I. INTERNATIONAL PAYMENTS

A. Electronic funds transfers

1. Report of the Working Group on International Payments on the work of its sixteenth session (Vienna, 2-13 November 1987) (A/CN.9/297) [Original: English]

1. At its nineteenth session in 1986 the Commission decided to begin the preparation of Model Rules on electronic funds transfers and to entrust this task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments[1]. It also decided that the first meeting for this purpose (sixteenth session of the Working Group) should be held in 1987 after the twentieth session of the Commission[2].

2. The Commission decided that the Model Rules should be flexible and should be drafted in such a way that they did not depend upon specific technology. Where appropriate, the Model Rules should present alternative solutions in order to take into account differences in banking systems. Furthermore, the Model Rules should deal with the relationship between banks as well as the relationship between banks and their customers[3].

3. It was suggested that the Working Group should begin its work by considering the list of legal issues set forth in the final chapter of the *UNCITRAL Legal Guide on Electronic Funds Transfers*[4] (hereafter cited as *UNCITRAL Legal Guide*) as well as any other issues the secretariat might consider appropriate to place before the Working Group.

4. The Working Group held its sixteenth session at Vienna from 2-13 November 1987. The Working Group is composed of all States members of the Commission. The session was attended by representatives of the following States member of the Working Group: Argentina, Australia, Austria, Brazil, Czechoslovakia, Egypt, France, Hungary, Italy, Japan, Kenya, Mexico, Netherlands, Nigeria, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia.

5. The session was attended by observers from the following States: Bolivia, Canada, Colombia, Democratic People's Republic of Korea, Germany, Federal Republic of, Indonesia, Morocco, Poland, Republic of Korea, Saudi Arabia, Thailand.

6. The session was attended by observers from the following international organizations: International Monetary Fund, Hague Conference on Private International Law, International Institute for the Unification of Private Law, Latin American Federation of Banks, Banking Federation of the European Community, International Chamber of Commerce.

7. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora (Mexico)

Rapporteur: Mr. Mervyn Alan Keehn (Australia)

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

(a) Provisional agenda (A/CN.9/WG.IV/WP.34).

(b) Electronic Funds Transfers, Note by Secretariat (A/CN.9/WG.IV/WP.35)

(c) UNCITRAL Legal Guide on Electronic Funds Transfers, United Nations publication, Sales No. E.87.V.9

9. The Working Group adopted the following agenda:

(a) Election of Officers

(b) Adoption of the agenda

(c) Preparation of Model rules on electronic funds transfers

(d) Other business

(e) Adoption of the report.

DELIBERATIONS AND DECISIONS

10. The Working Group decided to commence its work at the current session by considering a list of legal issues that might be considered for inclusion in the model rules contained in a report prepared by the secretariat (A/CN.9/WG.IV/WP.35).

11. The following paragraphs reflect the substance of the discussion with respect to each of the legal issues considered by the Working Group.

[1]Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 230.

[2]*Ibid.*, para. 273.

[3]*Ibid.*, para. 231.

[4]/A/CN.9/SER.B/1. The list of legal issues is also found unchanged in substance in the draft *UNCITRAL Legal Guide*, A/CN.9/266/Add.2.

I. Scope of application

I.1 *Should the Model Rules apply only to international funds transfers or also to domestic funds transfers?*

12. Views were expressed on the general nature of the Model Rules to be prepared. It was suggested that Model Rules drafted narrowly so as to cover only a few precise points would be welcomed by the banking community and would be likely to be widely adopted. The prevailing view was that the Model Rules should be drafted so as to cover a wider range of banking situations and legal problems. Although such rules would have less likelihood of being widely adopted, they would serve an educational role and thereby lead towards the harmonization of law in this field.

13. A view was expressed that the Model Rules should include both domestic and international funds transfers. In support of this view it was stated that international funds transfers necessarily involved domestic elements. Therefore, in order to reduce inconsistencies between the law governing purely domestic funds transfers and the domestic elements of international funds transfers, it would be desirable to consider both in the Model Rules.

14. Under another view the Model Rules should consider only international funds transfers. It was suggested that the task would not otherwise be completed in a manageable period of time. Moreover, Model Rules limited to international funds transfers would be more likely accepted than would rules that might conflict with national law. In order to facilitate restriction of the Model Rules to the international aspects of funds transfers, it was suggested that they should be restricted to inter-bank relationships. In opposition, it was stated that the inter-bank relationships could be adequately governed by contracts between the banks; the interest in the Model Rules lay in the possibility of developing rules affecting the rights of customers.

15. The prevailing view was that the Model Rules should concentrate on problems arising in international funds transfers, but would have to consider both domestic and international aspects of such transactions, and that a decision should be made at a later time on the extent to which the Rules should be considered to be applicable to domestic funds transfers.

I.2 *Should the Model Rules apply only to electronic funds transfers or also to paper-based transfers?*

16. There was general agreement that the Model Rules should not apply to the truncation of negotiable instruments even though in such cases the essential data is forwarded to the drawee by electronic means. Negotiable instruments present too many special problems that are already regulated by statutory law and international conventions. Furthermore, at least at the present time there appeared to be no truncation of negotiable instruments that circulate internationally.

17. Under one view the Model Rules should apply only to the electronic aspects of funds transfers. Under another view it would be preferable for the Model Rules to cover both electronic funds transfers and paper-based funds transfers. In support of that view it was suggested that, since many funds transfers used both electronic and paper-based techniques, it would be difficult to consider one without considering the other. Furthermore, although it was the special problems created by the electronic aspects of funds transfers that had led to the decision to prepare the Model Rules, the Model Rules should in any case be based to the extent appropriate on the rules governing paper-based funds transfers.

I.3 *Should the Model Rules apply to both credit transfers and debit transfers?*

18. In reply to a question whether there were currently in use any international electronic debit transfers, it was pointed out that the use of certain payment cards brought about a debit transfer. Another form of international electronic debit transfer was created when Eurobonds held in electronic form were sold and the clearing took place against credit to an account. It appeared, however, that ordinary commercial debit transfers fulfilling the payment functions of a bill of exchange did not exist as yet internationally.

19. The prevailing view was that the Commission should concentrate on credit transfers but that the Model Rules should be drafted, if possible, so that they could be adapted to debit transfers at a later time if that was found to be desirable.

I.4 *Should the Model Rules apply only to funds transfers where accounts at banks are to be debited and credited or should they also apply where accounts at other financial institutions are to be debited and credited?*

20. Under one view only accounts at banks should be envisaged. It was stated that in most countries the definition of what constituted a bank was established by law and the activity of banking was regulated strictly. Under another view many financial institutions other than banks engaged in electronic funds transfers. The Model Rules would apply to an activity and they should apply to all financial institutions that engaged in that activity. However, the Model Rules should stay neutral as to what kinds of financial institutions would be envisaged.

I.5 *Should consumer electronic funds transfers be excluded from the scope of application of the Model Rules?*

21. A view was expressed that the Model Rules should not cover consumer electronic funds transfers. In support of that view it was stated that there were already laws dealing with consumer funds transfers in several countries and that other international organiza-

tions, such as the Organization for Economic Co-operation and Development and the European Communities, were already studying these issues in respect of the countries belonging to those organizations. It was suggested that consumer issues were better dealt with at the national or regional level since they involved policy choices that might appropriately vary in different parts of the world.

22. According to another view consumer electronic funds transfers should not, as such, be excluded from the scope of application of the Model Rules. It was stated that, although there were different inter-bank arrangements for different electronic funds transfer techniques, those differences were not based on whether the funds transfer was by a consumer or for a consumer purpose. In general, it would be difficult to prepare a definition of a consumer funds transfer that would be adequate in all situations on a global basis.

23. It was suggested that, for the purposes of the Model Rules, it would be better not to employ the word "consumer", which is a loaded term in many countries, but to employ the term "user" or "customer". It was further suggested that in many cases the legal problems were the same in respect of all classes of users. This could best be determined by an examination of specific legal issues as they arose. It was also suggested that if the Model Rules were to offer solutions at a sufficient level of generality, it might be possible, in respect of certain classes of transactions or parties, for countries to adopt consumer protection legislation that would nevertheless remain consistent with the Model Rules. In response to a suggestion that the Model Rules might distinguish between high-value and low-value funds transfers, it was stated that the value of a funds transfer did not change the nature of the legal issues involved. A view was also expressed that it was premature to discuss whether the Model Rules should deal with funds transfers that raised issues of consumer rights until it had been decided to what extent the Model Rules would deal with issues that were not themselves connected to the international nature of the funds transfer.

II. Definitions and general provisions

II.1 *What terms should be defined in the Model Rules and what should be the orientation of the definition given?*

24. The Working Group considered the following types of terms that might be defined:

(a) Parties to a funds transfer;

(b) Bank;

(c) Funds transfer instruction;

(d) Dates relevant to the funds transfer: entry date; interest date; pay date and value date.

25. It was pointed out that terminology in this field had not as yet become standardized. The Committee on Banking and Related Financial Services of the International Organization for Standardization (ISO TC68) was in the process of standardizing the terminology that was being used by its various sub-committees when developing international standards and that it was intended to include in that effort the terminology used by the International Chamber of Commerce in its draft inter-bank compensation rules.

26. It was noted that the ISO TC68 terminology focused on the bank-to-bank transaction, which was a consequence in part of the fact that the international standards developed by that committee dealt primarily with the credit transfer message that passed between two banks. The terminology used in the *UNCITRAL Legal Guide* reflected the fact that the *Legal Guide* looked at the funds transfer primarily from the point of view of a bank customer transferring funds to the account of another bank customer at the same or a different bank. It also reflected the desire to use the same terminology, to the extent possible, to describe both credit transfers and debit transfers.

27. A view was expressed that the terms proposed by ISO TC68 should be used in the Model Rules. In support of this view it was stated that it was important to harmonize the terms as used by bankers and as used in legal rules governing funds transfers so as to reduce confusion. Under another view the terminology used in the *Legal Guide* was more appropriate for legal rules that were concerned with the rights of customers. It was also stated that, since the Working Group had decided that the Model Rules should be drafted in a style that would permit their application to debit transfers, the terminology in the *Legal Guide* should be used since it was more adaptable to debit transfers than was the ISO TC68 terminology.

28. The prevailing view was that an effort should be made to use the ISO TC68 terminology, but only to the extent that it was consistent with the purposes and needs of the Model Rules. It was pointed out that, in any case, great care would have to be taken in regard to the problems of terminology in languages other than English and French (the languages used by ISO TC68) and that it would be important for technicians in those languages to be consulted when the Model Rules were prepared.

II.2 *Should the Model Rules contain a rule as to the effect of contracts on matters governed by the Rules?*

29. Under one view it was inconsistent to discuss the effect of contracts on matters governed by the Model Rules when the Rules themselves would not necessarily be of a normative nature. Under another view, even if the Model Rules were not of a normative nature, they could indicate the view of the Commission as to the appropriate substantive rule and the extent to which that rule might be varied by contract.

30. There was general agreement that many aspects of the inter-bank funds transfer process and of the relationship between banks and their customers would continue to be governed by contracts. Under one view

those contracts should prevail over anything in the Model Rules to the contrary. In support it was stated that the provisions of the Model Rules would still be of value since they would apply in respect of issues not covered by those contracts or where there was no contract. Under another view, at least some aspects of the Rules would have to be mandatory to be effective. Otherwise, banks would be able to change them to their advantage through contracts of adhesion. Moreover, in some cases it might be necessary to have mandatory rules in order to achieve a desirable uniformity of result. It was suggested that it would be possible to decide on the desirability that the Model Rules be mandatory only as each issue was considered.

31. As to whether a customer should have a right to rely on the provisions of an inter-bank contract, under one view such contracts could give rights only to the parties to those contracts. Under another view, if customers could not rely on those contracts, for example in respect of the time within which a receiving bank had to notify a sending bank that it would not act on a funds transfer instruction, the Model Rules would have to have provisions on those matters that might duplicate or be different from the inter-bank rule.

II.3 *Should the Model Rules contain rules for their interpretation?*

32. A view was expressed that the question covered two issues, namely whether the Model Rules should contain rules for their own interpretation and whether the Model Rules should contain rules of interpretation of funds transfer instructions. A view was expressed that the Model Rules should not contain rules for their own interpretation. In support of this view it was stated that rules of interpretation cause more problems than the rules they seek to interpret. The prevailing view favoured the inclusion of rules for the interpretation of the Model Rules. In support of this view it was stated that interpretation provisions were useful in international texts and that there were standard formats for such provisions for use in UNCITRAL texts that would be appropriate in this context.

33. The Working Group considered the suggestion that a rule of interpretation in the Model Rules could be used to indicate which was to prevail when the account to be debited or credited was indicated both by name and by number and the two were not consistent. Views were expressed that banks do not generally bother with names since many people carry the same name. It was also said that computers do not transmit names and there may even be technical problems in doing so. Furthermore, a comparison of account numbers and names would cause delays. Under another view an instruction must be followed strictly as it was given. When it is not followed, the bank has breached its obligation to the customer. When the designation of the account is given by name and by number, the bank should investigate the cause of any discrepancy. A view was expressed that the rule to resolve this matter would not be a rule of interpretation but a substantive rule which would have to be resolved in connection with matters of liability.

II.4 *Should the Model Rules contain provisions on conflicts of laws?*

34. The Working Group was informed that the Hague Conference on Private International Law would have before it in January 1988 a report discussing whether the Conference should undertake work on conflicts of law in respect of transborder data flow. One aspect of that report would consider electronic funds transfers.

35. A view was expressed that the Model Rules should not contain provisions on conflicts of laws. In support of that view it was stated that there were no domestic laws on electronic funds transfers. It would therefore be useless to provide conflict rules where specific domestic law did not yet exist. It was further stated that conflicts of laws problems arising in this area did not differ from those in any other area of activity and that, therefore, there was no need to have special rules unless there were specific problems relating to electronic funds transfers.

36. It was agreed that conflicts of laws issues in this area were of great importance and under one view the Model Rules should contain provisions on the subject since the lack of agreement on what law was applicable to different aspects of funds transfers was one of the problems facing bankers and their lawyers. It was stated that the rules on conflicts of laws should be consistent with the substantive rules developed on the various issues and that the experience with rules for paper-based transfers should be used wherever possible. The Working Group expressed the hope that it would be possible to co-operate with the Hague Conference in this endeavour.

III. Obligations of parties

A. *Form of the instruction*

III.1 *Should the Model Rules include a provision on the form and minimum content of a funds transfer instruction?*

37. Under one view there was no need for the Model Rules to prescribe the form or minimum content of a funds transfer instruction. It was stated that the computers of neither the sending bank nor the receiving bank would process an instruction that did not include the data elements required by the funds transfer system in use. In reply it was stated the instruction might be sent by telex, in which case it was quite possible for the instruction to be incomplete.

38. Under another view the substantive provisions in the Model Rules would be based on assumptions as to the content of the various messages; it was important that those assumptions be made clear. The Working Group observed that the data elements to be required should be as limited as possible so as to guard against their becoming obsolete by the rapid advance of technology and to be sure that they did not give a competitive advantage to one system over another.

III.2 *Should the Model Rules require funds transfer instructions to be authenticated? If so, should they prescribe mandatory or acceptable forms of authentication? Should they state the consequences of following the form of authentication agreed for the type of instruction used?*

39. Under one view the reason for requiring authentication in most systems was to ensure the protection of the banker of the party to be debited. In support of this view it was stated that the question had arisen in the past most often in the context of deciding who should bear the loss where a signature had been forged so well that the forgery could not be easily detected. Many national laws put the loss on the banker since the banker was authorized to respond only to instructions emanating from the customer. In the case of a forged signature or other unauthorized instruction the customer would have had nothing to do with the instruction.

40. Under another view the requirement of an authentication was for the protection of the customer as well as the bank. Usually, once the bank had shown that it had received an instruction that appeared to be genuine, the bank would not recredit the customer's account unless the customer proved that the authentication was not genuine. Therefore, it was important to the customer that the system be so designed as to reduce to a minimum the likelihood of a forged signature or other unauthorized authentication. This was of particular importance in electronic funds transfers where it would normally be very difficult to show that an apparently correct authentication was in fact false.

41. Views were expressed that the Model Rules should not contain rules requiring funds transfers to be authenticated or rules prescribing the forms of authentication that would be acceptable. In support of those views it was stated that the methods of authentication depended on the system being used. It was pointed out that those methods were continually changing with technology. It was said to be up to the bank to set up an appropriate form of authentication as it would suffer liability in the event the authentication was false. Furthermore, since the form of authentication would be governed by a contract between the sender and receiver of the instruction, the issue of authentication could not be resolved without first solving the question of the relationship between the Model Rules and contracts. Holders of this view also subscribed to the view that the concern of the Model Rules in this regard should be to allocate responsibility for loss arising out of a false authentication.

42. The prevailing view was that the Model Rules should require identification of the sender of a funds transfer instruction before a bank could debit an account, but no particular method or level of authentication should be prescribed. Since different levels of security would be appropriate for different types of funds transfers, banks and their customers, including other banks, might appropriately agree on the level of security desired.

43. The Working Group then considered what consequences should follow when the bank acted on an instruction that had been falsely authenticated. There was general agreement that the bank had the responsibility to justify every debit to a customer's account. It was suggested that a bank could in some circumstances justify a debit to an account when the instruction was shown to be false, for example, when the false authentication was caused by the negligence of the customer or when an insecure method of authentication had been chosen by the customer because it was less expensive. The view was expressed that these questions could be pursued only in the context of a full discussion of the allocation of loss arising out of fraud or error.

44. It was further suggested that different levels of responsibility might be imposed on sophisticated users and unsophisticated users. In respect of funds transfer systems oriented towards individual customers, a lower level of security might be decided upon by the bank in order to save money for both the bank and customers. In respect of funds transfer systems oriented towards more sophisticated users, the user may have a choice as to the level of security desired. In bank-to-bank transactions the level of security of the authentication may be determined by all the banks in the system. The view was expressed that special consideration would have to be given to the extent to which, if at all, the parties should be permitted to allocate by contract the loss arising out of a false authentication.

45. The Working Group also noted that in a certain number of cases it was impossible to determine whether the authentication of an instruction was false or not. Under one view it was felt the bank should be required to bear any such losses, but under another view the question of whether the bank had the burden of proving the legitimacy of an apparently legitimate authentication or whether the customer had the burden of proving its falsity was determinative as to the party who bore the risk of the loss.

B. *Obligations arising out of funds transfer*

III.3 *Should the receiver of an instruction be obligated to act on a funds transfer instruction it has received?*

46. There was general agreement that a bank did not invariably have an obligation to follow an instruction it had received. Under one view the receiving bank had no obligation to follow an instruction until the bank had accepted the instruction. At most, failure to act on an instruction that had not been accepted might give rise to a breach of contract. Under another view where there was a pre-existing contract between the sender and the receiving bank, the receiving bank would be responsible on an instruction that conformed to the contract once the instruction was received.

47. It was noted that if it was decided that the receiving bank was never obligated as a matter of banking law to follow the instruction until the instruction had been

accepted, it would not be necessary to determine the circumstances that would justify the bank's refusal to follow the instruction. Any such determination could be left to the contract between the parties. On the other hand if it was decided that the receiving bank would be obligated to follow the instructions it had received, the list of situations when the bank would be exonerated from that obligation found in the working paper at paragraph 62 would be the nucleus of any such list to be included in the Model Rules.

48. The Working Group noted that if the obligations of a receiving bank to follow an instruction arose only on its acceptance of it, the concept of acceptance would have to be defined for this particular purpose. The idea of acceptance was widely used in the law, for example the acceptance of an offer or the acceptance of a bill of exchange, and these existing definitions would probably confuse rather than clarify the matter. It was said that the definition of acceptance in the draft legislation in the United States took over a page.

49. The view was expressed that if a bank did not intend to follow an instruction, it should have an obligation to notify the sender that it would not do so. Otherwise the sender could reasonably anticipate that his instruction was being carried out and the funds transfer was being made. Under one view this obligation should exist only when the sender was a bank. It was also suggested that such an obligation should not exist where the receiving bank had no prior contractual relationship with the sending bank. The prevailing view was that the receiving bank should have an obligation to notify the sender if it did not intend to follow an instruction, whether or not there was a contract between the sender and the receiving bank.

50. It was noted that an obligation on the receiving bank to notify the sender if it was not going to follow the instruction implied the existence of a time-limit. This raised two questions: the length of the time limit, and the consequence of failure to comply with the time limit. The Working Group did not consider the time limit that would be appropriate. As to the consequences of failing to notify in time that it would not follow the instruction, one suggestion was that the receiving bank should be considered to have accepted the instruction by the passage of time. The consequences of its failure to act would then be the same as in any other case of failure to comply with an instruction it had accepted.

51. Different views were expressed as to whether the bank sending a notice that it would not follow a funds transfer instruction should be required to give the reasons for its failure to act. On the one hand, it was stated that, from the viewpoint of the transferor and of the sending bank, it was important to know what needed to be done to modify the instruction or otherwise cause the receiving bank to act on it. If the receiving bank would not in any case act on the instruction, another intermediary bank would have to be used. On the other hand, it was stated that it was dangerous for the receiving bank to be required to give reasons for its refusal to execute the instruction, especially when it turned out that the reason given by a busy clerk turned out to be incorrect. It was also stated that when the difficulty was of a technical nature, the computer of the receiving bank might reject the instruction without human intervention. If the computer of the receiving bank was programmed to do so, it might indicate to the sender the reason it had rejected the instruction. When the reason for rejection was, for example, that the receiving bank suspected illegal activities, it would be inappropriate to require the receiving bank to notify the sending bank of its suspicions.

III.4 *If the Model Rules require a receiving bank to act on a funds transfer instruction, what actions would be required?*

52. Different views were expressed as to whether the Model Rules should set forth specific actions to be taken by a receiving bank, such as those listed in paragraph 51 of the working paper, or whether a general statement of obligation to do that which was necessary would be sufficient. It was suggested that in any case the Model Rules should not mention steps, such as verification of an authentication, that the bank would take for its own protection. It would be sufficient to state the consequences of having acted on a false authentication and permit the bank to decide whether in some circumstances it preferred not to verify the authentication and run the risk of bearing a loss.

53. The general view was that the Model Rules should describe in general terms the actions to be taken by a bank that was required to act on an instruction. It was suggested, for example, that a receiving bank that had accepted an instruction would be liable to carry out the instruction received, without setting forth in detail how it would do so.

54. A question was raised as to whether an intermediary bank that forwarded an instruction would be deemed to have guaranteed the authentication of the instruction received by his sending bank. Under one view if the transferor's authentication was false, every bank in the transmission chain from the transferor bank to the transferee bank where the account of the fraudulent party was held should be responsible to the defrauded party. Under another view a bank could verify only the authentication of the message it had received; it could not be held responsible for frauds or errors that happened prior to the message it had received. On the other hand, if the proceeds of the fraud or error were still in the possession of a bank, an adequate procedure should be available to permit the defrauded party to recover those funds.

III.5 *Should the Model Rules provide that the duty of the transferor bank is limited to performing certain specified acts as suggested above or should the duty of the transferor bank be to see that the transferor's instruction is carried out?*

55. The discussion of this question was limited to problems that arose prior to the time a correct funds

transfer instruction arrived at the transferee bank. In all but a few cases the transferee would have designated the transferee bank, and the transferor bank would have had no influence over that choice.

56. The view was expressed that the transferor bank undertakes as against its customer an obligation to achieve a result, i.e. to see that the funds transfer is effected. Therefore, it must be responsible to its customer for the consequences of any failure to effect the transfer as instructed, wherever the failure took place. If the failure occurred at an intermediary bank, the transferor bank should have a right of indemnity from that bank. In the opinion of some who held this view, the situation could appropriately be compared to that involved where goods were to be carried by successive carriers. If the goods were damaged, the consignor or consignee as the case may be could recover from the carrier with whom he had dealt. It was stated that this result was particularly important in international electronic funds transfers since it was often unclear what had gone wrong or where and, in any case, an intermediary bank would usually be in a foreign country where it would be difficult for the transferor to pursue his claim.

57. Under a different view a bank should be held responsible only for its own acts. One of those acts would be the choice of an appropriate transmission system and intermediary bank, but if the choice had been appropriate, the transferor bank should not be responsible for their failures. It was stated that, contrary to what was indicated in the prior paragraph, a bank undertook only to use its best efforts. Furthermore, since bank charges for making funds transfers were quite low and were not commensurate with the risk that would be involved if banks had to be responsible for failures at other banks, the cost of making funds transfers would increase.

58. It was suggested that much of the concern about increased risk was in reality related to a concern over the possibility of consequential damages. It was suggested that the present issue should be considered in the context of funds transfers that had gone astray and the claim of the customer was limited to return of the funds that had not been credited to the account of the transferee as instructed, with interest if appropriate, or was a claim for interest alone based on a delay in the funds transfer. At a later time consideration could be given to the question when, and from whom, consequential damages should be available as a result of the non-fulfilment of a funds transfer as instructed.

59. It was also suggested that consideration of the issue as to whether the transferor bank should be responsible to the transferor for failures that occurred at other banks became confused with the separate question as to the basis of liability of the transferor bank or intermediary bank, i.e. whether it should be strictly liable to achieve a result, should be liable unless it proved it was not at fault, or should be liable only if the transferor proved that the loss had occurred as a result of negligence or other fault.

60. The prevailing view was that the transferor bank should be responsible for the loss unless it showed that the loss had not occurred through its fault. Discussion centred on how the transferor bank could show that the problem had not occurred through its fault. It was suggested that this would require it to show who was at fault. A question was raised whether the transferor would then have to pursue the party at fault. Since there would be no direct contractual link between the transferor and the intermediary bank, several theories were suggested by which the transferor would acquire either a direct right of action or a derivative right of action from the transferor bank. Another question raised was whether the transferor bank would again become responsible if the intermediary bank was held by a court not to have been at fault. A question was also raised as to who should bear the loss if it occurred through the fault of an entity with limited liability, such as a telecommunications carrier. It was suggested that insurance might be available to reimburse for any such loss.

III.6 *Should the Model Rules provide whether and to what extent the responsibility of intermediary banks and transferee banks for properly carrying out their part in the funds transfer is to the bank that sent them the funds transfer instruction, to prior parties, especially the transferor, and in the case of the transferee bank, to the transferee?*

61. It was pointed out that most of this issue had been discussed in the context of the responsibility of the transferor bank to the transferor. However, the situation of the transferee bank had not been considered.

62. It was noted that at some point of time the transferee bank would become responsible only to the transferee. It was less clear when that point of time was reached and the nature of the transferee bank's responsibility prior to that time. It was suggested that a provision that the transferee bank was responsible only to the party who had chosen it, i.e. the transferee in almost every case, would have the practical effect that the transferor's obligation in regard to both the funds transfer and the underlying debt would be satisfied when a correct funds transfer instruction arrived at the transferee bank. Subsequent credit of the transferee's account would be important to the transferee but not to the transferor. On the other hand, a rule that the funds transfer was not complete until the transferee was "paid" by credit to its account or otherwise led to the conclusion that the transferee bank was responsible either to the transferor, the transferor bank or the last intermediary bank.

63. Because of the close inter-connection between these problems and the rules on finality which were yet to be considered, the Working Group decided to defer consideration of this issue.

III.7 *Should the Model Rules specify the occasions when the receiving bank would not be required to carry out the instruction?*

64. In light of the agreement that a receiving bank should not be required as a matter of banking law to carry out the instruction until it had accepted the instruction, it was not felt necessary to consider the question. It was recognized that in the further elaboration of the Model Rules it would become necessary to consider what events would exonerate a bank that had accepted an instruction from a failure to carry out that instruction.

III.8 *Should the Model Rules state the periods of time within which funds transfers must be implemented?*

65. One view was that the periods of time within which banks act on an electronic funds transfer instruction vary so much from one country to another and from one type of transmission technique to another that it would not be possible to fix specific time limits for a funds transfer. A different view was that customers and bankers alike would benefit from specific time limits and that, with the current technology, it would be possible to fix limits that would be meaningful but would not be too constraining on banks. It was suggested that it would already be helpful if a rule was devised with the limit left open to be filled in by each country. It might also be necessary to have a series of different time limits for different circumstances, or to phrase the limit as one of a reasonable period of time or "as soon as possible". During the discussion it became evident that some participants were thinking of time limits of 24 hours or less while others were thinking of up to a month, depending on the nature of the transaction.

66. The suggestion was also made that it would be sufficient if each bank in the chain was required to act within a specific period of time. The transferor could know the maximum period of time necessary for the funds transfer by adding the amount necessary for each segment.

67. It was stated that a transferor who needed funds available at a particular location at a particular time could contract with his bank by fixing a pay date. If the bank was not willing to commit itself to such an obligation, it could refuse to accept the instruction, or could accept it with a disclaimer as to its ability to guarantee the pay date. It was also suggested that, if the Model Rules were to set maximum time limits for funds transfers, those limits should be subject to being shortened by agreement but not lengthened.

68. There was general agreement that the draft rules should provide that if a transferor requested a particular pay date, the transferor bank should say whether it could meet that date. The Model Rules could provide the maximum period of time in which the funds transfer should be completed for those cases in which no pay date was requested by the transferor. It was noted that some delegations would prefer a less specific time.

III.9 *Should the Model Rules provide for the obligations of the sender of the funds transfer instruction?*

69. Although the Working Group agreed that the sender of the instruction was obligated to give correct information and to reimburse the receiving bank, it was not thought necessary to so provide in the Model Rules.

III.10 *Should the Model Rules provide for the obligations of the parties to the funds transfer process other than the banks?*

70. It was suggested that the Model Rules should provide that clearing houses and parties to the funds transfer process other than banks, such as telecommunications carriers, would be liable where the loss was attributable to them.

71. However, it was noted that the Model Rules could not effectively provide rules on the liability of public telecommunications carriers because in most countries they were exempt by rules of administrative law from liability for damages caused by loss or delay of messages or change in their content. Views were expressed that even though this was true, many international electronic funds transfer instructions were carried by networks that did not enjoy such an exemption from liability under administrative law. Some such networks were owned by banks. In some cases individual banks operated message systems by which they transmitted both domestic and international funds transfer instructions. It was suggested that the Model Rules should not ignore the consequences of loss caused by these message systems.

72. The prevailing view was that the Model Rules should not attempt to cover the liability of telecommunications carriers enjoying limited liability, but that there should be rules allocating any loss caused by such an entity between the parties to the funds transfer. In this respect it was noted that it had already been decided that the transferor bank should, in general, be responsible to the transferor for the proper carrying out of the funds transfer instruction, subject to indemnification by subsequent banks in the chain and to defences that were yet to be determined. It would be necessary to establish within the context of that liability system the party who should assume the loss caused by a telecommunications carrier or other such party.

C. *Obligations subsequent to the funds transfer*

III.11 *Should the Model Rules provide that banks are required to make a detailed statement available to their customers in respect of debits and credits to their accounts and the frequency of such statements?*

III.12 *Should the Model Rules provide that the bank's statement as to the debits and credits it has entered to the account is final if the customer does not object within some period of time? Should this period be shorter than the limitation period for beginning legal action? If so, about how long should it be and from what event should the time be measured?*

73. The Working Group decided to consider questions III.11 and III.12 together since they raised related issues.

74. The view was expressed that the frequency and manner by which banks distributed a notice of debits and credits to customer accounts was a matter involving the status of the account that was not properly for consideration in the Model Rules. Practices differed widely from one country to another and from one type of account to another.

75. Under another view it was not primarily a question of the status of the account but of the notification of a funds transfers that had been reflected by an entry in the account. With the increase in the number and value of funds transfers, the constant possibility of and the speed with which fraudulent transactions could be completed, all of which were associated with the increase in the use of electronic funds transfers, it would be to the benefit of both customers and banks for customers to be expected to report questionable transactions to their bank as soon as possible. This suggested that customers should have only a limited period of time within which to report apparent discrepancies. At the end of the period the customer might be precluded from raising the discrepancy, or the burden of proof that there had been an error or fraud might be placed on the customer. If this were so, banks would need to furnish some form of notification of transactions within a reasonable period of time.

76. It was suggested that different rules might apply in respect of individuals and of commercial customers. It was also suggested that large commercial customers sending and receiving large numbers of funds transfer instructions often could not be aware of discrepancies for a long period of time. It was questioned whether notice should be considered to have been given if the customer could access transaction information from his account by on-line computer link. A view was expressed that the Model Rules might contain a provision on the weight to be given to the records of the bank as evidence of the payment by the transferor to the transferee.

77. The prevailing view was that the Model Rules should take into consideration the need for the bank to make available to customers a record of international electronic funds transfers and the period of time within which customers could question allegedly unauthorized or incorrect entries to the account.

IV. Error, fraud and liability therefor

IV.1 *Should the Model Rules specify the consequences and the procedures for rectifying an error when*

- *the amount of the funds transfer was credited to an account at the wrong branch or at the wrong bank;*
- *the amount was credited to the wrong account at the correct bank;*
- *an insufficient amount was credited to the transferor's account;*
- *an excessive amount was credited to the transferor's account.*

78. It was stated that errors in international electronic funds transfers were frequent (having regard to the large number of transactions) and were usually settled easily in the absence of any specific error resolution procedure. It was pointed out that many aspects of an error resolution procedure would follow automatically from the decision of the Working Group that the transferor bank would be liable to the transferor for the proper carrying out of the funds transfer instruction unless it showed a reason why it should be exonerated. The right of each bank to indemnity from the bank to which it had sent a proper instruction would assure that the loss was placed on the bank where the error had occurred.

79. The Working Group considered whether a bank could make corrections to an account by debiting it without the consent of the customer. It was stated that banks do it regularly when the error was of a bookkeeping variety or was otherwise manifest and, it was suggested, the power of a bank to correct such an error was an implied term of the contract between the bank and its customer and should be considered acceptable. It was also suggested that the customer should be informed of the action of the bank and should have an opportunity to object. It was agreed that where there was a conflict over the entry, the bank had no power to correct the entry by unilateral action. A view was expressed that in some jurisdictions a bank had no power to correct any type of entry by debiting the customer's account without its consent and that such conduct on the part of the bank could very well be unconstitutional as amounting to taking the property of another without the process of law. It was also stated that in some countries the question was considered to be governed by the rules on the finality of a funds transfer.

80. The Working Group considered whether banks and customers should have an obligation to pay interest on funds that had been incorrectly credited to their account. It was pointed out that the draft interbank compensation rules being prepared by the International Chamber of Commerce contained such an obligation since the bank incorrectly credited with funds should not unjustly enrich itself in such a situation.

81. A general view was expressed that the customer should not bear any responsibility for interest on

money incorrectly credited to his account but that when the bank recovered the funds it should be able to recover any interest it might have credited the customer as a result of the excessive credit in the account. In support of that view it was stated that bank customers are not in the same situation as are banks. While banks actively manage all funds at their disposal, bank customers might not have earned any interest on the funds and might not even have been aware of the credit to the account. A view was expressed that where a customer used the funds knowing they had been wrongly credited, and it could be demonstrated that it had profited, the customer should reimburse the bank for interest. Another view was expressed that a customer should pay interest only where it had been asked for return of the funds and it had not returned them or where it had received the funds in bad faith.

IV.2 *Should the Model Rules contain provisions establishing the appropriate jurisdiction in case of litigation involving an international electronic funds transfer?*

82. The Working Group decided to postpone consideration of the question.

IV.3, IV.4 and IV.5

83. The Working Group decided not to consider questions IV.3, IV.4 and IV.5 since the issues had been dealt with during its consideration of question IV.1.

IV.6 *Should the Model Rules provide that a bank might be liable for consequential damages for its failure to execute a funds transfer properly?*

84. It was noted that the term "consequential damages" did not adequately express the desired concept in all languages. In the context it was used here it referred to any loss other than loss of funds, interest and loss arising out of changes in exchange rates.

85. There was a divergence of views on this issue. Under one view banks should be liable for consequential damages only if such damages were foreseeable by the bank. This was said to be the normal rule in contract law and that it struck a fair balance between the interests of the transferor and the transferor bank. It was stated that it was a particularly appropriate rule in view of the liability scheme agreed upon by the Working Group, since it would be up to the transferor bank to include in its funds transfer instruction to its receiving bank the information giving rise to foreseeability of possible consequential damages if it were to be able to recover indemnification for such damages from that receiving bank.

86. Under another view the test of foreseeability when applied to funds transfers often gave rise to difficult speculation as to the knowledge of various officials of the bank as to the possibility of consequential damages. It was suggested that the bank should be liable only if it had specifically contracted for such responsibility. Under yet another view the bank should be liable for consequential damages only if it had been negligent, or under still another view, if it had been in bad faith, or if it had been in deliberate disregard of the transferor's interest. It was also suggested that the matter, arising in the first place between the transferor and the transferor bank, could be left to local law.

IV.7 *Should the Model Rules contain rules as to whether the transferor is responsible for some or all fraudulent activity of family members, employees, or third persons that cause a funds transfer instruction to be sent to the transferor bank?*

87. The Working Group did not consider question IV.7 in detail.

V. Finality

88. Rather than considering the individual questions in the working paper as it had in regard to the other major issues, the Working Group decided that the first task was to clarify the concept of finality. It noted that, while all legal systems faced similar practical problems, the differences in organization of the banking system and the different legal concepts used to arrive at the solutions to the problems made it particularly difficult to consider this subject.

89. The Working Group decided to proceed by first considering two interrelated questions: whether there should be a single point of time when a funds transfer instruction should be considered to be final for all legal purposes and whether the questions of finality should be considered only in the context of the funds transfer as a whole or whether, when there were several transactions in the funds transfer, there should be separate rules of finality for each transaction.

90. A view was expressed that an attempt should be made to have a rule that would provide a single point of time at which a funds transfer would become final for all purposes. Such a rule would reflect the reality of the changing legal relationships between the transferor and transferee, transferor and transferor bank and transferee and transferee bank. Since the change in legal relationships would occur at some point of time, the consequences of that change in legal relationships should also be recognized as having occurred at that point of time. Banks should organize their funds transfer operations in such a way that they can effectively implement the obligations that flow from those legal relationships, bearing in mind the legal ownership of the funds at each step of the transaction.

91. Under another view it would not be feasible to have a single point of time when all aspects of the funds transfer would become final. In particular, it was pointed out that each transaction in a funds transfer would involve the sending and receipt of a funds transfer instruction between two banks and settlement between them. The fact that the high-value funds transfer systems in operation that include a settlement feature all had rules on two important aspects of finality (namely revocability of the instruction by the sending bank and reversibility of the transaction in case

of failure to settle) showed that finality rules already existed for the individual transactions. It was suggested that, while the finality rules of these funds transfer systems expressly governed only the banks themselves, they should be taken into account when considering the rules on finality for the funds transfer between the transferor and the transferee.

92. As to the right of the transferor to revoke the funds transfer instruction, under one view he should be able to do so until the latest possible point of time, i.e. when appropriate action had been taken by the transferee bank, which was assumed to be at the time of credit to the transferee's account. Until that time the transferor was master of the instruction. The instruction revoking the prior instruction might follow the same route as the original funds transfer instruction or, according to another suggestion, the transferor might have the revocation sent directly to an intermediary bank or to the transferee bank. It was suggested that the revocation would be effective only if it overtook the funds transfer instruction before that instruction had been acted upon. It was also stated that the revocation should be at the risk and expense of the transferor.

93. Under another view the transferor should lose the right to revoke the funds transfer instruction at an early point of time, which might be when the transferor bank had accepted the instruction, normally by debiting the transferor's account or by sending the instruction to an intermediary bank or to the transferee bank. It was suggested that permitting the transferor to revoke at a later time might be dangerous for the banking system. In reply it was suggested that the transferor's right to revoke its instruction need not put in question the finality of each separate transaction within the funds transfer.

94. During the discussion it was recognized that in some countries the transferor in a consumer funds transfer as defined by national law had been given an extended right to revoke funds transfers. Because of the special policy issues involved in such rules, the Working Group did not consider them as a basis for its own consideration of finality issues in international funds transfers.

95. The Working Group noted that a distinction should be made between revocation of a funds transfer instruction on the initiative of the transferor and reversibility of the action taken by a bank in pursuance of that instruction because the receiving bank did not receive settlement for the instruction. The Working Group noted that in some legal systems a bank was authorized to reverse the credit it had given because of failure to receive settlement while in other legal systems the rules on finality would preclude such reversal. It was noted that in international funds transfers transferees in one country might find that credit to their account had been reversed because of the failure of a bank in another country to receive settlement.

96. The Working Group undertook a preliminary consideration of the issues involved in the case of the bankruptcy of the transferor, transferee or of one of the relevant banks during the course of the funds transfer. It was noted that the existence of finality rules for each transaction in the funds transfer chain might tend towards placing the risk of the failure of an intermediary bank on the other banks rather than on the transferor.

97. The Working Group also exchanged views as to when credit to the account of the transferor would no longer be subject to attachment or other legal process and when credit to the account of the transferee became subject to such legal process. The difficulty of knowing when an account had been debited or credited was noted as well as the question whether debiting or crediting the account should be treated as a relevant legal act since the bank could schedule its off-line data processing operations at the time of the day most convenient to it. The view was expressed that there should not be different rules on finality for on-line and off-line data processing operations in a funds transfer. Under another view any rules on finality should take account of the technological changes that had taken place and they should be defined in operational terms that could be carried out by a bank.

FUTURE WORK

98. The Working Group requested the secretariat to prepare draft provisions based on the discussions during this session for its consideration at its next meeting. Where it seemed appropriate, the secretariat should prepare alternative provisions.

99. The Working Group recommended that its seventeenth session be held in New York from 5 to 15 July 1988.

2. Electronic funds transfers: note by the Secretariat (A/CN.9/WG.IV/WP.35) [Original: English]

1. At its nineteenth session in 1986 the Commission decided to begin the preparation of Model Rules on electronic funds transfers and to entrust this task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments[1]. It also decided that the first meeting for this purpose (sixteenth session of the Working Group) should be held in 1987 after the twentieth session of the Commission[2]. The session of the Working Group has been scheduled to be held at Vienna from 2 to 13 November 1987.

2. The Commission decided that the Model Rules should be flexible and should be drafted in such a way that they did not depend upon specific technology.

[1]Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 230.

[2]*Ibid.*, para. 273.