the second sentence of subparagraph *(b)* is examined; the Model Law applies to a conditional payment order only if the condition is subsequently satisfied. In certain circumstances, the condition will be satisfied only in the context of the execution of the payment order; thus one is inevitably confronted with two different legal orders, contrary to the original objective of the draft—to harmonize the payment process. Furthermore, a party can easily avoid the application of the Model Law by issuing a conditional payment order. We therefore recommend that this provision should be re-examined in the light of the foregoing considerations.

We also consider that the condition contained in subparagraph *(b)*(i), under which the receiving bank is to be reimbursed by the originator of the order, does not form part of the concept of a payment order; it is rather the logical consequence of executing the payment order, as is clear, moreover, from article 4, paragraph (6), of the Model Law.

#### Article 3. *Variation by agreement*

The fact that the principle of freedom of contract is expressly provided for in the Model Law must be approved. It is desirable that the parties should be able, within determined limits, to depart contractually from the Model Law. The scope allowed for freedom of contract is, however, too restricted—unnecessarily so. This comment is particularly relevant in respect of article 13, paragraph (2), and article 16, paragraph (7).

Freedom of contract may legitimately be subject to restriction when interests deserving protection—that is, those of the public and of the economy—so demand. In the present context, it would more be a question of ensuring the smooth functioning of the payments process or the protection of consumers' interests. As has already been indicated, the legal rules at present in force, which contain few restrictions on freedom of contract, are adequate to regulate the flow of payments. As for the protection of consumers, it should be borne in mind that not only banks and companies but also consumers may be party to international transfers. However, the Model Law has not been conceived to protect the rights of consumers (as expressly indicated in the footnote to article 1), but rather to harmonize trade law at world level, in accordance with its basic objective. The Model Law should therefore not contain restrictions on individual freedom based on the protection of consumers' rights.

For the reasons expressed, we are in favour of the broadest possible guarantee of freedom of contract. We are nevertheless conscious of the need to have rules reflecting the greatest possible uniformity for the payments process in general. However, such rules should not impair basic legal principles, as they do here in the case of freedom of contract.

Article 4. *Obligations of sender*

The Working Group addressed the question of regulating payments by compensation, or netting, in the context of this article. As this problem is not specific to payments and the subject is not sufficiently "ripe" for codification, it should not, in our view, be regulated in the Model Law. A reference to netting contracts and to the rules of certain netting systems would tend to be a source of uncertainty.

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

According to paragraph 2 of this provision, the receiving bank is obliged to execute the payment order within one day. This time limit is very short and hardly leaves the bank time for processing or, where applicable, transmitting the order with care. It should be borne in mind that banks are not in a position to process and transmit automatically and without delay all the payment orders which come to them. It often happens, particularly in international payments, that complementary information and verification is necessary. It therefore seems justified to extend by one banking day the time limit within which the payment order must be processed, the more so as the Model Law regulates all types of transfers and not only those affected through electronic systems. A solution aimed at treating different transactions (electronic and other transactions) separately would scarcely facilitate the application of the Model Law; it might even lead to additional difficulties of interpretation.

Article 11. *Revocation*

In order to strengthen the security of transactions and the smooth functioning of the international payment process, the principle of irrevocability of transfer orders should be established and, in particular, exceptions to this principle should be defined expressly and restrictively. However, Swiss law does not recognize the principle of absolute irrevocability, and the transfer order is considered in principle to be revocable; the assignor may revoke the assignment to the assignee, provided that the assignee has not notified his acceptance to the beneficiary (cf. article 470, paragraph 2, Code of Obligations). Since in practice acceptance is not notified before payment, the notifice of credit should be considered as acceptance. The customer, as assignor, may revoke the credit transfer order given to the assignee bank provided that a credit advice has not been effected to the bank of the final beneficiary.

The Model Law does not state where the sender may revoke the transfer order, in the event that revocation is admissible. In Swiss law, the sender can revoke the transfer order only through his bank—that is, the receiving bank. He cannot take similar action in respect of the other banks involved in the execution of the transfer order (indeed, such banks could not even identify him, since as a rule they do not know him). For reasons of practicality and on the basis of a certain legal logic, the revocation should take place in cascade—i.e., it must be transmitted by each receiving bank to the next bank in line. A right of direct revocation, bypassing one or more links in the transmission chain, could not be admitted.

Under Swiss law, an assignment which has not yet been accepted is deemed to be revoked in the event of bankruptcy of the assignor (article 460, paragraph 3, Code of Obligations). Paragraph (8) of article 11 seems to run counter to this principle, in that bankruptcy does not automatically cancel a transfer order. We therefore request that this paragraph (8) should be reexamined in the light of the foregoing comments, at least taking account of international insolvency law.

Article 13. *Duty to refund*

We have very serious reservations concerning the duty to refund envisaged in this article, for the following reasons. Firstly, this guarantee of refund is contrary to certain fundamental principles of Swiss contract law. Swiss law authorizes the originator's bank to debit the customer's account provided that the credit transfer order has been correctly executed in accordance with the instructions of the parties. The bank is in no way bound to guarantee the success of the transaction as a whole. If the intermediary banks have diligently fulfilled their obligations, the originator must bear the consequences of any incidents. The originator's bank thus answers for the good execution of the credit transfer order, a responsibility which to some extent includes a judicious choice of intermediary banks. For legal reasons and reasons of principle, we categorically reject the idea of a broader responsibility, *a fortiori* one of an objective or causal nature.

Such a guarantee of refund would correspond to a kind of insurance, resulting in an obligation for the bank to collect the charges related to such operations with a view to adequate financial cover. In extreme cases, some banks might even refuse to effect payments in countries where there are high risks attached to transfers and commission.

Finally, it should also be noted that such risk regulation, which is, all in all, highly problematic for the banking sector, could, as a kind of *"pièce de résistance"*, prevent broad acceptance of the Model Law.

If the guarantee of refund is retained, it should be a matter of enabling law. The parties to an international transfer would thus be able, on a contractual basis, to avoid the rule provided in the Model Law in respect of duty to refund. As a result of such flexibility, banks would have the choice of proposing payments with or without guarantee of refund. We therefore propose that article 13 should be formulated as a rule of enabling law.

Article 16. *Liability and damages*

The Model Law starts out here from the idea that the originator's bank is liable to the originator for the good execution of the transfer order and thus assumes liability for the transaction as a whole. Such a concept, which is very close to the objective liability attached to company contracts, is contrary to Swiss doctrine and jurisprudence, under which transfer orders are governed by the law of agency and assignments. Under these provisions, the agent is liable only for the good and faithful execution of the mandate and not for the result of the operation itself. Thus, when a bank carries out a transfer order with all the diligence that can be expected of it (good and faithful execution), it can in no case be made liable for any damage which might ensue. Any liability in respect of errors committed by intermediary banks should therefore be rejected. Otherwise the bank would run the risk of having to answer for significant damages which it had not itself caused. Firstly, such risk regulation is contrary to the *ratio legis* of a Model Law which is intended to be balanced; secondly, it would simply oblige banks to insure themselves against such risks or set aside the necessary funds. This would inevitably result in higher transaction costs without being particularly useful to the banking systems of States.

The Model Law should provide for liability only in the context of a direct contractual relationship, meaning only between the various parties involved in executing a transfer order. To this end, we recommend that paragraph (8), which moreover relates more to the area of illicit acts and therefore has no place in a Model Law of the type proposed, should be quite simply deleted. This question should, if necessary, be regulated by national law.

According to article 16, paragraph (7), a bank can restrict its liability to the originator of an order or the beneficiary only to a very limited degree. This provision should be rejected, if only on the grounds of freedom of contract. Such a restriction also places an obstacle in the way of flexible regulations for certain types of payment ("high speed/low cost" transactions). We therefore take the view that it is for the parties to settle the question of risk by contractual means; a referral to national law may perhaps be possible.

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

We are convinced that the Model Law must not intervene in the basic relationship between the originator of the order and the beneficiary. The transfer is independent of the relationship with the basic transaction and all provisions of the Model Law which directly or indirectly refer to that transaction should be eliminated. For the sake of clarity, it could even be stated in the Model Law that the transfer is abstract and independent of the legal relationship underlying it.

## UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

*[Original: English]*

1. *Article* 2(a): *"Credit transfer"*

We are not yet convinced that the words in square brackets should be retained. Transfers effected through point-of-sale systems may be either debit or credit transfers. If they are debit transfers the words in square brackets are unnecessary because debit transfers should be excluded by paragraph (ii) of the definition of "payment order". If they are credit transfers we are not certain why they should be excluded. We are concerned that if the words are retained to overcome a problem with card based payment systems, this might cause difficulty in the future if facilities are developed for processing ordinary credit transfers through terminals primarily intended for card based payment systems. However, we are willing to look at this further if the potential problem remains a concern, provided the meaning of "point-of-sale payment systems" can be made clear.

2. *Article* 2(b): *"Payment order"*

Requirement (ii) of the definition specifies that the instruction must not provide that payment is to be made at the request of the beneficiary. This is intended to exclude debit transfers, but may have the effect of excluding credit transfers made to a beneficiary who does not have an account where the beneficiary's bank is instructed to "pay on application". Any solution to this problem is not without difficulty but it might help to add the following paragraph between (ii) and the paragraph about conditional order—

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

3. *Article* 2(k): *"Execution date"*

The Working Group has noted that the provisions of the Model Law relating to payment, execution and acceptance are circular in that under article 4(6) a sender is not obliged to pay for a payment order until the execution date, but it is implicit in article 10 that a payment order does not have to be executed until it has been accepted and under articles 6(2)*(a)* and 8(1)*(a)* acceptance does not take place (assuming no other action on the part of the receiving bank) until payment is received. We propose amendments to articles 4(6) and 10 which we hope may overcome the problem. The problem is also relevant in relation to the definition of execution date. We comment below on those articles which refer to the "execution date" in a sense which we believe differs from the expression as currently defined.

4. *Article* 2(l): *"Execution"*

The draft report of the last session of the Working Group noted that the definition of "execution" adopted at that session did not cover the beneficiary's bank. Although it would be possible to devise another term for that purpose, we believe it would be better to adapt the present definition. The present definition (which relates to a receiving bank other than the beneficiary's bank) corresponds to "the doing of an act described by article 6(2)*(d)*". We believe therefore that it would be appropriate to add the following wording in order to cover the beneficiary's bank—

> ". . . and with respect to the beneficiary's bank, the doing of any act described by article 8(1)*(d)*, *(e)*, *(f)*, or *(g)*."

The words referred to by cross reference could be written out in full if that were thought to be clearer or more consistent with the first part of the definition, but that would make it much longer.

We have reviewed the terms "execute" and "execution" in the places where they occur in square brackets and believe that they work correctly if the definition of "execution" is amended as we suggest.

5. *Article* 2(m): *"Payment date"*

The term "payment date" is used in articles 10(1), 10(3), 11(2) and 16(5). We propose below that in articles 10(3), 11(2) and 16(5) it would be more appropriate to refer to the "execution date". If those amendments are accepted, there would be little point in keeping the defined term for use only in article 10(1): it would be sufficient there to refer to "a date when the funds are to be placed at the disposal of the beneficiary". The Working Group has also noted that SWIFT payment messages do not contain a field for a payment date and ISO has proposed to delete any reference to a pay (or payment) date in its next revision of standards, so the use of the term in the Model Law is somewhat unsatisfactory.

6. *Article 3*

The Working Group at its last meeting affirmed that the Model Law should be subject to freedom of contract. It recognized that there should be limits to this and that certain provisions should be mandatory, but apart from one or two cases (such as article 13) did not decide which. A problem with permitting variation by contract is that not all the parties to a credit transfer will be in contractual relationships with each other. It is not always easy to see how an agreement between two parties to vary the operation of a rule in the law might effect other parties to the same transfer.

A further difficulty is that it is not clear which parts of the law are capable of variation by agreement. Article 1 for example, which defines the scope of the law, is presumably not capable of variation. Similarly, the definitions in article 2 determine the meaning of other provisions and should not be capable of amendment; if it is desired to change a definition in order to change the operation of certain of the substantive provisions, the substantive provisions themselves should be varied by agreement. This difficulty extends to other provisions of the law which are interdependent: it is hard to assess the effect of variation on the dependent provisions. The rules on deemed acceptance in article 6(2)*(a)* and 8(1)*(a)*, for example, depend on when payment takes place, which is set out in article 5. Other provisions, although logically capable of amendment, are essential to the structure of the law, such as article 7(2) (the obligation of a receiving bank which has accepted a payment order to issue a payment order to implement it) or article 9(1) (the obligation of the beneficiary's bank to place the funds at the disposal of the beneficiary in accordance with the applicable law). We have taken the view that the following provisions are either not logically capable of being varied or are in a necessary part of the structure of the Model Law and as such should not be capable of variation:

article 1
article 2
article 3
article 4(3)
article 5
article 6(1) and (2)
article 7(1), (2) and (7)
article 8(1)
article 9(1)
article 10(6)
article 11(3), (5), (6), (7), (8) and (9)
article 13(2)
article 15
article 16(6), (7) and (8)
article 17
article 18

In some cases it is difficult to decide whether a provision is truly a necessary part of the structure of the law. If it is argued that certain of the above provisions are not truly essential to the structure of the law, we would reply that we nevertheless believe that it is essential for them to be mandatory.

We believe that the following provisions of the law, although not a necessary part of its structure, should be mandatory:

article 4(6) (obligation mandatory, time of payment variable)
article 6(3)
article 7(3) and (4)
article 8(2)
article 9(2) and (5)
article 10(1), (2), (3), (4) and (5)
article 11(1) and (2) (except as permitted by (3))
article 11(4)
article 12
article 13(1) (as stated in (2)).

A table setting out our analysis with a brief summary of our reasoning is contained in an annex to this note.

In view of the large number of provisions which we believe should not be varied, we wonder whether it would not be better from a drafting point of view to return to the position where contracting-out was not permitted except where stated.

7. *Article 4(6)*

As stated above the Working Group has noted that the provisions of the Model Law relating to payment, execution and acceptance are circular. The Group has also noted that a bank's failure to pay for a payment order is not treated as failure to execute and does not attract any liability under article 16. There is thus no incentive for a bank to break the circle. We believe that a bank should be required to pay for payment orders that have not been rejected and that late payment should attract an interest penalty. We suggest that article 4(5) be reworded as follows:

> "(6) A sender becomes obligated to pay the receiving bank for the payment order when it is issued, but unless otherwise agreed payment is not due until the day when the receiving bank is required to execute the order under article 10, or would be required if the order had been accepted."

In order to ensure that a bank which pays late incurs an interest penalty for the delay caused, we propose below that a reference to a bank's failure to pay be inserted in article 16(1). We make other proposals to overcome the circular problem in relation to articles 6(2)*(a)*, 8(1)*(a)* and 10(1).

8. *Article 6(2)*(a)

We noted above the circular problem relating to payment and acceptance. Acceptance under article 6(2)*(a)* cannot be dependent on execution if execution depends on acceptance. We propose below that article 10 should say explicitly that a payment order does not have to be executed until after it has been accepted, but that in determining the time for execution for the purpose of article 6(2)*(a)* that rule should be disregarded. This should have the effect of breaking the circle.

A further problem with "deemed acceptance" is that even when the payment order is received before the bank's cut-off time, the bank may be unable to execute it on the same day if "deemed acceptance" under paragraph (2)*(a)* occurs too late in the day. For example an order may be received first thing in the morning, but payment may not be received until shortly before close of business. Unless the bank rejects the order it will be deemed to have been accepted and the bank will be liable if it does not execute it that day (assuming neither 10(1)*(a)* nor *(b)* apply). This is not of course a problem with other forms of acceptance as they all involve a conscious act, or agreement, on the part of the bank. Nor is this a problem when payment is in accordance with article 5*(b)*(i) or (ii) as that involves either a conscious act (use of the credit) or a further day. We therefore suggest the addition of the following paragraph after paragraph (2):

> "(2 *bis*) A receiving bank may set a time after which acceptance occurring under paragraph (2)*(a)* (except by virtue of payment under article 5*(b)*(i) or (ii)) may be treated as occurring on the following day the bank executes payment orders of the type concerned. Any such time must be set before the payment order has been accepted."

It should not be possible to vary this provision by agreement.

We have also given consideration to the concept of "deemed acceptance" in article 6(2)*(a)* in the light of the concern that a bank which was deemed to have accepted a payment order without action on its part might find itself obliged to deal with a bank with which it would not normally deal. In practice we believe a bank in this position would refuse to complete the transfer and would refund the money. It might of course have to pay interest for failure to execute in accordance with article 7(2), but that would be the extent of its exposure under the law.

9. *Article 6(3)*

Paragraph (3) provides that a notice of rejection must be given not later than on the execution date. As we state elsewhere it is implicit that execution will not, indeed cannot, take place before acceptance. It is therefore not clear how the definition of "execution date" should be interpreted in relation to a payment order that is not to be accepted but is to be rejected. We suggest that the end of the paragraph be reworded as set out below. We also remain concerned that the words "otherwise than by virtue of subparagraph (2)*(a)*" are not entirely clear. It has been suggested that they mean that it is not necessary to notify rejection if funds are not received; whereas the words are intended to mean only that it is not necessary to notify the fact that the proviso has operated to prevent deemed acceptance taking place. We suggest the paragraph be reworded as follows:

"(3) A receiving bank that, otherwise than by virtue of the proviso to subparagraph (2)*(a)*, does not accept a sender's payment order is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than the date when, if it were accepted, the receiving bank would be required to execute it under article 10."

10. *Article 7(3)*

At the twentieth session of the Working Group it was stated that the Model Law should not set forth a duty to detect misdirection but that it was appropriate to require notification once the misdirection had been detected. The present wording of article 7(3) does not reflect this and we believe it is important that it should. We suggest it be reworded as follows:

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

11. *Article 7(4)*

Instructions which are not payment orders are strictly outside the scope of the Model Law but we nevertheless think that a provision of this kind is useful. However we are concerned that the provision as currently drafted is too widely drawn. It covers instructions regardless of whether the receiving bank appreciates that the provision applies. If the provision is to be retained the following might be more appropriate:

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

12. *Article 7(5)*

The view was expressed at the twentieth session of the Working Group that this provision was too restrictive. We agree: the amount might for example be expressed in some form of code. The following wording is suggested:

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

The last sentence of the present draft is unnecessary if article 3 is retained.

13. *Article 7(6)*

This paragraph is not entirely clear. Is a receiving bank able to choose another route without reference to the sender if it acts in good faith, or is it merely to enquire of the sender what action it should take (in which case unilateral action would be at its own risk)? The present draft says that the bank is "not bound" to follow the relevant instruction and "acts within the time required by article 10" if it enquires of the sender what it should do; it does not therefore appear to permit unilateral action. We suggest it read as follows:

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

In any event article 10(2) should be amended to refer to the making of an enquiry under article 7(6).

14. *Article 8(1)*(a)

We would make the same comments as we made on article 6(2)*(a)*. Our proposed amendment to article 10 addresses the circular problem. We propose that the following paragraph be added after paragraph (1) to deal with the problem of deemed acceptance occurring too late in the day for execution to take place:

"(1 *bis*) The beneficiary's bank may set a time after which acceptance occurring under paragraph (1)*(a)* (except by virtue of payment under article 5*(b)*(i) or (ii)) may be treated as occurring on the following day the bank executes payment orders of the type concerned. Any such time must be set before the payment order has been accepted."

It should not be possible to vary this provision by agreement.

15. *Article 8(2)*

We would make the same comment as we made on article 6(3). We suggest that paragraph (2) be reworded as follows:

"(2) A beneficiary's bank that, otherwise than by virtue of the proviso to subparagraph (1)*(a)*, does not accept a sender's payment order is required to give notice to that sender of the rejection, unless there is insufficient information to identify the sender. A notice of rejection of a payment order must be given not later than the date when, if it were accepted, the beneficiary's bank would be required to execute it under article 10."

16. *Article 9(2)*

We would make the same comment as we made on article 7(4). The following is suggested as more appropriate:

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

17. *Article 9(3)*

We would make the same comment as we made on article 7(5). The following wording is suggested:

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

The last sentence of the present draft is unnecessary if article 3 is retained.

18. *Article 9(4)*

This paragraph requires the beneficiary's bank to give notice to the originator's bank, if it can be identified, as well as to its sender. We understand that the reference to the originator's bank may have been added to this paragraph, but not to paragraphs 9(2) and (3), partly because a discrepancy in the manner of identifying the beneficiary was indicative of fraud. After further consideration we believe that only a minority of such discrepancies arise because of concerns about fraud; in our view this requirement would place an unnecessary burden on banks and should be deleted. This will not prevent banks from continuing to notify others in the chain if they suspect fraud, but the Model Law will require them to notify only their senders. We understand that this is the normal practice in the absence of suspicious circumstances.

19. *Article 9(5)*

Where the beneficiary's bank is directed to pay on application, notification is not required. We believe that this could be achieved by amending the beginning of paragraph (5) to read:

"(5) Unless the payment order states otherwise, the beneficiary's bank shall . . ."

20. *Article 10*

It is perhaps implicit that a bank does not have to execute a payment order it has not accepted but this is not clear from the wording of article 10(1). The difficulty with stating this expressly is that, as we have noted elsewhere, acceptance is itself linked to the time for execution. We believe that this difficulty could be overcome if articles 4(6) and 10(1) are amended in the way we suggest. We propose the insertion of the following paragraph after paragraph (1):

"(1 *bis*) Nothing in paragraph (1) shall be taken to require a bank to execute a payment order before it is accepted, but for the purposes of articles 6(2)*(a)* and 8(1)*(a)* this provision shall be disregarded in determining the time for execution."

It should not be possible to vary this provision by agreement.

21. *Article 10(1)*

Article 10(1)*(b)* uses the term "payment date". We propose that in the other places where the term is used it should be replaced by "execution date". If those amendments are agreed, it would be unnecessary to retain the definition for use in 10(1)*(b)*, which would read:

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

22. *Article 10(2)*

As noted above this provision should be amended to refer to the making of an enquiry under article 7(6). We suggest:

"(2) A notice under article 7(3), (4) or (5) shall be given, and an enquiry under article 7(6) shall be made, on or before the day the payment order is required to be executed."

23. *Article 10(3)*

We believe that if the definition of "execution" is amended to include the beneficiary's bank in the way we suggest, the reference to "payment date" in article 10(3) (which is in any event unsatisfactory as the payment order may not specify a payment date) should be amended to read:

". . . the day the payment order is required to be executed".

It would also be possible to use the defined term "execution date" here and in article 10(2).

24. *Article 11*

At the last meeting of the Working Group it was suggested in the context of what was then article 12 that the law should address the case where a bank that was obliged to pay interest to another bank could not recover that interest from an insolvent bank. We proposed wording for this but it was not adopted because, although on first analysis it seemed fair, it was feared it might be incompatible with bilateral or multilateral netting schemes. It was pointed out that the rule would be of greater significance in the context of an obligation to refund the principal sum. We have therefore reconsidered it in relation to articles 11 and 13. In our view a rule of the kind proposed would be incompatible with netting schemes only if it purported to alter the obligations arising under those schemes. If it did not do so, a bank which had come under a separate obligation pursuant to such a netting scheme (or having given irrevocable instructions might do so when final settlement occurred) would not seek to take advantage of the rule. We propose the following paragraph to follow paragraph (6):

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

It should not be possible to vary this provision by agreement.

25. *Article 11(2)*

This paragraph refers to "the payment date". As we point out in relation to article 10(3) a payment order may not specify a payment date. We believe that if the definition of "execution" is amended to include the beneficiary's bank as we suggest, the reference to "payment date" can be changed to "execution date".

26. *Article 11(5)*

At the last meeting of the Working Group it was agreed that execution of a payment order by a bank before the execution date (or payment date in the case of the beneficiary's bank) should not relieve the bank from the consequences of failing to act on a revocation order that was otherwise in time. Paragraph (5) refers to the execution or acceptance of a payment order "that has been revoked". However, if the revocation order is received before the execution date (or payment date), a sender should not have to pay for an order executed (or accepted) before the revocation order was received. We propose that the words "that has been revoked" are replaced by the words:

"in respect of which a revocation order that is effective under this article has been or is subsequently received".

27. *Article 12*

Articles 12 and 13 both begin "If the credit transfer is not completed in accordance with article 17(1) . . .". However, the duty to refund arises only where it is clear the transfer will not be completed, whereas we believe that the duty to assist should continue until the credit transfer is completed. We suggest that article 12 begins:

"Until the credit transfer is completed in accordance with article 17(1), . . . ".

28. *Article 13*

We referred above to the need for a rule permitting a bank obliged to make a refund to make it to a prior sender. We propose the following addition to paragraph 13(1):

"Without prejudice to its obligations under any agreement that nets obligations bilaterally or multilaterally, a bank subsequent to the originator's bank which is obliged to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent."

The originator's bank and intermediary banks between it and the refunding bank will still be liable for their share of the interest, which will have to be passed up the chain or foregone. The exposure of a bank above an insolvent bank will however be greatly reduced where the rule operates.

29. *Article 16(1)*

As we mentioned above we believe that article 16(1) should be amended so as to require a bank which delays in paying for a payment order to pay interest. We suggest the insertion after the words "article 10(1)" the following:

", or its failure to pay for a payment order in the time required by article 4(6),".

30. *Article 16(5)*

This paragraph refers to "the payment date". As we point out elsewhere a payment order may not specify a payment date. We believe that if the definition of "execution" is amended to include the beneficiary's bank as we suggest, the reference to "payment date" can be changed to "execution date".

## *Annex*

The table below shows our analysis of the extent to which it should be possible to vary provisions of the Model Law by agreement. We have described as "structural" those provisions which are logically incapable of amendment or which we believe are a necessary part of the structure of the law. Other provisions are described as "mandatory" or "variable".

| *Provision* | *Structural* | *Mandatory* | *Variable* | *Notes or Explanation* |
|---|---|---|---|---|
| 1(1) | × | | | Scope of the law. |
| (2) | × | | | Definition. |
| 2 | × | | | Definitions. |
| 3 | × | | | Provision about variation. |
| 4(1) | | | × | Variable in principle, but scope for variation probably limited. |
| (2) | | | × | Variation subject to (3). |
| (3) | × | | | Provision about variation. |
| (4) | | | × | Could be varied by contract. |
| (5) | | | × | First sentence a basic proposition. Remainder could be valid by agreement, e.g. no liability if sender fails to comply with procedure. |
| (6) | | × | | The obligation must be mandatory. The time of payment may be varied by agreement: we believe its useful to state this. |
| 5 | × | | | Effectively a definition. |
| 6(1) | × | | | |
| (2) | × | | | Effectively a definition. |
| (3) | | × | | It is implicit that the first sentence is mandatory; we believe the second sentence should also be. |
| 7(1) | × | | | |

| *Provision* | *Structural* | *Mandatory* | *Variable* | *Notes or Explanation* |
|---|---|---|---|---|
| (2) | × | | | This provision is essential to the operation of the law. |
| (3) | | × | | We believe the law will be more effective if this is mandatory. |
| (4) | | × | | We believe the law will be more effective if this is mandatory. |
| (5) | | | × | The existing draft provides for contracting out; we agree with this. |
| (6) | | | × | Senders may wish to agree that banks should not delay but always act on their instructions. |
| (7) | × | | | |
| 8(1) | × | | | |
| (2) | | × | | See our comment on 6(3). |
| 9(1) | × | | | See our comment on 7(2). |
| (2) | | × | | See our comment on 7(4). |
| (3) | | | × | See our comment on 7(5). |
| (4) | | | × | Banks may in practice agree to rely on words or figures; we believe such agreements should be permitted. |
| (5) | | × | | If this provision is amended as we suggest it should be mandatory. |
| 10(1) | | × | | The originator could agree with its bank a later payment date, e.g. for a lower fee. The rule must otherwise be mandatory if transfers are not to be delayed. |
| (2) | | × | | This provision is supplemental to 7(3), (4) and (5) (and (6) if 10(2) is amended as we suggest) and should be variable only to the extent that they are variable. |
| (3) | | × | | This provision is supplemental to 9(2), (3) and (4) and should be variable only to the extent that they are variable. |
| 10(4) | | × | | There could be no reason to vary this rule. |
| (5) | | × | | There could be no reason to vary this rule. |
| (6) | × | | | |
| 11(1) | | × | | This and paragraph (2) can be varied only to the extent specified in paragraph (3). |
| (2) | | × | | |
| (3) | × | | | Provision about variation. |
| (4) | | × | | We believe this is important. |
| (5) | × | | | This and paragraph (6) are necessary for the operation of the law. |
| (6) | × | | | |
| (7) | × | | | This proposition is the minimum that can be said. |
| (8) | × | | | This is quasi-definitional. |
| (9) | × | | | |
| 12 | | × | | We believe that the law will be more effective if this is mandatory. |
| 13(1) | | × | | See 13(2). |
| (2) | × | | | Provision about variation. |
| 14 | | | × | A bank might agree with its sender or the beneficiary that it did not need to trouble itself with small discrepancies. However, in the absence of an agreement with the beneficiary, a bank should be able to contract out only as between itself and its sender: it must issue a payment order for the difference even where it has agreed its sender need not do so. |

| Provision | Structural | Mandatory | Variable | Notes or Explanation |
|---|---|---|---|---|
| 15 | × | | | This is the minimum that can be said. |
| 16(1) | | | × | Paragraphs (1) to (5) are variable only to the extent stated in (7). |
| (2) | | | × | |
| (3) | | | × | |
| (4) | | | × | |
| (5) | | | × | |
| (6) | × | | | This provision is supplemental to 9(1) and (5). |
| (7) | × | | | Provision about variation. |
| (8) | × | | | This provision is supplemental to the rest of article 16. |
| 17(1) | × | | | Article 17 contains fundamental propositions about the nature of the law and should not be capable of amendment. |
| (2) | × | | | |
| (3) | × | | | |
| 18(1) | × | | | Provisions about conflict of laws are not capable of amendment. |
| (2) | × | | | |
| (3) | × | | | |

## Intergovernmental international organizations

### BANKING FEDERATION OF THE EUROPEAN COMMUNITY

*[Original: English/French]*

I. *General observations*

As the problems inherent in international credit transfers are currently settled by banks through agreements, as widely accepted international standards do exist (e.g. SWIFT) and as the contentious issues in this area are of little importance, the Banking Federation considers that a Model Law on international credit transfers is unnecessary and indeed of no use.

This aside, the draft Model Law should respect the principle of contractual freedom which allows the parties to agree on the solution best adapted to their needs. The Federation considers that the restrictions placed on this principle by the draft Model Law should be deleted.

II. *Detailed observations*

Article 2. *Definitions*

(*a*) *Credit transfer*

The Federation considers that the notion of credit transfer would benefit from being defined as follows:

"Credit transfer means the movement of funds from an originator to a beneficiary, in accordance with a payment order from the originator received by his bank."

Should this proposal not be adopted, the present definition of credit transfer should at least be amended to specify that the credit transfer begins with a payment order that the originator gives to his own bank. The words "to his bank" should thus be inserted in the first sentence of (*a*) of article 2, after the words ". . . of the originator's payment order".

The square brackets around the sentence relating to payments made through a point-of-sale payment system should be deleted, leaving no doubt that these payments do not come within the sphere of application.

Article 3. *Variation by agreement*

In the concern to allow practice to develop in line with needs, the Banking Federation would like the Model Law to establish more widely the principle of freedom of agreements, contrary to the provisions of this text.

It suggested that the restrictions laid down in the following provisions should be deleted:

— paragraph 3 of article 4,
— the first sentence of paragraph 2 of article 13,
— the last sentence of paragraph 7 of article 16.

Article 5. *Payment to receiving bank*

The Banking Federation expresses its satisfaction that the Model Law mentions the settlement of obligations among participants either bilaterally or multilaterally, and the application of bilateral netting agreements.

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

To avoid any ambiguity the Banking Federation suggests wording the title as follows: "Acceptance or rejection of a payment order by beneficiary's bank".

Article 9. *Obligations of beneficiary's bank*

With regard to the fourth paragraph the Federation proposes that the rule be amended so that in the event of discrepancy between the description of the beneficiary in words and any reference number, it is the latter description which prevails.

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

The Banking Federation points out that in practice it will not always be possible to comply with the requirements of the time limit laid down in the first paragraph of article 10. It thus considers that the rule, whereby a receiving bank is required to execute the payment order on the day it is received, is too strict. The rule is all the more severe as article 16 provides tough rules relating to liability. The rule differs moreover from the principle stated by the European Recommendation of 14 February 1990 on the transparency of banking conditions relating to cross-border transactions, under which a cross-border credit transfer should be executed within two working days. Banks in European Community countries risk facing problems in applying the requirement, due to the practical impossibility of sorting out credit transfers into those for EEC countries and those for non-EEC countries.

It is therefore proposed that the first sentence of paragraph 1 of article 10 be amended as follows:

"A receiving bank is required to execute the payment order as soon as possible, and at the latest on the day after it is received."

In any case, agreements contrary to the rule of paragraph 1 of article 10 should certainly be allowed.

Article 11. *Revocation*

The Banking Federation is in favour of the principles of this article.

It is suggested however that the text be clarified by adding to the fifth and seventh paragraphs that the revoked payment order in question is an order revoked under the rules of paragraphs 1 and 2.

Article 13. *Duty to refund*

The Banking Federation is opposed to the rule of the first paragraph of article 13 and considers as unacceptable the rule of paragraph 2 under which agreements contrary to the rule of the first paragraph are not allowed (see article 3 above).

It considers that the principle of liability of the originator's bank is too strict, and that this liability should depend on the nature of the negligence. In particular, the Federation cannot accept that the originator's bank, obliged to return the funds if the credit transfer is not executed, must also pay interest when failure to execute the credit transfer is a result of non-acceptance of the credit transfer by an intermediary bank or the beneficiary's bank, who have refused to execute the credit transfer.[1]

Furthermore, comparison of paragraphs 1 and 2 of article 13 reveals that the second sentence of the former refers to "the originator's bank and each subsequent bank", whereas the second sentence of the latter refers only to "a receiving bank". The question therefore arises of whether the originator's bank, although a receiving bank according to the definition given in article 2, profits by the exception provided by the second sentence of paragraph 2 of article 13. To remove any ambiguity in this respect the second sentence of paragraph 2 should expressly refer to the originator's bank.

This same second sentence of paragraph 2 of article 13 only considers the case where suspension of payment or prevention from making the refund relates to an intermediary bank, whereas such suspension or prevention may be due to the beneficiary's bank. The beneficiary's bank should thus be referred to as well as an intermediary bank through which it was directed to effect the credit transfer.

Article 14. *Correction of underpayment*

The rule should be completed as follows "(. . .) without prejudicing the right to recover the amount of the charges as laid down in article 17(3)".

Article 16. *Liability and damages*

These rules would be too severe if the requirement stipulated in article 10 for the execution of the payment order by the receiving bank were to be maintained.

*Paragraphs 3 and 4:* these paragraphs can be deleted since the originator does not incur any financial loss in the cases mentioned.

*Paragraph 7:* the Banking Federation is not at all satisfied with the rule under which a bank cannot reduce its liability to an originator or a beneficiary that is not a bank. It considers that agreements contrary to the provisions of article 16 must be allowed without reservation. In any event, the originator's bank should not be liable to the originator in the event of executing a formal order from the latter.

*Paragraph 8:* the Federation understands the reference to reckless behaviour on the part of a bank to correspond to inexcusable or gross negligence (for example, a credit transfer made to a country where it seems almost certain, and well-known, that it will not be executed). The paragraph, which can be approved in principle, would benefit from being worded more clearly.

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

The Banking Federation considers that a credit transfer is completed only when the funds are placed at the disposal of the beneficiary by the latter's bank, and it expresses the wish that article 17 be amended in this sense.

Furthermore, it would perhaps be more logical to place this chapter after chapter I.

## COMMISSION OF THE EUROPEAN COMMUNITIES

*[Original: English]*

Article 5. *Payment to receiving bank*

We would suggest to reformulate article 5(*d*)(iii) as follows:

"When final settlement is made in favour of the receiving bank at a central bank in which the receiving bank maintains an account."

[1]The Dutch Banking Association considers it is not unreasonable that the originator's bank guarantees the execution of a payment order. The originator's bank should however have the right to refuse a payment order if the risks are too high. In this case the parties should be able to agree that acceptance of a payment order is subordinated to the condition that the originator bears the entire risk for a payment order not properly executed. Furthermore, an originator's bank accepting a payment order with special risks must have the right to charge the additional costs for covering the risk to the originator.

We consider that situations may arise, especially within the European Community, in which banks participate in payment systems, and have accounts with Central Banks of other countries without being located (established) in those countries. The proposed amendment clarifies that this possibility is not precluded by the specifications laid down in article 5. The amendment does not intend to modify the provisions of this article with regard to the timing of a payment ("following day" in sections (i) and (ii) as opposed to "final settlement" in sections (iii) and (iv)).

Article 10. *Time for receiving bank to execute payment orders and give notice*

We assume that the opening clause of article 10, stipulating that a receiving bank is required to execute a payment order on the day it is received, will be discussed again during the twenty-fourth session of the Commission to be held at Vienna from 10 to 28 June 1991.

The Commission of the European Communities is presently developing plans to increase the efficiency and in particular the speed, of cross-border transfers in the Community. Endeavours to induce banks to execute payment orders on the day they are received are, therefore, in principle to be welcomed.

The Commission has the impression, however, that banking systems of some countries might experience difficulties in this respect at the present stage. Without making a formal proposal to this effect, we would like to suggest that a possible compromise in this discussion, if it arises, may be reached in stipulating that the execution of a payment order must take place no later than the following day.

Article 18. *Conflict of laws*

The relation between this article and the "Convention on the law applicable to contractual obligations" (opened for signature in Rome on 19 June 1980, doc. 80/934/EEC, *Official Journal of the European Communities* No. L 266 of 9/10/1980, page 1) requires further studies. It might be useful to include certain principles, in particular those enshrined in article 9 of the said Convention, in article 18 of the Draft Model Law. However, this raises very complex problems of international law. We have not been able to retain the possibility of making further comments in this respect.

## HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

*[Original: French]*

Article 2. *Subparagraph* (a): *Definition of credit transfer*

It is proposed that the second sentence of the definition of "credit transfer" be deleted, saying that the term "includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order". Not only does this sentence seem unnecessary, since the hypothesis it envisages is already covered by the first sentence of the definition, but it even presents a danger, to the extent that a court might interpret the sphere of application of the Model Law as defined in its article 1 in a restrictive manner, applying the Model Law only to the element of the transfer effected between the sending bank and the receiving bank situated in different States.

Article 5. *Payment to receiving bank*

*Subparagraph* (b)*(iv) a:* The Permanent Bureau wishes firstly to point out that there is a typographical error in the draft Model Law submitted for appraisal by Governments: the reference to "applicable law" should be placed in square brackets, as is clear from the the last sentence of paragraph 83 of the report of the Working Group (A/CN.9/344 of 10 January 1991).

The Permanent Bureau proposes that this reference to applicable law should be deleted. It will be recalled in this connection that the hypothesis envisaged in this subparagraph relates to settlements effected by an interbank "netting" system. Netting is a relatively new system which has been the subject of study, notably by a Group of Experts on Payments Schemes of the Central Banks of the Group of Ten Countries, which met under the auspices of the Bank for International Settlements (BIS). As the report of the UNCITRAL Working Group quite correctly notes in paragraphs 60-62 (document A/CN.9/344), the Group of Ten was faced with an extremely complex legal problem, notably with regard to determining the law applicable to netting. Indeed, it is clear from their work and the statements made during the twenty-second session of the Working Group by the observer for BIS that the system of netting is only instituted with the agreement of all the parties and this agreement is reflected in internal rules, not depending on or regulated by the law of a given State. The only consensus which has been achieved within the Group of Ten is that the internal rules creating the netting must not be in conflict with the laws of *any* of the States parties to the system.

In other words, the monetary settlement that takes place between a sending bank and a receiving bank linked by a netting system can be in accordance only with the rules of the system: the reference to applicable law has no meaning because, once the netting is established, monetary settlement can take place only in accordance with the system established and not with a national law. The end of the article therefore only needs to read: "the settlement is made in accordance with the rules of the system".

*Subparagraph* (c): While a provision such as that contained in subparagraph *(c)* of article 5 can perhaps be justified in the context of an international convention, it does not seem to have any meaning in a Model Law. The fact is, and this is a classic legislative technique, that any reference in a Model Law to "the law" can refer only to that Model Law, which will become the national law of a State which decides to incorporate it in its system of law. It is precisely this Model Law, having become national law, which lists the means of settlement by which the sender's obligation to pay the receiving bank is discharged: that is the subject of article 5. One cannot see to which other law subparagraph *(c)* refers, unless there is an intention to allow the national legislator to add other means of paying the obligation to article 5; if that is the case, it would suffice simply to give such authorization either in the report or by a footnote. In the view of the Permanent Bureau, subparagraph *(c)* of article 5 should be deleted.

Article 17. *Paragraph 3*

The Permanent Bureau takes as its starting point the idea that the reference to the applicable law, in the last sentence of this paragraph, refers to the law applicable to the underlying liability linking the originator of the transfer with the beneficiary. It is suggested, for clarification purposes, that this should be specifically stated in the text of the provision.

Article 18. *Conflict of laws*

The problems raised by the conflict of laws in relation to international credit transfers, particularly because of the various modalities of such transfers, are extremely complex in nature and would have deserved serious study before regulatory provisions of the kind contained in article 18 could be adopted. Not only has no such study been undertaken during the deliberations of the Working Group on International Payments, but article 18 as it stands, with the additions adopted during the last session of the Working Group following a proposal by the United Kingdom delegation, was not even discussed in open session. In the view of the Permanent Bureau of the Hague Conference, this article 18 raises too many delicate issues to be adopted as it is and, since it is not possible to amend it without serious study, the Permanent Bureau suggests that article 18 of the Model Law should simply be deleted.

Without going into all the problems raised by article 18, the Permanent Bureau would like to draw attention to the following points:

*(a)* Article 18, paragraph (1), as submitted by the UNCITRAL Secretariat (document WP.42 of 27 April 1989—it was then article 15), contains an ambiguity because of an apparent confusion of two problems: on the one hand the conditions for the application of the Model Law, and on the other the conflict-of-laws rules whose object is precisely to determine the application of this Model Law. The report of the Secretariat suggested that one could envisage a provision regulating conflict of laws only when the dispute arose in a State which had adopted the Model Law, and the other interested State or States had not done so. Hence the ambiguity: is article 18 intended only to determine the applicable law when the banking relationship involves States which have not adopted the Model Law—which would imply that, for application in a State of the uniform rule itself, another conflict rule should apply—or is article 18 also intended to designate the law of the State which has adopted the Model Law? If that should be the case, and the Permanent Bureau cannot see how article 18 can be interpreted in any other way, one is faced with a clear technical inadequacy, consisting of adopting in a substantive law a conflict rule whose aim is specifically to determine the application of that law. This technique is, admittedly, used in some legal systems (notably in the United States—cf. the conflict rule in article 4A of the Uniform Commercial Code (UCC), section 507—but in this context it can be justified as an American interstate rule), but it is quite alien to the civil law system and the Permanent Bureau knows of no examples of conventions or Model Laws adopting such a solution.

*(b)* A much more serious objection, in the eyes of the Permanent Bureau, to the solution in article 18 concerns the very nature of the Model Law and its very broad substantive sphere of application. The Permanent Bureau does not think that it is possible for one and the same conflict rule to be included in the Model Law to cover two fundamentally very different cases: that of paper-based transfers and that of electronic transfers. In the case of paper-based transfers, the segmentation of a global international credit transfer into a series of distinct bilateral operations, to each of which a different law would apply, may be conceivable (although it does not seem desirable), but it would seem quite impracticable in the case of an electronic credit transfer. The extreme speed of such transfers makes it in practice impossible to split them into different bilateral operations within the overall transfer, and for this new method of transfer a system should be devised in which a *single law* regulates the transfer as a whole.

Moreover, it seems that in the United States, where electronic credit transfers are most advanced, such a conception of the single law does indeed exist, despite the conflict rule of article 4 of UCC, section 507: credit transfers through the Federal Reserve Bank system, that is transfers through FEDWIRE, are subject to a new Regulation J which came into force on 1 January 1991 (see Federal Register, vol. 55, No. 194, of Friday, 5 October 1990) and which mandatorily sets aside article 4A of UCC for all transfers by FEDWIRE and imposes Regulation J on all parties to such transfers. The same goes for the system introduced by the Clearing-House Interbank Payments System (CHIPS), which in its rule 3 imposes the law of New York for all transfers made through that system (see document A/CN.9/341 of 13 August 1990, paragraph 27).

These considerations probably explain why the United States delegation at one time proposed a special rule for article 18 (which was then article 15) to resolve the specific problem raised by an electronic funds transfer system (see document A/CN.9/341 of 13 August 1990, paragraphs 24 *et seq.*), a proposal which was not taken up by the Working Group.

The Permanent Bureau wishes to recall here that the Hague Conference has placed on its agenda of future work a study of specific problems of private international law which, in regard to trade law, may arise from the use of electronic procedures (see the final act of the sixteenth session, B, paragraphs 4*a* and *b*), and has in particular invited the Permanent Bureau to establish links in this area with those international organizations concerned, "taking specially into account, as regards electronic funds transfers, the work undertaken within the United Nations Commission on International Trade Law (UNCITRAL)". It is likely that, if article 18 were to be deleted from the Model Law, the Hague Conference would then undertake work on the subject, making the necessary studies of specific problems of conflict of laws relating to international transfers, in collaboration with interested banks, in order to achieve complete regulation of conflict of laws for all transfer systems.

[A/CN.9/347/Add.1]

## FRANCE

*[Original: French]*

The Draft Model Law on International Credit Transfers, adopted by the Working Group on International Payments at the conclusion of its twenty-second session, held in Vienna from 26 November to 7 December 1990, calls for the following observations.

1. *On the principle of a model law*

A model law seems preferable to the drafting of an intergovernmental convention.

2. *Sphere of application* (article 1)

The sphere of application as defined in article 1 is satisfactory.

3. *Definitions* (article 2)

*Definition of "credit transfer"*

The phrase in square brackets ["The term does not include a transfer effected through a point-of-sale payment system"] should be deleted since the question of knowing whether the payments effected through a point-of-sale system are credit orders or debit orders is not clear.

4. *Payment to receiving bank* (article 5)

*Paragraph* (b)*(iii)*

The wording adopted by the Working Group is based on the idea that a bank can only obtain "central bank settlement" at the central bank of the country in which it is located.

Thus, assuming that the sending bank and the receiving bank are located in different countries and that both have an account at the central bank of the country in which the sending bank is located, the obligation to pay could be discharged only under the terms of paragraph *(b)*(ii) ("when a credit . . . is used" or "on the business day following the day on which the credit is available for use") and not under the terms of paragraph *(b)*(iii) (that is, when final settlement is made at the central bank).

If the basis of the rule laid down in paragraph *(b)*(iii) is that a settlement through an account at a central bank is equivalent to a settlement in cash, all cash settlements at central banks should be treated in the same way, with no distinction made as to whether it is the central bank of the country in which the receiving bank is located or another central bank.

This point is all the more important since within the European Economic Community some central banks are unclear as to the possibility of accepting in the settlement systems they manage banks that are not established in their country but that operate out of another Community country.

For these reasons, it is proposed that paragraph *(b)*(iii) should be amended as follows:

"when final settlement is made in favour of the receiving bank at the central bank at which it has an account, or".

*Paragraph* (b)*(iv)*

The Working Group has wished to recognize the existence of interbank settlement systems, on the one hand, and bilateral netting agreements, on the other.

According to the present wording of subparagraphs *(a)* and *(b)* of paragraph *(b)*(iv), the obligation to pay the receiving bank would be discharged when final settlement was made through any interbank settlement system or in accordance with any bilateral netting agreement even if these systems or agreements were operating under conditions that were insufficiently secure in legal terms to allow these systems or agreements to be recognized as valid according to the criteria laid down in the Report of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries (report published by the Bank for International Settlements in November 1990).

It would be advisable, therefore, at least to add a reservation to subparagraphs *(a)* and *(b)* of paragraph *(b)* (iv). This reservation might consist in adding the following phrase to each of these subparagraphs:

"provided that the rules governing this system (this agreement, in the case of subparagraph *(b)*) are compatible with this law."

5. *Obligations of receiving bank that is not the beneficiary's bank* (article 7)

It is desirable that the following sentence should be added to article 7(2):

". . . to implement the credit transfer in an appropriate manner. It must, specifically, effect the operation in the currency or unit of account stipulated by the sender."

The purpose of this addition is to remind the banks that they are not, when implementing payment orders, to take the initiative of converting the funds received into a currency other than that in which the order has been made out by the sender.

The automatic conversion of currencies by receiving banks is the main source of disputes between French and United States banks in connection with the implementation of credit transfers.

6. *Obligations of beneficiary's bank* (article 9)

An addition similar to the one recommended for article 7(2) and inspired by the same concern is also desirable in the case of article 9(1):

". . . relationship between the bank and the beneficiary. It must, specifically, place the funds at the disposal of the beneficiary in the currency stipulated by the sender, unless otherwise instructed by the beneficiary."

7. *Time for receiving bank to [execute] payment order and give notices* (article 10)

The principle of execution on the same day is too restrictive since the purpose of the model law is to govern not only electronic credit transfers but also paper credit transfers.

It is proposed that the chapeau of article 10(1) should be amended as follows:

"A receiving bank is required to [execute] the payment order no later than the day after it is received, unless . . .".

8. *Revocation* (article 11)

Article 11(4) requires the authentication of a revocation order, whereas article 4 suggests that the authentication of payment orders is optional. This difference in treatment hardly appears justified.

Moreover, the current wording of article 11(4) has resulted, it would seem, from the fact that at one time it was envisaged that a revocation order was to be authenticated "in the same manner as the payment order" that it revoked, and that the Working Group had rightly taken the position that this formal parallelism was not necessary.

Once the words "in the same manner as the payment order" had been deleted, all that remained of the original provision was the phrase "A revocation order must be authenticated", with no further specification.

This being the case, article 11(4) would gain by being redrafted in the following way:

"When a revocation order must be authenticated, this need not necessarily be done by the same method as the payment order."

9. *Duty to refund* (article 13)

The drafting of article 13(2) is not satisfactory.

It is very important that the principle of the obligation to refund the funds received when a credit transfer cannot be completed should be maintained. Under French law, in fact, a bank that has received funds for the purpose of carrying out a credit transfer is regarded as bound to the party that has remitted these funds to it by a bailment contract, it being considered that the obligation on the part of the bailee to return the funds to the bailor is the very essence of a bailment contract.

Nevertheless, it should be admitted that, *in certain circumstances*, a bank can only agree to carry out a credit transfer at the risk of the originating party.

In the current drafting, the second sentence of article 13(2) does not convey this idea that only exceptional circumstances can justify the stipulation in a credit transfer order that it is "at the risk" of the originating party.

In addition, it also seems reasonable to suppose that, assuming that the originating party has instructed that the transaction should involve one (or several) particular correspondent (or correspondents), he will make it his business to recover the funds directly from the correspondent (correspondents) in question as soon as it (they) has (have) received the funds.

Article 13(2) at best very indirectly reflects this idea, which is only conveyed by the words "through which it was directed to effect the credit transfer" (French: "conformément aux instructions reçues", line 5 of the French text).

For these reasons, article 13(2) should be discussed anew.

## ITALY

*[Original: English]*

The draft Model Law refers to credit transfers, i.e. to shifts of amounts carried out under the initiative of the debtor at an international level, i.e. implying an ordering bank and a receiving bank sited in two different States.

The regulation of the different phases and multiple aspects of these payments has been dealt with by a draft Model Law, and it is not excluded that the latter can be transformed into a Convention. To this regard we esteem that the second solution would be more advisable, as it would not leave to adherent States any space for possible departure from the official procedure, therefore enabling to pursue the aim of a standardized regulation.

On the other hand, the necessary flexibility in some particular situations would in fact be guaranteed, within some limits, by article 3, which allows parties to depart from the law, unless the latter formally provides for non-derogation.

Operations regulated by the draft Model Law are characterized as international transfers. To this regard in Community circles, it has been debated on the opportunity to extend the implementation of the law also to national transfers, keeping into account the possibility that the EEC itself incorporates UNCITRAL dispositions in a measure of its own (directive or other).

To this regard we point out that there would not be any hindrance to an extension of this legislation within our country, such legislation being consistent with inter-bank systems in force.

The Model Law, furthermore, excludes from its field of implementation the transfers originated by means of a point-of-sale terminal, i.e. those specifically defined under the banking terminology, but also covers all other transfers, of any amount. This exclusion seems consistent with the choice not to take into account matters which may pertain to the consumers' protection.

This line of activity moreover can seem satisfactory for the United States which already avail themselves of an adequate legislation as far as the relationship between consumers and financial institutions is concerned, but leaves the matter unsolved for the European nations who, like ours, do not have such regulation.

Referring to provisions concerning the intervention of intermediary banks, the article 6(2)*(a)* establishes the rule that the order has effectively been accepted, if the term provided for by article 10 has elapsed without notice of rejection having been given, but such acceptance is subordinated to an availability of funds in the account to be debited, or to the fact that the payment has been executed.

On the other hand we deem it would be preferable, keeping in mind a clear need of security, that the rule could be valid in every case, i.e. that the bank which receives the order should always be bound to make its rejection known, even if such rejection is due to lack of funds, because otherwise the person who issues the order, faultlessly unaware of such circumstance, could rely on the execution of the order and be kept liable for failure of execution. A possible modification, as we have suggested it, would entail the necessity to modify accordingly the following paragraph (3).

Article 7 regulates the obligations of the receiving bank which is not the bank of the beneficiary. In paragraph (5) of this article, it would be better to establish that in case there should be not time to ask instructions to the sender, the order should stand for the lesser amount or for the amount written into letters, and the sender should be notified thereof. In paragraph (6) of the same article it is advisable to delete the sentence contained between "or that following the instruction" and "the credit transfer", as the execution of an order is not impossible in this case, but it might be more expensive.

The same consideration can be made, with reference to the above-mentioned comment relating to article 6(2)*(a)* and article 8(1)*(a)* when regulating the case of acceptance by the beneficiary bank. If this modification is accepted, paragraph (2) should also be adjusted, in cases of rejection of a transfer order.

As for article 9(3), we hold that what is said in paragraph (5) of article 7 is valid, as the former seems to be a repetition of the latter.

In the Model Law the principle of the irrevocability of the transfer is established, in view to give security to the use of such means of payment. In fact this principle lives together with a whole set of possibilities of exception which would repeal its validity. As on the other hand the same article 11 allows parties to establish the total irrevocability of the order which has been given, it would be better to reverse the matter, and establish the irrevocability from an absolute point of view, providing for a possible waiver by means of an agreement between the debtor and the beneficiary. If article 11 were to be maintained in its original wording, the possibility to shorten the terms of the revocation of a payment, provided for at article 3, should not be allowed, as it could be a source of insecurity. In paragraph (4) of this article, one should then regulate the hypothesis of the paper money order, for which there is the problem of the signature (and authentication of the signature) of the person who can legitimately undertake obligations on behalf of the sender.

Lastly, we must remember the principle contained in article 17, under which the acceptance by the beneficiary's bank is the last phase of the payment order, and it extinguishes the obligation existing between the parties just like a payment in cash. The principle is taken from the recent United States law on the matter of funds transfers, but it is opposite to the solution sustained by the best Italian doctrine, under which the paying off of the obligation coincides with the crediting of the beneficiary's account, or in any case with the moment when funds are placed at the disposal of the beneficiary.

## MOROCCO

*[Original: French]*

1. *Article 2*

*(a)* The last, bracketed sentence in the definition of "credit transfer" should be deleted since a payment order issued by a point-of-sale payment system also implies an authentication or validation procedure agreed upon by the originating party and his bank.

*(i)* The definition of the term "funds" or "money" is overly restrictive since it is limited to credits on account and excludes cash payments.

*(j)* If the authentication procedure is correctly applied, the payment order in its entirety will be regarded as having been issued by the purported sender, so that the words "all or part of" should be deleted.

*(m)* The "payment date", more commonly known as the "validity date", is not always indicated on the initial payment order. In this case, it generally corresponds to the date on which the payment order is accepted by the beneficiary's bank. Accordingly, it would be useful to provide for this case.

2. *Article 4*

The provisions of paragraphs 1 to 4 have not been drafted with sufficient clarity to facilitate their understanding and interpretation, all the more since the term "purported sender" is nowhere defined.

What is more, the provisions of paragraph 4 are subject to criticism in that, in actual practice, all payment orders that have been duly authenticated in accordance with the authentication procedure agreed must bind the sender *vis-à-vis* his bank or its foreign correspondent. The purported sender must logically enter a claim against the party that originated the fraudulent instruments and not against his bank or its foreign correspondent. The purported sender remains bound by these instruments so long as he has not revoked them before the completion of the credit transfer.

3. *Article 5*

Paragraph *(c)* refers to the "law" without specifying whether it is the law of the country of the sender (originating party, primary receiving bank or intermediary bank) that is intended.

Moreover, it might be supposed that this paragraph refers, *inter alia*, to payment by drawing on an authorized overdraft or cash facility. If this is not the case, which would imply the prior existence of sufficient funds on account, explicit provisions should be made for this case. Subparagraph *(a)*(ii) of paragraph 2 of article 6 and subparagraph *(a)*(ii) of paragraph 1 of article 8 should be brought into conformity with this observation.

4. *Article 10*

Since certain national regulations provide for execution dates different from those covered by paragraph 1 of article 10, a subparagraph (1)*(c)* should be added to this article with the following wording:

"The regulations in effect in the country of the receiving bank provide for an entirely different execution date."

5. *Article 13*

In the case of the non-completion of the credit transfer in accordance with article 17(1), the principle of the refund of the funds paid at the different stages of the operation is incontestable. With regard to the interest running from the day of payment to the day of refund, the payment of such interest does not have to be justified except when the receiving bank has failed to honour the sender's instructions. This idea should be reflected in paragraph 1 of article 13.

6. *Article 16*

*(a) Paragraphs 1 and 2*

The provisions of paragraph 1 do not appear to be in keeping with actual practice. In fact, when there is a delay in the receipt of the funds by the beneficiary, the latter enters a claim for damages (delay interest) against the originating party and not against a receiving bank other than his own. However, for its part, the beneficiary's bank that fails to place the funds at the beneficiary's disposal within the period specified remains directly responsible and thus liable to the beneficiary for delay interest.

Accordingly, paragraphs 1 and 2 of article 16 should be redrafted.

*(b) Paragraph 5*

The last sentence of this paragraph should have referred to the receiving bank's liability for the shortfall between the amount of the payment order received and accepted and the order issued for execution. As drafted, this sentence should be deleted.

## UNITED STATES OF AMERICA

*[Original: English]*

I. *Background*

The seventh session on international credit transfers of the United Nations Commission on International Trade Law (UNCITRAL) Working Group on International Payments ("Working Group") was held in Vienna, Austria, from November 26 to December 7, 1990 ("Vienna session"). A revised text of a draft model law on international credit transfers ("draft model law") was produced. This text of the model law will be presented to the plenary meeting of UNCITRAL, to be held in Vienna from June 10-28, 1991 ("plenary meeting"). The United States has urged that the draft model law be designed to be compatible with new computer banking and clearing systems and thus facilitate international commerce and trade.

II. *Organization*

This paper is a list of the continuing concerns of the United States regarding the draft model law.

Some of the continuing concerns are accompanied by a proposed change in the draft model law. Each proposal is specifically denoted as such by separating it from the preceding and subsequent text.

Other concerns, however, are not accompanied by a specific draft for a proposed change. The United States hopes that such discussion will lead to an appropriate change in the draft model law. The absence of a specific draft for a proposed change below should not be interpreted as an indication that the concern listed is of diminished importance.

III. *General comments*

The delegation is heartened by the significant progress made at the Vienna session. But, it cannot fail to express its continuing concerns regarding certain provisions in the draft model law. What must be considered are potential adverse effects of these provisions on: (1) existing high-speed, high-volume electronic credit transfer systems; and (2) facilitating the development of such systems.

The position of the United States is dependent upon there not being introduced and adopted new provisions which would undercut the ability of the Model Law to support existing and future high-speed, high-volume electronic credit transfer systems.

IV. *List of continuing concerns and proposed changes*

A. *Article 1: Sphere of application*

1. Article 1(1): Test for internationality

A credit transfer should not be divided into an "international" part and a "domestic" part. Such a distinction poses conceptual problems. The test for internationality contained in article 1(1) ("a sending bank and its receiving bank are in different States") is formalistic and therefore potentially under- and/or over-inclusive. For example, suppose a sending and receiving bank are located in State A, but the originator is in State B and the beneficiary is in State C. This transfer is treated as outside the scope of the draft model law, and accordingly the draft model law may be viewed as under-inclusive.

The test for internationality also may pose operational problems. It presumes that a receiving bank is cognizant of the geographic location of its sending banks. In many instances, this may be so. But the draft model law purports to govern all segments of an international credit transfer, and not all receiving banks in a funds transfer chain may be aware that a sending bank earlier in the chain was located in a different State. For instance, suppose a sending bank is located in State A and receiving bank No. 1 is located in State B, so the Model Law is triggered under article 1(1). Suppose further that subsequent intermediary banks, e.g., receiving banks Nos. 2 and 3, are located in State B too. The draft model law purports to govern the credit transfer segments between receiving banks Nos. 1 and 2 and Nos. 2 and 3. It is not clear that receiving banks Nos. 2 and 3 know that sending bank No. 1 was in State A. This is relevant in so far as the draft model law imposes obligation on them that are different from those under domestic law.

Finally, as a legal matter, dividing credit transfers into "international" and "domestic" does not necessarily result in greater harmony among domestic payments system laws, contrary to the goal of the Working Group. Rather, it may result in the creation of a public international law document (the draft model law) which tolerates disharmony among domestic laws. Stated differently, to the extent the draft model law seeks to create a "level playing field" in the area of payments system law, then the drafters should be wary of artificial distinctions.

2. Footnote: Consumer law

The footnote to this article states that the draft model law does not deal with consumer-protection issues. It is unclear whether this means that the draft model law applies to consumers unless the internal laws of a particular State otherwise govern the transaction. What if consumer protection laws of a State conflict with provisions in the draft model law only in some respects? Would the draft model law apply to parts of a credit transfer, and that State's consumer protection laws apply to other parts of the transaction?

*Proposed change:*

To clarify such issues, the footnote as currently drafted should be replaced by the following footnote:

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

B. *Article 2: Definitions*

1. "Credit transfer" (article 2*(a)*)

There appears to be opposition on the part of certain delegations to the bracketed language in the definition of "credit transfer". The draft model law should not cover point-of-sale transactions ("POS"), because these are more properly regarded as debit transfers. Furthermore, regardless of the conceptual issue, the legal implications of POS transactions have not been reviewed *vis-à-vis* all the other provisions of the draft model law. Finally, POS transactions are primarily consumer transactions, and the complications of including them seems at odds with the purpose of the draft mode law.

*Proposed change:*

The square brackets should be removed and the text should remain as currently drafted.

In addition, a "credit transfer" is more precisely viewed as a series of "payment orders," not a series of "operations".

*Proposed change:*

Accordingly, the word "operations" in the first sentence of article 2*(a)* should be replaced with the word "payment orders".

Finally, the ending point of a "credit transfer" is currently set forth in the first sentence of article 17(1). To avoid any misunderstanding, it would be more appropriate to include this in the definition of "credit transfer" in article 2*(a)*.

*Proposed change:*

The first sentence of article 17(1) should be included in article 2*(a)* as the last sentence of article 2*(a)*.

2. "Beneficiary" (article 2*(d)*)

This definition is not sufficiently restrictive so as to eliminate the possibility that a "beneficiary" could be a party receiving funds from a non-bank.

3. "Bank" (article 2*(f)*)

This definition is too broad because it includes telecommunications carriers, possibly certain securities firms, and other entities which do not maintain the same standards as banks and are not subject to similar regulatory regimes.

*Proposed change:*

The current definition should be eliminated and replaced by the following definition:

"A bank is defined as an institution that:

(i) engages in the business of banking;

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

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

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

4. "Authentication" (article 2*(j)*)

A payment order is authenticated in its entirety, but this definition refers to the authentication of "part" of a payment order. In addition, authentication can refer to amendments of a payment order.

*Proposed change:*

The definition of "authentication" should be amended by deleting the words "all or part of". In addition, the words, "an amendment of a payment order" should be inserted after the words "payment order". Thus, article 2*(j)* should read:

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

5. Additional definitions

Even though the term "Credit Transfer System" (or "Funds Transfer System") is used in articles 5 and 7, it is not defined. (See article 5*(b)*(iv).) This is also the case with respect to "Interest" and "Revocation" of a payment order.

*Proposed changes:*

"Credit transfer system":

" 'Credit Transfer System' means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed."

"Interest"

"Unless otherwise agreed between the relevant parties, 'interest' refers to the inter-bank rate of interest in the currency of the State in which the receiving bank is located."

"Revocation"

"A 'Revocation' of a payment order is an instruction to a receiving bank from a sender intended to rescind a payment order previously issued by the sender."

C. *Article 3: Variation by agreement*

Article 3 does not provide for variation by a credit transfer system rule. How will this affect a credit transfer sent through existing and future systems? For example, how will it affect a credit transfer involving the Society for Worldwide International Financial Telecommunications ("SWIFT"), or a credit transfer through the Clearing House Interbank Payments System ("CHIPS"), which is destined for a foreign beneficiary's bank on the books of a US bank? How will this affect a credit transfer which in part is sent through Fedwire but which has an international aspect to it (e.g., the beneficiary's bank and the beneficiary are located in a foreign country)?

The draft model law should provide for the possibility of varying the effect of a rule of a credit transfer system by agreement, if rules of a credit transfer system provide for such variance, and therefore, this should be made clear in article 3.

D. *Article 4: Obligations of sender*

1. Article 4(3): Authentication

Article 4(3) is a problem because, if authentication is not commercially reasonable, then article 4(2) does not apply by its own terms. It would seem that the intent behind article 4(3) is to prohibit variation by agreement of the effect of article 4(2). Yet, because article 4(2) deals only with payment orders subject to authentication, is it possible to vary the terms of the draft model law as they relate to an unauthenticated payment order? That is, may the parties vary the effects of article 4(1) by having the purported sender of an unauthorized order be bound by the order none the less because the receiving bank and the sender choose not to authenticate?

2. Article 4(2): Variation

An additional and perhaps more important concern is as follows. Under article 4(2), a purported sender of a payment order is bound by that order if the order is authenticated by a commercially reasonable security procedure with which the receiving bank complied. Suppose the authentication procedure is not commercially reasonable. Can a sender agree with its receiving bank that the sender nevertheless will be bound by the payment order? Under article 4(3), the answer is no.

This answer is imprudent. Each sender should be allowed to perform its own cost-benefit analysis and agree with its receiving bank on the security procedure that is less than commercially reasonable. In turn, the receiving bank should be allowed to disclaim liability if such a procedure is adopted. Currently, major banking systems do allow such variation. A law which purports to prohibit such an accepted commercial practice poses difficulties that are not matched by any benefits.

*Proposed change:*

Article 4(3) should be deleted in its entirety.

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

Article 6(2)*(a)* is objectionable because it allows for "passive" acceptance on the part of the originator's bank or the intermediary bank. That is, not rejecting within the time for execution prescribed by article 10, acceptance is deemed to have occurred. A court may view culpability for failure to execute an accepted payment as a very serious matter, and "the door remains open" to consequential damages. (See article 16(8).)

F. *Articles 7 and 9: Obligations of banks*

1. General concerns

*(a)* The obligations are neither appropriate nor feasible

Notification duties are imposed on receiving banks that are well beyond the scope of duties normally viewed as reasonable and are incompatible with the development of high-speed, high-volume electronic credit transfer systems. In particular, a receiving bank may be required to give notice of a misdirection, an insufficiency in data, or an inconsistency between words and figures (article 7(3)-(5) and article 9(2)-(4)).

Receiving banks in an electronic environment must have the ability to rely on figures, not words. Electronic transmission in large volumes cannot be stopped on receipt of each payment order and checked for discrepancies. An electronic credit transfer is akin to an express train that, unlike a local train, bypasses most stations. Forcing a delayed system because of pauses at each receiving bank will increase costs, slow volume, and not work with high-speed banking.

Hence, for example, the obligation imposed on a receiving bank to give notice of an inconsistency between words and figures describing the amount (article 7(5)), and the obligation to give notice of an inconsistency between words and figures describing the beneficiary (article 9(4)), are too severe. A receiving bank should be entitled to rely solely on figures, and so long as prior parties in the credit transfer chain are aware of this practice, the receiving bank should bear no liability for mismatches or misdescriptions.

There is no clear indication in the draft model law that a receiving bank is allowed to rely on a figure, as opposed to a word, in the event of an inconsistency. For high-speed, high-volume systems, in which processing of payment orders is automated, the ability to rely on numbers is crucial. Presumably, banks want to comply with laws. Yet, as an operational matter, compliance with the draft model law would be difficult or impossible.

If a receiving bank is permitted to rely on numbers with respect to domestic credit transfers, but not with respect to international credit transfers under the draft model law, then it would be forced to divide the payment orders it receives between those that come from domestic and from foreign senders. Yet, this would pose serious operational difficulties and increased costs, and would be unlikely to be implemented.

*(b)* The penalties are not properly specified

The remedy for failure to perform these duties is interest on the funds that are held (article 16(3)-(4)). While this might simply prevent unjust enrichment, there is no definition of "interest" so this is not certain to be the result.

2. Specific concerns

*(a)* Article 7(2)

The reference to "appropriate" intermediate bank is ambiguous. Receiving banks that are instructed should not be authorized to change those instructions unilaterally. (See the discussion of article 7(6).)

*Proposed change:*

The word "appropriate" should be deleted.

*(b)* Article 7(5)

This subparagraph concerns an inconsistency in a payment order between words and figures. In the case of "straight-through" processing (i.e., automated processing without manual intervention), the inconsistency may not be discovered by a receiving bank. Or, the receiving bank may not be notified of a problem occurring elsewhere in the credit transfer.

*Proposed change:*

An appropriate correction in the text of the draft model law should be made.

*(c)* Article 7(6)

This subparagraph allows a receiving bank to disregard the instructions of a sender regarding the use of an intermediary bank. Suppose the beneficiary's bank (or the beneficiary) relied upon the receipt of funds at a designated intermediary bank, and consequently drew down on its account with the intermediary bank in reliance upon this expected receipt. Then, an overdraft might be created, and overdraft interest charges and other damages might result. Accordingly, a receiving bank should not be allowed unilaterally to disregard instructions on the designation of an intermediary bank.

*(d)* Article 9(3)

This is a serious problem for the reasons previously discussed, namely, with automated processing, a beneficiary's bank should not be expected to discern a discrepancy between words and figures.

*(e)* Article 9(4)

This provision poses serious difficulties and would have deleterious effects on the payments system. Because a beneficiary's bank is likely to receive payment orders from a myriad of sources, and because it is not possible to have contracts with all bank senders and remote parties varying this provision, how can reliance ever be placed by a beneficiary's bank on account number? Suppose the account number matches the beneficiary with reasonable certainty, but does not match the name of the intended beneficiary. Will the beneficiary's bank be liable for the amount of the credit transfer if it credits the party identified by number? Banks which are not able to distinguish domestic from international credit transfers will have to match all orders by name and account number. Processing payment orders will be slowed down immeasurably, and the cost of such processing will vastly increase. This is all the more likely because article 9(4) would require a beneficiary's bank to give notice both "to its sender and to the originator's bank".

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

Article 8(1)*(a)*(i) refers to "passive" acceptance occurring upon receipt of sufficient available funds in the account of the sender to be debited. There is a lack of precision as to when acceptance occurs, because deposit accounts are dynamic. That is, funds are incoming and outgoing continually throughout the day. Few banks in the United States (and we believe in other countries as well) have on-line, real-time accounting systems; only at the close of the banking day will there be a static balance.

*Proposed change:*

It is essential to have a rule that allows for rejection within a specific time from the opening of the next banking day.

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

Apparently, this applies to all types of receiving banks—originator's banks, intermediary banks, and beneficiary's banks. Article 10(1) requires execution unless certain enumerated events (i.e., (1)*(a)* or *(b)*) occur. However, the relationship between this provision and articles 6 and 8, which do not require execution (i.e., which allow for a payment order to be rejected), is unclear and must be addressed.

In addition, the times within which required notices must be provided are unrealistically brief. If a notice must be provided (see the discussion of articles 7 and 9), it may well be operationally impossible to provide it on or before the day the payment order in question is required to be executed (article 10(2)), or on or before the payment date (article 10(3)).

Suppose a payment order is received late in the day, and that day is the execution date or the payment date. If a notification duty is triggered, it may be too late in the day to fulfil this duty. Instead, the earliest time at which notification can be provided may be after the beginning of the next banking day.

*Proposed change:*

Article 10(2)-(3) should be changed to allow for the provision of notice on the banking day after the payment order in question is received.

I. *Article 11: Revocation*

The conjunctive "and" on the fourth line of article 11(1) should read "or". (See, e.g., the style in article 11(2).)

*Proposed change:*

Replace "and" with "or" on the fourth line of article 11(1).

J. *Article 12: Duty to assist*

A receiving bank is obligated to assist each prior party in a credit transfer, and to seek the assistance of each subsequent party in a credit transfer, in the event the transfer is not completed. The vagueness of this duty is a serious problem.

With respect to this objectionable "duty to assist", there is no explicit statutory penalty for a failure to abide by the "duty", which itself is not defined. Does it mean telephone calls? Does it mean filing lawsuits in three countries? While the provision could be viewed as unimportant for this reason, a court may reason that a right without a significant remedy is not right at all, and, accordingly, it may read an implied remedy into the draft model law. Such an implied remedy could be severe.

K. *Article 13: Duty to refund*

1. Article 13(1)

Article 13(1) requires a refund with *interest* if the credit transfer is not completed in accordance with article 17(1). "Interest", however, is not currently defined. The definition of "interest" here proposed for article 2 will correct the ambiguity.

2. Article 13(2)

This subparagraph indicates that subparagraph (1) may not be varied by agreement. That is, the purpose of article 13(2) is that the general rule of article 13(1), the "money-back guarantee", may not be varied by agreement. In so far as this is accomplished by article 13(2), this is entirely correct—it should not be possible to vary the money-back guarantee by agreement.

The money-back guarantee is a fundamental aspect of the overall synthesis of interests of parties to credit transfers under the draft model law. It works to the advantage of senders of payment orders in view of the necessary compromises on other issues made because of the high-speed, high-volume nature of electronic credit transfers.

However, as a separate matter, there is a potential ambiguity in article 13(2). Does it, for example, mean that the parties cannot agree as to an appropriate interest rate? This should be clarified.

L. *Article 14: Correction of underpayment*

An ambiguity needs to be resolved in view of existing commercial practices. Suppose the receiving bank does not issue a payment order for the difference between the amounts of the payment orders. This might occur because the originator has undertaken to remit the shortage or other arrangement may have been concluded to resolve underpayment (e.g., set-offs, etc.). What happens then? The draft model law should not be worded so as to preclude commercial practices.

M. *Article 16: Liability and damages*

1. Article 16(1), (5)

These subparagraphs are troubling in that they could create rights in a would-be beneficiary of a non-existent credit transfer against some bank. Specifically, the legal theory, and the conception of the relationships of the parties upon which this liability would exist, are seriously at variance with existing commercial legal principles and practices.

2. Article 16(3)-(5)

The "interest" which must be paid is unclear. The definition of "interest" proposed above will correct the ambiguity.

3. Article 16(4)

As currently drafted, this provision is applicable only to the obligations imposed on a beneficiary's bank that are specified in article 9(2) and (3). The draft model law does not specify the penalty for failure to perform the obligation specified in article 9(4) or 9(5). We have recommended that these obligations be deleted because of their impracticality. In any event, the penalty for violation of these obligations should have been limited to that specified in article 16(4).

4. Article 16(8)

This provision remains a very serious problem. The draft model law proposes penalties that have not been accepted in any other major electronic or telecommunications commercial field, and are unlikely to be accepted if included here.

A general "exclusivity clause" exists which states that the remedies set forth in the draft model law are exclusive. An express exception exists for "any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order *(a)* with the *intent* to cause loss, or *(b) recklessly* and with *knowledge* that loss *might* result". (article 16(8), emphasis supplied).

This exception is dangerous and unnecessary for several reasons, and is incompatible with high-volume, computerized banking and clearing systems.

First, the highlighted words may be interpreted differently in different jurisdictions, and may be seen as an invitation to award catastrophic damages. That is, terms like "intent", "recklessly", "knowledge", and "might" are imprecise without further qualification and have different meanings in different legal cultures.

Second, the words "any remedy" could be taken to include consequential damages. More generally, if "any" is meant literally, then this word is most troubling. Does this include consequential and punitive damages? Criminal sanctions?

Third, the words "reckless" and "might" are so broad as to open participating banks to liabilities that could preclude modern high-speed, high-volume systems.

Fourth, just as the language above is imprecise and vague, so too are the "trigger mechanisms". What constitutes a "failure" to execute or "improper" execution? These terms are not clearly defined. Yet, these are critical terms because these events trigger the imposition of an article 16(8) remedy.

Finally, article 16(8) is commercially unacceptable because it could apply to an originator's bank or intermediary bank that "passively" accepts a payment order.

N. *Article 18: Conflict of laws*

The general choice of law rule is that in the absence of an agreement, the law of the receiving bank applies (article 18(1)). This appears to be the proper result in the absence of a conflicts law which results in one law as applicable to all segments of a credit transfer.

However, this rule is inapplicable in the event of interloper fraud and in the event of a disputed agency relationship (article 18(2)). In such cases, there are two senders, the innocent customer and the alleged wrongdoer. If these parties are in different jurisdictions, then there are two additional potentially applicable laws to determine the issue of authority—that of the innocent customer and that of the alleged wrongdoer. This would present problems.

*Proposal:*

Article 18(2) should be eliminated in its entirety.

*Comment:*

A credit transfer system should be allowed to freely choose the law applicable to its system. The failure to include such a provision is likely to result in considerable difficulties in applying the draft model law. This is because international banking is increasingly moving toward new high-speed, high-volume means of transferring credit.

*Proposal:*

The Working Group should reconsider its earlier decision rejecting this concept.

## BANK FOR INTERNATIONAL SETTLEMENTS

*[Original: English]*

A number of comments that address specific international aspects of the draft Model Law, in particular from the point of view of cooperation between central banks, have been transmitted to [BIS] by several central banks.

In the Bank's capacity as an observer at the sessions of UNCITRAL's Working Group on International Payments, I feel that it would be helpful if we were to pass on to you, in summary form, the comments which have been received by the BIS. I therefore have pleasure in enclosing that summary, which complements, in specific areas, the observations which may already have been transmitted to you directly by the national delegations.

*Summary of the comments received by the BIS from several central banks with regard to the UNCITRAL Model Law on International Credit Transfers*

A. *General observations*

(1) Attention was generally drawn to the risk of possible conflict arising between different rules governing "national" and "international" credit transfers if the Model Law were adopted by legislation in any given country. In general it was felt that banks had sufficient capacity to distinguish between national and international credit transfers (e.g. usage of the SWIFT system).

However, the view was expressed that it was desirable for the rules which govern purely domestic credit transfers to be harmonized with those which deal with international credit transfers in order that the risks which arise in a credit transfer can be easily foreseen by the parties involved. In one country a special advisory committee is working on both the rules for purely domestic credit transfers and those for international credit transfers so that those rules become compatible.

(2) The point was raised that the application of the Model Law to interbank payments would lead to problems whenever the rules of the respective funds transfer system contradicted the rules of the Model Law. It seemed unlikely that national funds transfer systems would adapt their rules to the Model Law; in order to accomplish international funds transfers via the existing systems, the operating agency of such funds transfer systems, e.g. the central bank, would have to exclude the applicability of the Model Law as much as necessary and feasible.

(3) It was suggested that some of the problems indicated above could be overcome if the rules of the Model Law were not incorporated in a "model law" intended to be incorporated into different national legal systems but rather in a "convention". The "model law" approach could lead to a situation where, for instance, an intermediary is located in a country that had not adopted the rules of the Model Law. If, in such a case, the credit transfer was not completed, the originator's bank would have to refund the originator (article 13.1), without being able to get its money back from its receiving bank. On the other hand, a "convention" could be drafted in such a way that the rules would apply only if all banks involved were domiciled in contracting States (see, for example, the UN Convention on International Sale of Goods).

(4) A number of central banks feared that too great a divergence of the Model Law from existing national practice and domestic legal rules would cause participants in a credit transfer to make the widest use possible of "variation by agreement" (article 3), thereby invoking the danger of the Model Law being "art for art's sake".

B. *Comments on specific articles*

Article 5(*b*)(iv). *Payment to receiving bank/netting*

On the question whether there might be a conflict between the rules of netting schemes (or of a bilateral netting agreement) and the rules of the Model Law, various views were expressed.

(1) One view was that this clause should be maintained since it did not pose a major problem. The clause left the actual time of payment to be determined by the netting scheme's rules and applicable law; there was no attempt to validate or harmonize national laws governing netting.

Although these references to netting were narrow and limited, it was felt that they may be helpful in highlighting for national legislators the issue of the legal validity of netting, albeit only in the context of credit transfers.

(2) Other views expressed were in favour of deletion of the clause. It was stated that with regard to interbank netting schemes, there seemed to be a consensus that the time at which an obligation under a payment order is discharged should be determined by the terms and conditions of each netting scheme. Accordingly, it was suggested that article 5*(b)*(iv) was neither appropriate nor necessary.

The concern was voiced that the problems relating to "netting" had not yet been solved in a sufficient manner to be included in the Model Law with a view to defining the time of payment between sending and receiving bank.

(3) According to an intermediate view the clause required further study and refinement. It was thought that a mere reference to a netting agreement or to rules of a netting scheme would tend to create rather than to reduce uncertainties in this respect. For instance, it was pointed out that it was uncertain whether choice-of-law clauses in netting scheme rules would be upheld by a national court; rules relating to bankruptcy might be upheld in one, but not in the other country; bankruptcy law was mostly "national" law, and there did not exist generally accepted conflict-of-law rules regarding bankruptcy; netting involved problems like assignment of future obligations and novation of future debt that are not known or equally accepted in all legal systems. (For instance, it was stated that a rule like article 11.8 was contrary to certain national bankruptcy rules according to which a payment order is deemed to be revoked by the sender if it has not yet been accepted by the recipient.)

It was also pointed out that subparagraphs *(a)* and *(b)* open the possibility for an obligation to be settled in a "netting scheme" that did not function with all required legal security and that, in particular, did not comply with the minimum standards put forward in the Report of the Committee on Interbank Netting Schemes of the central banks of the Group of Ten Countries.

In addition, even though this clause did not seem to have a direct influence on the way participants in a "netting scheme" regulated their contractual relations, it was felt that this question should be studied more thoroughly, especially by those countries having wide experience in that domain. In addition, the references to netting in the Model Law did not address the problems which may arise from differing national law; it was suggested that this issue could be addressed by UNCITRAL in the future.

Article 10. *Time to execute payment order*

Concern was voiced that the rule according to which a receiving bank is required to execute the payment order on the day it was received created a problem whenever payment orders issued on paper and concerning small amounts were involved. In the light of the fact that the Working Group had opted not to make any reference to the form in which the payment order might exist and therefore not to limit the Model Law to electronic credit transfers, it was suggested that article 10 should more realistically reflect banking practice by obliging the receiving bank to execute a payment order no later than one banking day after the day it was received. Another solution would be to make a distinction between electronic and paper based credit transfers.

Article 13. *Duty to refund*

(1) With reference to the "money-back guarantee" and the concern that this clause—which deviates greatly from banking practice in a large number of countries—might have a bearing on the applicable capital ratio, we refer to the letter from the Secretariat of the Basle Committee on Banking Supervision of 22 May 1991 (copy enclosed).

(2) With regard to article 13.2 it was suggested in comments received by the Legal Service that the exceptions listed should be more explicit. The French version, for instance, speaks of "impossibilité de payer". Does that include bankruptcy of the bank concerned? If so, the guarantee and security which is meant to be achieved in article 13 would be greatly weakened. In addition, under certain circumstances, a bank might not wish to perform a credit transfer unless it was agreed that the originator would assume all risks.

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

(1) Some answers appear to be in favour of the proposed rule: they stated that it was not unreasonable to relate the completion of a credit transfer to the point at which the beneficiary's bank accepts the payment order. However, under existing law, this approach remains a minority view in some countries.

Even though this rule might be considered an encroachment upon the underlying relationship, the rule nevertheless had the advantage that the beneficiary's bank would be considered as his "agent", so that the beneficiary would bear the risk of his own bank's bankruptcy.

In this connection, it was suggested that while the principle contained in article 17.1 correctly stated the time when a credit transfer is completed, this provision should rather be moved to the definition of "credit transfer" in article 2*(a)*.

(2) Other answers were more critical with respect to the proposed rule. Taking into consideration the fact that credit transfers were often initiated for the purpose of discharging underlying obligations, it was observed that article 17.1 could complicate the situation because there may be some discrepancy between the time at which the credit transfer is completed pursuant to article 17.1 and the time at which the underlying obligation is discharged under relevant domestic rules.

Several answers commented that substantial differences existed with regard to time and place of "cash-less" payments. These problems were not solved by linking the completion of a credit transfer to "acceptance" by the beneficiary's bank. It was suggested that it would be preferable for international initiatives to achieve harmonization of domestic rules among major countries with regard to the time and place of payment to be revived. Such efforts should be given sufficient time to resolve possible conflicts with civil and commercial laws in those countries.

(3) With regard to article 17.2 several comments were made.

It was suggested that the question of time of payment could be dissociated from that of revocation of payment, so that the latest possible moment for revocation would be, for example, the debiting of the originator's account, while the payment itself would only be completed when the beneficiary's account was credited. This would have the advantage of reducing risks linked to credit transfers (especially that of insolvency of the originator) while at the same time being in conformity with civil law rules on the time of payment.

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

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

Article 18. *Conflict of laws*

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

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

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

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

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

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

(a) *Basle Committee on Banking Supervision*

22 May 1991

Dear Mr. Bergsten,

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

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

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

(P. C. Hayward, Secretary)

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

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

### CONTENTS