I. INTERNATIONAL PAYMENTS

A. Report of the Working Group on International Payments on the work of its seventeenth session (New York, 5-15 July 1988) (A/CN.9/317) [Original: English]

INTRODUCTION

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

2. The Working Group undertook the task at its sixteenth session (Vienna, 2 to 13 November 1987), at which it considered a number of legal issues set forth in a note of the Secretariat (A/CN.9/WG.IV/WP.35). The Group requested the secretariat to prepare draft provisions based on the discussions during its sixteenth session for consideration at its seventeenth session.

3. The Working Group held its seventeenth session in New York from 5 to 15 July 1988. The Group is composed of all States members of the Commission. The session was attended by representatives of the following States members: Algeria, Argentina, Australia, Austria, Brazil, China, Cyprus, Czechoslovakia, France, German Democratic Republic, Hungary, India, Iraq, Italy, Japan, Libyan Arab Jamahiriya, Mexico, Netherlands, Nigeria, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Yugoslavia.

4. The session was attended by observers from the following States: Barbados, Canada, Colombia, Finland, Germany, Federal Republic of, Israel, Malta, Mozambique, Niger, Peru, Philippines, Poland, Republic of Korea, Switzerland and Venezuela.

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

6. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora (Mexico)

Rapporteur: Mr. Ross Burns (Australia)

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

(a) Provisional agenda (A/CN.9/WG.IV/WP.36);

(b) Draft Model Rules on electronic funds transfers: report of the Secretary-General (A/CN.9/WG.IV/WP.37).

8. 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.

I. DELIBERATIONS AND DECISIONS

9. The Working Group decided to commence its work at the current session by considering the draft provisions for Model Rules on electronic funds transfers as submitted in document A/CN.9/WG.IV/WP.37. Chapter II of the present report reflects the substance of the considerations and the decisions of the Group with respect to the draft provisions.

10. At the close of its considerations, the Working Group requested the secretariat to prepare a revised draft of the Model Rules taking into account the considerations and the decisions of the Group.

II. CONSIDERATION OF DRAFT PROVISIONS FOR MODEL RULES ON ELECTRONIC FUNDS TRANSFERS

General comments

11. There was general agreement that the preparation of Model Rules for electronic funds transfers was both important and urgent. The rapid growth in international funds transfers and the entry of foreign parties into domestic financial systems increased the need for clear rules. It was stated that the function of the Model Rules would not be to harmonize existing legislation, which hardly existed on the subject, but to furnish a model for new legislation.

12. It was suggested that the Model Rules would have to take account of the fact that some forms of funds transfers

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

were governed by well established national payment systems whereas other forms of transfers were not subject to such systems. Another important factor was that modern technology made it possible for a customer or a group of customers to effect related funds transfers successively in different markets and in different time zones, thereby increasing the importance of having harmonized legal rules governing those various funds transfers.

13. It was suggested that the Model Rules should, on the one hand, provide legal certainty and uniform treatment to the forms of funds transfers that were being developed in practice, but that, on the other hand, the Model Rules should not create a necessity for extensive or radical revisions of existing and well established national payment systems. It was stated in reply that the primary criterion in the considerations of the Working Group should be worldwide acceptability of the Model Rules, and only secondarily should the Group be concerned with the effect the Model Rules might have on the need to revise certain national payment systems.

14. It was also suggested that the Model Rules should avoid dealing with legal issues arising from the relationship between a bank and its customer. Such legal issues touched upon questions of consumer protection, questions that were often subject to divergent national policies or policies that the States sought to implement by different means. It was stated in reply that bank-customer relationships were constituent elements of funds transfers and that, therefore, the Model Rules should deal with them as well as with some aspects of the protection of the bank customers. It was stated that in doing so the Rules should avoid providing solutions that might conflict with national rules on the protection of individual consumers.

15. It was stated that it would be desirable for the Working Group to consider as its fundamental approach the adoption of a set of rules that encompassed the concepts of delivery, acceptance or rejection, and execution of a payment order. That would permit the Model Rules to reflect banking practice and, importantly, to preserve the ability of each bank to make the necessary intra-day credit, operational and other judgments at each point in the transaction.

Article 1. *Sphere of application*

16. The text of article 1 as considered by the Working Group was as follows:

> "These rules apply to funds transfers made pursuant to a payment order [or to a debit transfer instruction] [where the originator's bank and the beneficiary's bank are in different countries]."

Exclusion of debit transfers

17. The Working Group agreed that the Model Rules should not, at least for the time being, deal with debit transfers, i.e. transfers where the account of the originating bank or its customer was to be credited and the account of the destination bank or its customer was to be debited. It was pointed out that systems of debit transfers were normally not international and that, therefore, there existed little need for harmonizing the rules on such transfers at this time.

Coverage of international and domestic segments of a funds transfer

18. In the discussion of the question of the extent to which the Model Rules should cover domestic aspects of funds transfers in addition to the international aspects of such transfers, it was noted that an interbank funds transfer consisted of individual segments and that some of the segments may be between parties in the same State and some between parties in different States. Different views were expressed on the question of which segments should be covered by the Model Rules.

19. Under one view, the Model Rules should cover only those segments in which the parties were located in different States, or where the payment order crossed a national border. Some proponents of that view stated that domestic segments of an international funds transfer were dealt with by national laws and that the Model Rules should not interfere with those laws. Others stated that, while the unification of the rules by the Commission should be restricted to the international segments of a funds transfer, it should be left to the national legislature whether it wished to extend the unified régime to the domestic segments.

20. Under another view, the Model Rules should cover the domestic as well as international segments constituting a funds transfer. It was stated that it would be particularly difficult to exclude a domestic segment when it occurred between two different international segments, as was apt to happen whenever the currency of the funds transfer was not that of either the country of the originator's bank or the beneficiary's bank. Moreover, according to that view, it would be necessary for the Model Rules to cover purely domestic funds transfers as well as the domestic segments of international funds transfers. Otherwise, funds transfers transiting certain domestic systems would be subject to two different sets of legal rules depending on whether the funds transfer was purely domestic or had an international element.

21. It was suggested that the preliminary views of delegations on that point might depend in part on the extent to which they believed that their banking systems could isolate the domestic segments of international funds transfers from purely domestic funds transfers. The Working Group decided to proceed with the discussion under the assumption that the Model Rules would cover funds transfers between the originator and the beneficiary, thereby including domestic segments of international funds transfers and leaving open the question of purely domestic funds transfers.

22. A suggestion was made that, among the domestic segments, it might be appropriate to exclude from the scope of the rules certain customer-bank relationships such as those between the customer who was the originator of the first payment order and its bank, and the

relationship between the ultimate party to be credited or paid as a result of the funds transfer and its bank.

23. Another suggestion was that the Model Rules should deal with rights and obligations of customers of banks, whether such customers were business entities or individual consumers. In that connection, the Working Group noted that there might exist a need for providing special solutions that would apply only to consumers. However, the Group considered that such special solutions should be elaborated on a regional or national level rather than on the universal level. The Group was of the opinion that it would be useful to express in an appropriate way that the Model Rules did not prevent States from enacting supplementary legislation dealing with rights and obligations of consumers in funds transfers, however consumers might be defined by those States.

24. It was suggested that the wording of article 1 should reflect more clearly the fact that a funds transfer might be effected in different segments. However, it was suggested that that should not have consequences for the determination of the responsiblity for the orderly execution of an electronic funds transfer or for the irrevocability of a funds transfer.

Form of Model Rules

25. Pending a decision to be taken at a later time on the form of the Model Rules, the Working Group decided to proceed under the working assumption that the outcome of the work would be model legislation.

Article 2. *Definitions*

26. The Working Group agreed that the sequence of items defined in article 2 should be based on a logical order rather than the alphabetical order in English found in the current draft.

27. It was suggested to substitute in article 2 and, where appropriate, elsewhere in the Model Rules the term "person" for the term "party".

28. The definitions as considered by the Working Group were as set out below.

"*(a)* 'Bank' means a financial institution which, as an ordinary part of its business, engages in funds transfers for itself or other parties [, whether or not it is recognized as a bank for other purposes];".

29. The Working Group agreed that the definition should be based on a functional approach, i.e. that it should encompass all financial institutions that effected funds transfers, whether or not such institutions were termed as banks and whether or not such institutions accepted financial deposits from the public. It was therefore decided that consideration should be given to using an alternative word to the word "bank". It was observed that doing so might create problems because the term would encompass a securities firm and a futures broker and possibly other institutions as well.

30. It was observed that a decision might have to be made on whether a branch of an institution and an independent subsidiary of the institution should be considered to be separate entities for the purposes of the Model Rules. It was noted that that decision could be made only in the light of the substance of the Model Rules. (See later discussion in paragraphs 95 to 97.)

31. A suggestion was made that the words "itself or" should be deleted from the definition so that only those financial institutions that engaged in funds transfers for other persons would be included. In that connection the question was raised whether the Model Rules should cover funds transfers between the subsidiaries of a financial holding company that were effectuated by the company when the company did not offer its services to the public.

"*(b)* 'Beneficiary' means the ultimate party to be credited or paid as a result of a funds transfer;".

32. The Working Group approved the definition.

"*(c)* 'Cover' means reimbursement of a bank that has acted on a payment order;".

33. The Working Group approved the definition subject to making it clear that the provision of cover might precede or follow an action on a payment order. The view was expressed that the Model Rules should not use a concept of cover but instead should create an obligation to pay (or reimburse the receiver for) the payment order.

"*(d)* 'Entry date' means the date when entries are made in the records of an account;".

34. The Working Group noted that the term defined in the subparagraph was placed between square brackets so as to indicate that it had not been used in the text of the Model Rules but that there might be a need for using it in a subsequent revision of the text.

35. The Working Group approved the definition.

"*(e)* 'Execution date' means the date the sender has instructed the receiving bank to execute the payment order;".

36. It was suggested that it should be made clearer that the definition referred to the date of the execution of the payment order and not to the date when the order was given.

"*(f)* 'Funds' or 'money' includes credit in an account kept by a bank whether denominated in a national currency or in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that these Rules shall apply without prejudice to the rules of the intergovernmental institution or to the stipulations of the agreement;".

37. The Working Group approved the substance of the definition subject to making it clear in all language versions that the wording of the definition included the case where credit was denominated in a currency other than the national currency of the State in which the account was kept.

"*(g)* 'Funds transfer' means the movement of funds between the originator and the beneficiary;".

38. It was noted that the definition of "funds transfer" did not incorporate the entire text of ISO 7982-1. It was suggested that the shortened text did not properly convey the idea that the funds transfer might be composed of segments. Therefore, it was decided that the full ISO definition should serve as the basis for the next revision.

"*(h)* 'Funds transfer transaction' means the movement of funds directly between two parties involving no intermediaries other than a payment or communications service;".

39. It was noted that the term was not used in the current draft of the Model Rules but that it was used in the definition of "funds transfer" in ISO 7982-1. Therefore, if the definition of "funds transfer" in the Model Rules were made to conform to the ISO definition, it was suggested that it might be appropriate to include the ISO definition of "funds transfer transaction" as well.

40. However, the Working Group was not satisfied with either the term or its definition. As to the term, it was noted that in French the word "transaction" had a specific legal content that was far removed from the meaning attributed to it in the context of funds transfers. As to the definition, it depended on the definition of "payment service" and "communication service" in ISO 7982-1, which presented additional problems. As a result, it was decided to delete the term.

"*(i)* 'Intermediary bank' means a bank between the originator's bank and the beneficiary's bank through which the funds transfer passes;".

41. It was suggested that the definition should make it clear that it included all banks executing a payment order in the course of a funds transfer, including those banks that served only as reimbursing banks. A suggestion was made that that might be achieved by providing that an intermediary bank included any bank executing a payment order other than the originator's bank and the beneficiary's bank. It was noted that, as a consequence of the earlier decision to reconsider reference to the word "bank" in the next version of the Model Rules, there was the danger of including payment and communications services within the group of entities currently referred to as intermediary banks. The Working Group requested the secretariat to take the suggestions into account in preparing the revised draft of the subparagraph.

"*(j)* 'Originator' means the issuer of the first payment order in a funds transfer;".

42. The Working Group approved the subparagraph.

"*(k)* 'Pay date' means the date when the funds are to be freely available to the beneficiary as specified by the originator;"

"*(l)* 'Payment date' means the date when the funds are made available to the beneficiary;"

"*(p)* 'Value date' means the date when funds are to be at the disposal of the receiving bank."

43. The Working Group requested the secretariat to consider harmonizing in subparagraphs *(k)*, *(l)* and *(p)* the words expressing the idea of availability of funds to the designated person. It was observed that the subparagraphs should take into account that the mere fact that the designated person's account was credited did not always mean that the designated person had a free access to the cash equivalent of the credit in the designated currency.

"*(m)* 'Payment order' means an instruction addressed to a bank directing it to pay, or to cause another bank to pay, to the beneficiary a fixed or determinable amount of money [either in cash or by credit to an account];".

44. The following suggestions were made during the discussions: *(a)* to delete reference to money and to forms in which payment might be made; *(b)* to replace the expression "beneficiary" by the term "specific person" or "designated person"; and *(c)* to make it clear that the expression "payment order" as used in the Model Rules did not include orders for debit transfers. The Working Group noted that the draft rules of the International Chamber of Commerce (ICC) used the term "funds transfer message" where the current draft of the Model Rules used "payment order". It was felt that "funds transfer message" as defined in the ICC draft rules, which was consistent with ISO 7982-1 on that point, was a broader term than "payment order" and was not appropriate for use in that context. The Working Group requested the secretariat to prepare alternative provisions reflecting the discussion.

"*(n)* 'Receiving bank' means the bank to which a payment order is delivered;".

45. An observation was made that the word "delivered" in the definition might not cover the situation in which the payment order was sent but was not delivered. The Working Group requested the secretariat to take the observation into account in the preparation of the revised text of the subparagraph.

"*(o)* 'Sender' means the party who sends a payment order [, including the originator and any 'sending bank'];".

46. The Working Group approved the subparagraph. It was suggested that the term "sender" should not cover the originator.

New subparagraph on "authentication"

47. It was suggested that article 2 should contain a definition of "authentication" that emphasized that, as used in the Model Rules, it was a technique to validate the source of a message. That was stated to be particularly important since in some legal systems the term conveyed the idea of formal authentication by notarial seal or the equivalent, while it was used in the electronic data interchange context, including in ISO 7982-1 (see "message authentication"), to refer to the technique used between the sender and the receiver to validate the source and part of or all the text of a message. It was suggested that either in the definition or in another appropriate place some

standard should be established as to what would be an acceptable authentication, e.g. "commercially reasonable", that did not enter into the technical means of authenticating a payment order.

Article 3. *Form and content of payment order*

48. The text of article 3 as considered by the Working Group was as follows:

"(1) A payment order may be in any form [, including both written and oral form,] and may be transmitted between the sender and the receiving bank by any means of communication.

"(2) A payment order must be properly authenticated and contain at least the following data:

"*(a)* an order to a bank to make the transfer and, if payment is not by credit to an account at the beneficiary's bank, the method of payment to the beneficiary;

"*(b)* the identification of the sender;

"*(c)* the identification of the receiving bank;

"*(d)* the amount of the funds transfer, including the currency or unit of account, if that is not otherwise self-evident;

"*(e)* the identification of the beneficiary;

"*(f)* the identification of the beneficiary's bank.

"(3) Any required or optional data may be represented by words, figures or codes. If a data element is represented by any combination of words, figures or codes and there is a discrepancy between them, each form of representation is equally valid and the sender shall be responsible for the payment order as executed by the receiving bank and any intermediary payment or communications service, unless the receiving bank or intermediary payment or communications service knew or ought to have known of the discrepancy."

Paragraph (1)

49. Divergent views were expressed on the question of whether the Model Rules should apply to payment orders in any form, as was currently provided in paragraph (1), or whether the payment orders governed by the Model Rules should be only those in electronic form.

50. There was considerable support for the view that the scope of application of the Model Rules should require at least one, and possibly the international, segment of the funds transfer to be initiated by a payment order in electronic form. Supporters of that view stated that *(a)* the reason for undertaking the project was the growing use of electronic means in funds transfers and the possibility that the existing rules on paper-based funds transfers might not always be appropriate for such cases; *(b)* the mandate given to the Working Group by the Commission was based on the assumption, expressed in the title of the Model Rules, that the legal text to be prepared would apply to electronic funds transfers; and *(c)* in national legal systems there existed rules on paper-based funds transfers and there was no evidence that there was a need for modifying such national rules.

51. The prevailing view, however, was that the Model Rules should apply to payment orders irrespective of the form in which they were made and the means by which they were transmitted from the sender to the receiving bank. In support of that view it was stated that *(a)* it may be difficult for a customer, and often also for banks, to know whether a segment of the funds transfer had been or would be effected in a particular form, and that in such cases the customer or the bank should not be exposed to the uncertainty as to the applicable legal régime; *(b)* the legal issues arising from funds transfers were essentially the same irrespective of the form of the payment order and the means of transmission used; *(c)* whenever special rules needed to be formulated that depended on the form or means of transmission, they could be accommodated in the text of the Model Rules; *(d)* a dichotomy of the legal régime on funds transfers was undesirable; and *(e)* rules on paper-based as well as electronic funds transfers were in need of modernization and harmonization.

52. It was recognized by the Working Group that the arguments adduced in favour of and against the current draft of article 3, paragraph (1), were essentially those relating to the scope of application of the Model Rules. That was a result of the fact that article 1, on the scope of application, referred to payment orders. It was also observed that, since the scope of application of the Model Rules did not depend upon there being any electronic link, consideration might be given to deleting the word "electronic" from the title of the Model Rules.

53. It was observed that paragraph (1) did not preclude the parties from agreeing on a particular form for a payment order and that such an agreement would be binding on the parties. It was suggested that such prevalence of the will of the parties should be expressed in paragraph (1). Another suggestion was that, since the paragraph stated the obvious, it might be deleted. Yet another suggestion was that, if the paragraph was to be retained, the words in square brackets might be deleted since the idea was adequately expressed without those words.

Paragraph (2)

54. It was suggested that the content of paragraph (2) should be moved to the definition of a "payment order" in article 2. Those messages that did not contain all of the requisite data elements would not be considered to be a payment order and the Model Rules would not apply.

55. Under another approach it was not necessary to include a list of the required elements in a payment order. While it might be agreed that a receiving bank would find it difficult to execute a payment order if it did not have all of the data elements listed in subparagraphs *(a)* to *(f)*, that was essentially a question of responsibility. A bank that repaired an incomplete order did so at its own risk and knew that it took such a risk. Furthermore, different payment systems normally established their own required data elements, and the insertion of a list of such elements in the Model Rules would constitute an interference with freedom of contract. The view was expressed that authentication was a liablity issue and should be covered in article 4 of the Model Rules.

56. Under yet another approach the Model Rules should contain a list of minimum data elements, even if the Model Rules could be drafted in such a way as to achieve the same legal result without such a list. The Model Rules would have an educational function beyond the strictly legal one, and a list of required data elements would be one way of carrying out that function.

57. During the discussion of the minimum content of a payment order, there was frequent reference to the rule expressed in article 5, paragraph (2), that a receiving bank was bound not to execute an incomplete order. Most delegates were of the view that the receiving bank should have the possibility not to execute the order, a result which was already expressed in article 5, paragraph (1), rather than be bound not to execute it. (For further discussion see paragraph 84.)

Subparagraph (a)

58. According to one view, a payment order should specify the method of payment in all cases, including the usual case where the payment was to be made by credit to an account. According to another view, there was no need for subparagraph *(a)* to refer to the method of payment since article 7 dealt with the method of execution of a payment order. Yet another view was that it was in the nature of a payment order that it contained an order for the transfer of funds and that, therefore, there was no need to express that element in the form of a requirement.

Subparagraph (b)

59. It was suggested that, if the sender was not the originator, subparagraph *(b)* should require the identification of the originator. In response it was stated that the identification of the originator should not be obligatory.

Subparagraph (d)

60. A suggestion was made for the deletion of the phrase "if that is not otherwise self-evident" since it might give rise to differences in interpretation. Another suggestion was to provide a rule of interpretation for the cases where the order did not specify the currency.

61. An observation was made that there might exist rules restricting the freedom of the parties to determine the currency of the funds transfer, and that subparagraph *(d)* should not be understood as affecting such a restriction.

Paragraph (3)

62. It was suggested that the first sentence of paragraph (3) permitting the use of words, figures or codes was self-evident and that it might be eliminated.

63. It was noted that the first part of the second sentence provided a rule of interpretation whenever the same data was represented in more than one way and there was a discrepancy between the data as so represented. It was suggested that a distinction might be drawn between the case in which the same data element, e.g. the amount, was represented in two or more different ways and when there were two different data elements relating to the same ultimate item, e.g. name of account and number of account.

64. In regard to the account to be credited, under one view the originator would have intended the credit to be made to the named account. The number of the account would have little meaning except as a convenience. Under another view an account number was precise in a way that an account name could not be, and the use of such numbers for account identification should be encouraged.

65. It was suggested that new technology permitted computers to compare different data fields and note discrepancies. Therefore, consideration should be given to putting receiving banks on notice of all such discrepancies. In response it was stated that such technology would certainly not be universally available and it would be unrealistic to base rules of law on an assumption as to its existence.

66. It was suggested that the last part of the second sentence, which allocated responsibility for the consequences flowing from discrepancies in payment orders, did not belong in article 3 but should be placed in article 4 or 5, depending on the person to bear the loss.

67. A general observation was made that, to the extent possible, the orientation of the Model Rules should be the elimination of any discrepancy, e.g. by obligating the receiver of the message to get in touch with the sender, rather than allowing the receiver of the message to rely on the form of representation of data of his choice.

68. It was noted that the current draft of the Model Rules did not contain any provisions on the right or duty of a receiving bank to reverse entries arising out of error or fraud. The matter had been discussed at the last meeting of the Working Group at Vienna (see A/CN.9/297, para. 79) and should be included in the next revision.

Article 4. *Obligations of sender*

69. The text of article 4 as considered by the Working Group was as follows:

"(1) A sender is bound by authorized payment orders as issued or transmitted by it, and for any error or delay during the transmission of the order to the receiving bank, except as set forth in article 5(2).

"(2) A payment order is authorized when it is sent or given to the receiving bank by the sender or by a person authorized to act for the sender in regard to orders of the type in question.

"(3) A sender is bound by an unauthorized order when it was sent or given to the receiving bank by a person who was able to do so because of present or past employment with the sender or because of the negligence or bad faith of the sender or of an employee or agent of the sender.

"(4) If the sender denies having authorized the order, the receiving bank has the burden of proof that the

order was authorized by the sender or that the sender is bound by an unauthorized order under paragraph (3). If the sender denies that the order sent contained the data said to have been received, the receiving bank has the burden of proof of the content of the order received.

"(5) A [sender] [sending bank] is bound to adhere to any message structure prescribed by the transmission system used or agreed between the parties [and is liable for any loss resulting from a failure to do so].

"(6) A sender which has not made previous arrangements with the receiving bank as to how the receiving bank will be reimbursed for executing its instructions shall ensure that adequate cover is in place and duly advised to the receiving bank on or before the value date.

"(7) A sender is bound to reimburse the receiving bank to the extent the receiving bank has properly executed the payment order of the sender [including any fees or costs charged or incurred by the receiving bank]."

70. It was suggested that the article attempted to cover too many different problems. A distinction should be drawn between, on the one hand, the basic obligation of a sender, which was to reimburse the receiving bank as provided in paragraph (7), and, on the other hand, the responsibility of a sender for the payment order.

71. It was suggested that consideration should be given to whether the originator and sending banks should be subjected to the same régime in regard to the matters covered in article 4. In that regard, it was noted that in paragraph (5) the possibility of making such a distinction was specifically envisaged.

72. It was stated that consideration would have to be given at a later time to the consequences of errors or delays in transmission. The suggestion was made that the rule stated in paragraph (1) might be too absolute, especially if it was the receiving bank that had chosen the means of communication. That suggestion was said to be particularly pertinent to originators, and especially to consumers.

73. The Working Group engaged in an extensive discussion as to whether the basic test should be whether a payment order had been authorized or whether it had been authenticated. It was noted that authorization was a legal concept and authentication was a procedure undertaken by the sender to permit the receiving bank to assure itself as to the source of the payment order. The question of authorization focused on whether the specific person sending the message and the purpose for which it was sent were appropriate from the sender's point of view. The question of authentication focused on whether the receiving bank could rely on the payment order it had received.

74. It was suggested that paragraph (2) was unnecessary because it was essentially circular. It would be difficult to define briefly when a payment order was authorized without engaging in such circularity.

75. As for paragraph (3), it was suggested that it attempted to provide a rule for what might be better left to the national law of agency. Questions were raised as to specific aspects of the provision such as for how long a former employer would remain responsible for the fraudulent payment orders of a former employee.

76. The prevailing view was that the problem posed in paragraphs (2) and (3) should be dealt with in the Model Rules, but that more explicit consideration should be given as to whether the payment order had been authenticated. Under one analysis that was widely accepted in the Working Group, the sender would be responsible for the payment order as acted upon by the receiving bank if the payment order had been authorized, whether or not it had been authenticated. If the payment order had been neither authorized nor authenticated, the sender would not be responsible. If the payment order had not been authorized but it had been authenticated, the sender would generally be responsible for it, but there would be exceptions that would have to be elaborated at a later date.

77. In regard to paragraph (4), a question was raised whether the receiving bank should have the burden of proof that the payment order was authorized. It was noted, however, that the issue of burden of proof would be framed differently if paragraphs (2) and (3) were redrafted to rely more on authentication.

78. There was a difference of opinion as to whether paragraph (5) was necessary. Under one view, the matter could be left to the contract between the parties. Moreover, paragraph (5) raised questions as to the person to whom the duty was owed. Under another view, paragraph (5) served an important educational function and should be retained. If it was felt that originators that were not banks should not be subject to the same rules in regard to adhering to particular message structures, it would be easy to make that distinction in the revision of the paragraph.

79. A question was raised as to the duty of a sender to have cover in place and to notify the receiving bank of that fact on or before the execution date. When the funds transfer was in United States dollars and the beneficiary's bank was in the Eastern hemisphere, the cover might be given in New York during banking hours in New York but long after the close of business where the beneficiary's bank was located. As a result, it was suggested that the sending bank's duty should be to have cover in place at an earlier time so that notification of the cover could be effected by the execution date.

Article 5. *Obligations of receiving bank*

80. The text of article 5 as considered by the Working Group was as follows:

"(1) A receiving bank is bound either to execute the payment order or to notify the sender that it will not do so. If a receiving bank intends to delay executing a payment order beyond the time required by article 8 in order to await notification that cover was available, it must notify its sender of that fact. If within the required time a receiving bank does not give notice that it will

not act on a payment order, it may no longer give such notice and is bound to act on the order.

"(2) A receiving bank is bound not to execute a payment order that it knows or ought to know to be in error or incomplete. If a receiving bank would have discovered an error or that the payment order was incomplete through the proper use of an error checking procedure that was required by the funds transfer system or was agreed upon with the sender, the bank ought to have known of the error or incompleteness."

Paragraph (1)

81. Some support was expressed for the idea contained in paragraph (1) that the receiving bank should in all cases be bound either to execute the payment order or to notify the sender that it would not do so. A suggestion was made that a possible exception to the duty to notify might be the case when it was not practicable or reasonable for it to make the notification. However, the prevailing view was that the solution should depend on whether there existed a prior relationship between the sender and the receiving bank, e.g. in the form of a contract or course of dealing between the parties. When no such relationship existed, the bank should not be bound to react to a payment order, although it would be free to do so. It was also suggested for consideration that, instead of providing that the receiving bank could become bound by a payment order through passivity even when there had been no prior relationship, the receiving bank should in those cases only be held to the damages caused to the sender by the receiving bank's failure to notify that it would not act.

82. The suggestion was also made that the receiving bank should not have to react to a payment order when the problem was that the sender did not have sufficient funds with the receiving bank. The sender should be considered to be under a duty to know the balance of its account at all times. In any case, receiving banks would normally prefer to wait and see whether sufficient funds would arrive so that they could execute the payment order. Since doing so was to the benefit of both the originator and the beneficiary, banks should not be encouraged by the Model Rules to reject the payment order rather than wait for the receipt of additional funds.

83. It was suggested that the Model Rules should recognize the possiblity that the manner of acceptance or rejection of a payment order might be covered by the contract or course of dealing between the parties.

Paragraph (2)

84. With reference to the discussion on article 3, paragraph (2) (see paragraph 57), the Working Group adopted the position that in the case of an order in error or an incomplete order the Model Rules should not prescribe a duty for the bank not to execute the order, but should provide that the bank was not bound to execute such an order. It was noted that such a rule would already be subsumed in paragraph (1). In view of that position, it was suggested that there might be no need for retaining the second sentence of paragraph (2).

Article 6. *Execution by receiving bank that is not beneficiary's bank*

85. The text of article 6 as considered by the Working Group was as follows:

"(1) A receiving bank that is not the beneficiary's bank properly executes a payment order when, within the required time, it provides or arranges for cover and

"*(a)* transmits the order to the beneficiary's bank or to the required or an appropriate intermediary bank,

"*(b)* issues its own payment order containing instructions and other data consistent with the order received, or

"*(c)* otherwise provides for completion of the funds transfer in an appropriate manner.

"(2) If the payment order received contains an instruction as to the intermediary bank or banks, the funds transfer system or the means of transmission to be used, the receiving bank as sender shall execute the order received in compliance with that instruction. The payment order issued by the receiving bank as sender shall include any instructions for action of the receiving bank of that order necessary to implement the order in an appropriate manner.

"(3) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive delay in completion of the funds transfer. The receiving bank acts within the time required by article 8 if it, in good faith and in the time required by that article, enquires of the sender as to the further actions it should take in light of the circumstances."

Paragraph (1)

86. It was noted that subparagraphs *(a)* to *(c)* made provision for different forms in which the intermediary bank might have received or forwarded payment orders. A suggestion was made that it might be possible to cover all possible instances with one generally worded provision.

Paragraph (2)

87. A suggestion was made to cover also instructions for any subsequent intermediary bank in the second sentence of subparagraph *(c)*.

Paragraph (3)

88. The Working Group noted that the receiving bank was deemed to have acted within the time required by article 8 if it dispatched the inquiry within that time.

Article 7. *Execution by beneficiary's bank*

89. The text of article 7 as considered by the Working Group was as follows:

"(1) If the beneficiary maintains an account at the beneficiary's bank into which funds transfers are normally credited, the bank executes the order by:

"*(a)* crediting the beneficiary's account;

"*(b)* making the funds available for withdrawal or for transfer; and

"*(c)* notifying the beneficiary as agreed between them of the availability of the funds.

"(2) If the beneficiary does not maintain such an account, the bank executes the order by:

"*(a)* making payment by the means specified in the order or by any commercially reasonable means; or

"*(b)* giving notice to the beneficiary that it is holding the funds for the benefit of the beneficiary."

90. It was suggested that the Model Rules should not deal with the manner of execution of payment orders by a beneficiary's bank, and that it would be more appropriate to leave the matter to bank practice and to the contracts between banks and customers. However, the Working Group adopted the view that it was useful to maintain the substance of article 7 in the Model Rules, since its solutions were relevant to provisions on the discharge of the underlying obligation, currently contained in article 16.

Paragraph (1)

91. It was noted that inter-bank agreements might provide limitations on the right of a receiving bank to execute a payment order. Specific mention was made of the rules in the United States establishing bilateral credit limits and net debit caps. It was suggested that the Model Rules should take into account such practices.

92. It was suggested that the Model Rules should recognize that the payment order might not direct credit to an account but might instruct the receiving bank to purchase securities or undertake some other obligation for the originator. Furthermore, the crediting of an account did not necessarily mean that the funds were immediately available for withdrawal by the beneficiary. Funds might not be available as a result of, for example, a decision by a court, the right of a creditor or of the beneficiary's bank itself to use the funds to cover a claim, or exchange control regulations. Moreover, it might sometimes be difficult to establish the moment when the account was credited, in particular when bookkeeping was in electronic form and the processing of a given payment order was done in different stages.

Paragraph (2)

93. The Working Group approved the substance of paragraph (2).

Article 8. *Time to execute payment order or give notice*

94. The text of article 8 as considered by the Working Group was as follows:

"(1) A receiving bank shall execute the payment order received, or give notice that it will not do so, within the time consistent with the terms of the order.

"(2) When the payment order states a pay date, a receiving bank that is not the beneficiary's bank shall execute the order at such time as to assure in the ordinary course of events receipt by the beneficiary's bank of the payment order and cover by the pay date. The beneficiary's bank shall execute the order not later than on that date.

"(3) When the payment order states an execution date, the receiving bank shall execute the order not later than on that date. When the payment order states a value date but no execution date, the execution date shall be deemed to be at the value date. Unless otherwise agreed, the receiving bank may not charge the sender's account prior to the execution date.

"(4) When no execution, value or pay date is stated, the execution date shall be deemed to be the date the order is received, unless the nature of the order indicates that a different execution date is appropriate.

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

"(6) A receiving bank that receives a payment order too late to execute it in conformity with the provisions of paragraphs (2) and (3) nevertheless complies with those provisions if it executes the order on the day received regardless of any execution, value or pay date specified in the order.

"(7) A notice that a payment order will not be executed must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order."

Branches as banks

95. The Working Group returned to the question of whether branches of banks should be considered to be separate entities for the purposes of the Model Rules (see paragraph 30). It was generally agreed that it was difficult to discuss the time limits applicable to funds transfers unless it was clear how those time limits would apply to branches.

96. It was stated that the issue was complex, especially if one took into account the related issue of whether deposits placed in a branch in a foreign country were obligations of that branch alone or were obligations of the bank as a whole.

97. There was general agreement that for the purposes of the Model Rules, branches should be considered to be separate institutions. It was recognized that when the branches were within the same country and were linked by an on-line computer system, there was some reason to consider the bank with all its branches to be one institution. However, in the context of the Model Rules individual branches served as links in a funds transfer chain. If

the branches were in different time zones, the application of time limits would have to take that into account. Moreover, when the branches were in different countries, they were subject to different legal régimes and to different banking supervision.

General structure of the article

98. It was suggested that, since paragraph (1) stated a general rule that was amplified by paragraphs (2) to (7), those paragraphs might be re-drafted as subparagraphs of paragraph (1).

99. It was suggested that it would be easier to understand the relationship between paragraphs (2) and (3) and paragraph (6) if they were closer together. It was also suggested that the order of paragraphs (2) and (3) might be reversed.

Paragraph (2)

100. There was general agreement that paragraph (2) addressed an important problem since it was important to reconcile the interest of bank customers in being able to rely on the payment system when effecting time-sensitive funds transfers and the concerns of the banks that excessive duties and liabilities might be imposed upon them.

101. It was suggested that, since the pay date first manifested itself in the payment order from the originator to the originator's bank, that bank alone should be considered, by accepting the payment order, to have undertaken an obligation that the funds would be available to the beneficiary by the stated pay date. There was general agreement that the obligation of intermediary banks should be stated in such a way that they did not find it more advantageous to reject a payment order than to run the risk of failing to meet the requisite time limit with consequent liability.

102. It was stated that it would often be difficult for a receiving bank, and especially an intermediary bank, to know how long it would take in the ordinary course of events for the beneficiary's bank to receive the payment order. It was also suggested that receipt of cover by the beneficiary's bank should not be part of the obligation in respect of the pay date.

103. An alternative approach to the matter of time limits was put forward, namely that the primary obligation of the originator's bank and subsequent intermediary banks should be an obligation to use their best efforts to effect the transaction by the due date. That obligation might need to be supported where necessary by more specific rules.

104. It was suggested that intermediary banks should undertake an obligation only in respect of the time within which they would act, and not, as currently stated, an obligation in respect of the time when the funds transfers would be completed. Although there was some support for a rule that intermediary banks should use their best efforts to execute payment orders the day received, the prevailing view was that intermediary banks should have a firm obligation to execute payment orders within a somewhat longer period of time, such as the next day.

105. It was noted that any final decision as to the nature of the time limit within which various actions should be taken could be made only in the light of the liability of a receiving bank for failing to meet those time limits. In that connection, it was stated that it was common for banks to pay interest to one another when they failed to execute high value payment orders within the expected time periods.

106. It was suggested that the last sentence of both paragraphs (2) and (3) should indicate that no execution of the payment order in favour of the beneficiary should take place prior to the indicated date since the originator might have had reasons outside the funds transfer for wishing to delay completion until that date.

Paragraph (3)

107. It was noted that the last sentence of paragraph (3) seemed to be the only occasion where it was specifically mentioned that the rule might be varied by agreement. That was said to raise a question as to whether any of the other provisions could also be varied by agreement. It was suggested that there might be a general provision on that point.

108. It was observed that book-keeping entries were independent from the funds transfers.

Paragraph (5)

109. It was suggested that care should be given to harmonizing the concept of calendar days and days on which the bank executed payment orders in the various provisions. Under one suggestion the concept of "date" might be treated separately, perhaps in article 2 on definitions.

Paragraph (7)

110. Several suggestions were made to assure that the time limit in regard to the giving of a notice of failure to execute a payment order would correspond to the time limit for executing the order.

Article 12. *Liability of receiving bank*

111. It was decided to consider article 12 out of numerical sequence because the extent of the liability régime to be adopted in the Model Rules was a major factor in any further consideration of the obligations to be imposed on receiving banks. The text of article 12 as considered by the Working Group was as follows:

> "A receiving bank, other than the beneficiary's bank, that fails to execute a payment order, executes it improperly or executes it when it is bound not to do so is liable
>
> "*(a)* to the originator and to its sender for loss of interest that may have occurred as a result;

"*(b)* to the originator, beneficiary or any other bank for loss caused by a change in exchange rates;

"*(c)* to the originator and to its sender for any other loss that may have occurred as a result, but not for more than the amount of the originator's payment order."

112. A suggestion was made to include among the categories of damage covered by article 12 any expenses for a new payment order and any attorney's fees.

113. In view of the earlier decision taken in the context of article 5(2) that the Model Rules should not prescribe a duty for the bank not to execute a payment order (see paragraph 84), the Working Group decided to delete in the opening phrase of article 12 the words "or executes it when it is bound not to do so".

114. The Working Group discussed the question of whether the liability of the receiving bank under article 12 should be based on negligence or whether the liability should be strict. As regards the instances of liability covered by subparagraphs *(a)* and *(b)*, the Working Group agreed that the policy seeking to protect effectively the persons that had suffered the loss called for a solution according to which those persons should not be required to show negligence on the part of the receiving bank. It was suggested that the solution should be clearly expressed in the article. It was also suggested that the same rule would apply to other direct damages.

115. As regards the liability for indirect loss, which was covered by subparagraph *(c)*, the Working Group was in agreement that the liability should not be a strict one. However, it was noted that the concept of indirect loss, which article 12*(c)* attempted to cover, concerned only some legal systems. There was broad agreement that the person claiming indirect loss should be required to show more than mere negligence on the part of the receiving bank. Under one view, the claimant should be required to show gross negligence. In support of that view it was stated that, according to general principles of liability of a number of legal systems, gross negligence triggered the liability for indirect loss and that the same principle should be incorporated into subparagraph *(c)*.

116. The view was contested on the ground that the concept of gross negligence was uncertain in many legal systems. Moreover, such a standard of liability was unreasonable in economic terms. It was said that the extent of the risk of indirect economic loss depended on the circumstances of the case that were known to the parties to the underlying transaction but seldom to the bank. Thus, it was more appropriate to leave it to the originator to protect itself against such loss, rather than to compel the bank to seek insurance for a risk that often depended on facts unknown to it and on the operation of a foreign liability régime, and that was normally very difficult to assess before the event.

117. Under another view, for there to exist a liability for indirect loss, the claimant should be required to show that the receiving bank had caused the damage by a wilful or reckless action. A suggestion was made that a model for describing such an action might be found in article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg).

118. An observation was made that, as a result of the receiving bank's failure to execute a payment order or its improper execution, the originator might be responsible to the beneficiary for damages arising out of the underlying relationship. Such damages might concern, for instance, lost interest, loss caused by a change in exchange rates, or in some circumstances even indirect loss. The question was raised whether the claim of the originator to recover such damages from the receiving bank was adequately covered by the wording of article 12.

119. The Working Group discussed the question of who should be the persons entitled to claim damages under article 12. There was support for giving a right of recovery only to persons who were in the direct chain of contractual relationship with the bank that had caused the loss. There was also support for recognizing such right to persons to be specified in article 12 even in the absence of such contractual relationship. A further suggestion was that the provision should be drafted in such a way that it would furnish the exclusive rule of liability. Otherwise, claimants would be able to rely upon non-uniform doctrines of liability under national law, even in respect of foreign banks. It was stated that the relationship between doctrines of liability based on breach of contract and liability based on tort was unclear in many legal systems.

Article 9. *Revocation and amendment of payment order*

120. The text of article 9 as considered by the Working Group was as follows:

"(1) A revocation or amendment of a payment order issued to a receiving bank that is not the beneficiary's bank is effective if it is received in sufficient time for the receiving bank to act on it before the receiving bank has transmitted the order received or has issued its own order implementing the order received.

"(2) A sender may require a receiving bank that is not the beneficiary's bank to revoke or amend the payment order the receiving bank has transmitted or issued. A sender may also require a receiving bank to instruct the subsequent bank to which it transmits or issues an order to revoke or amend any order that the subsequent bank may in turn have transmitted or issued.

"(3) A revocation or amendment of a payment order issued to the beneficiary's bank is effective if it is received in time for the bank to act on it before the earliest of the following:

"*(a)* the bank receives the payment order, where the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place;

"*(b)* the bank receives both the payment order and notice that cover is available;

"Variant A

"*(c)* the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

"Variant B

"*(c)* the bank gives the beneficiary the [unconditional] right to withdraw the credit or the funds [, whether or not a fee or payment in the nature of interest must be paid for doing so];

"Variant C

"*(c)* the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

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

"(4) A sender may revoke or amend a payment order after the time specified in paragraph (1) or (3) only if the receiving bank agrees.

"(5) A sender who has effectively revoked a payment order is not obligated to reimburse the receiving bank [except for costs and fees] and, if the sender has already reimbursed the receiving bank for any part of the payment order, it is entitled to recover from the receiving bank the amount paid.

"(6) Any revocation of a payment order under the applicable law resulting from the death of the sender or of the originator or from determination of legal incapacity by a competent authority is binding on a receiving bank only if the bank knows of the death or determination of legal incapacity before the time specified in paragraph (1) or (3) of this article.

"(7) A bank has no obligation to release the funds received if ordered by a competent court not to do so [because of fraud or mistake in the funds transfer.]"

Paragraph (1)

121. The Working Group was in general agreement with paragraph (1). A suggestion was made that the last part of the paragraph should refer only to transmitting the payment order.

Paragraph (2)

122. Different views were expressed as to whether a sender should be able to stop the funds transfer after the receiving bank had already transmitted the payment order only by pursuing the payment order through the same chain of intermediary banks as had been used to transmit the payment order or whether the originator or the originator's bank could notify an intermediary bank or the beneficiary's bank that the payment order had been revoked.

123. In favour of permitting the sender to notify an intermediary bank or the beneficiary's bank it was stated that it would increase the possibility that the revocation would be received before the beneficiary's bank received the payment order and acted on it. It was stated that such a possibility was of particular importance in cases of fraud.

124. In reply it was stated that neither an intermediary bank nor the beneficiary's bank would have any reason to know whether the revocation was genuine or not.

125. The prevailing view was that any revocation of a payment order should be permitted only by sending the revocation through the same chain of banks as the payment order was sent. Such a rule would mean that a payment order for any given segment of the funds transfer could be revoked only by the sender of that payment order. It was suggested that the Model Rules should make it clear that messages revoking payment orders were subject to the same rules as to authentication and liability for failure to follow the instruction to revoke as were payment orders themselves. It was suggested that the word "require" should be replaced by the word "request".

126. The question was raised whether the problem under discussion continued to be of importance in an environment in which payment orders passed through computers in fractions of a second, making it impossible to catch up with a payment order once sent. In reply it was stated that not all payment orders were processed by computer or were for immediate execution. Telex transfers and value dated funds transfers continued to give the possibility of revocation.

Paragraph (3)

127. It was noted that paragraph (3) and article 16(3) expressed different aspects of the finality of the funds transfer and that the events of finality were drafted with identical words. There was general agreement that this was appropriate, although the question was raised on whether article 16 should contain any rule on discharge of the underlying obligation.

128. The Working Group noted that each of the subparagraphs was relevant to a different factual situation. Subparagraph *(a)* was intended for systems such as CHAPS, where net settlement occurred at the end of the day but a receiving bank was obligated to execute a payment order when it was received. Subparagraph *(b)* was intended especially for telex or SWIFT transfers, when prior arrangements for cover were in effect between the beneficiary's bank and its sender. Subparagraph *(c)* in the different variants was intended for various situations where subparagraphs *(a)* and *(b)* did not apply and the earliest basis for finality was an action taken by the beneficiary's bank itself.

129. The Working Group engaged in a general discussion of the various subparagraphs, in some cases making comments on the drafting as it applied to particular situations. There was, however, agreement that the subject was complex and that the Working Group would have to gain a better understanding of the banking practices and of the legal conceptions in different countries before it would be prepared to make policy choices in this regard.

Paragraph (4)

130. It was suggested that there should be a more complete provision in the Model Rules permitting or requiring

a receiving bank to reverse a credit in certain cases, and especially those involving obvious errors. It was suggested that the secretariat present a draft provision to that effect for consideration by the Working Group at its next session.

Paragraph (5)

131. The Working Group had no comments on the paragraph.

Paragraph (6)

132. There was general agreement that the paragraph should be redrafted to provide that death or incapacity of an originator should have no effect on the continuing legal value of a payment order. The legal incapacity of a receiving bank was understood to be of particular relevance to its bankruptcy. Although there was some sentiment for considering that problem, the general agreement was that there should be no attempt to do so at this time.

Paragraph (7)

133. Since the paragraph was included for the purpose of raising the issue, pending any decision by the Commission at a later time, of whether it would undertake consideration of the related problem in the context of stand-by letters of credit and guarantees, it was decided to place the paragraph in square brackets.

Article 10. *Statement of debits and credits to an account*

134. The text of article 10 as considered by the Working Group was as follows:

"(1) A bank shall make available to its account holders [at least every . . . month[s]] a notice or statement of the debits and credits to the account together with such information as is reasonably available to the bank that will enable the account holder to identify the source of the entries. The notice or statement shall be available as agreed between the bank and the account holder, and may be available by computer access.

"(2) An account holder shall notify the bank within [. . .] [days] [months] after the statement is available of any error or of any unauthorized debit or credit.

"(3) An account holder who fails to notify the bank as provided in paragraph (2) of this article shall be precluded from asserting any claim against the bank arising out of the error or unauthorized debit or credit and shall bear any loss to the bank or to any other person that results from such failure."

135. The prevailing sentiment was that the application of article 10 to the relationship of bank customers with their banks went beyond what was necessary to include in the Model Rules on funds transfers. Therefore, it was agreed that the article should be deleted.

136. Nevertheless, the view was expressed that the article would serve a useful function in regard to the relationship of the banks among themselves. It was suggested that the differences in practice in different countries sometimes made it difficult to reconcile international funds transfers.

Article 11. *Responsibility for proper execution of payment order*

137. The text of article 11 as considered by the Working Group was as follows:

"(1) The originator's bank and each intermediary bank is responsible to the originator for the proper execution of the funds transfer as ordered in the originator's payment order. An intermediary bank has fulfilled its responsibility to the originator if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and it executed the payment order it received within the time required by article 8.

"(2) The funds transfer is properly executed if a payment order consistent with the payment order issued by the originator is received by the beneficiary's bank and cover is available to the beneficiary's bank for the order,

"*(a)* when a pay date was stated on the originator's payment order, in sufficient time for the beneficiary's bank to execute the order on or before that date;

"*(b)* when no pay date was stated on the originator's payment order, within an ordinary period of time for the type of payment order issued by the originator.

"(3) A receiving bank [, other than the beneficiary's bank,] is responsible to its sender for the proper execution of the funds transfer as ordered in the sender's payment order."

138. It was noted that the first sentence of paragraph (1) expressed the decision made by the Working Group at its sixteenth session that the originator's bank should be responsible to the originator for the proper execution of the funds transfer. That was said, however, to be contrary to the law in some countries where the originator's bank and each intermediary bank was directly responsible to the originator for properly executing its own segment of the funds transfer.

139. The question was raised of whether the originator, in addition to being able to hold the originator's bank responsible for the proper execution of the funds transfer, should also have a right to hold each intermediary bank directly responsible, as was provided in the current draft. In support it was stated that there might be reasons why the originator could not recover directly from the originator's bank, such as the bankruptcy of that bank. In reply it was suggested that there might be problems if the trustee in bankruptcy of the originator's bank recovered the damages caused by the intermediary bank to which it had sent its payment order and the originator subsequently claimed recovery from the same intermediary bank.

140. A similar question was raised in the context of paragraph (3) in respect of the beneficiary's bank. There was a general sentiment that the beneficiary's bank should

be responsible to its sender for the proper execution of the payment order it received, which would be achieved by deleting the words in square brackets. Some who supported that position were in favour of providing that the beneficiary's bank should also be responsible to the originator.

141. It was noted that, under the structure of the current draft of the Model Rules, it was appropriate for the beneficiary's bank to be responsible only to the beneficiary since the various rules on finality of the funds transfer, including articles 9(3), 16(3) and paragraph (2) of the article under discussion, proceeded on the assumption that a funds transfer was complete when the payment order and cover arrived at the beneficiary's bank.

142. The Working Group noted that as a result the beneficiary's bank would in effect have no right to reject the payment order, contrary to the rule adopted in article 5 in respect of all other banks. It was stated that such a result was inappropriate because the beneficiary's bank, as any other bank, might have its reasons for wishing to reject the payment order or to reject the cover that was offered to it. However, any right of the beneficiary's bank to reject the payment order under the Model Rules would be tempered by contractual obligations to the beneficiary.

143. Another suggestion was that, if the current rule contained in article 11 was maintained, the assumption that the beneficiary had chosen the beneficiary's bank should be made explicit. Where that bank was chosen by another party, most likely by the originator's bank, it should be made clear that the beneficiary's bank would have the right to reject the payment order so that it need not become obligated to a beneficiary with which it had not previously dealt. A view was expressed that the beneficiary's bank should not be liable to the sender and the originator unless that bank had been chosen by the originator.

144. It was pointed out that the function of paragraph (2) was not clear in some language versions. The paragraph was intended to explain when a payment order was properly executed for the purposes of paragraph (1).

145. It was suggested that paragraph (2) was inadequately drafted in a number of respects and was not in complete conformity with articles 9(3) and 16(3).

Article 13. *Responsibility of beneficiary's bank*

146. The text of article 13 as considered by the Working Group was as follows:

> "The beneficiary's bank is responsible to the beneficiary for the proper execution of the payment order it has received and, if it will not or cannot execute the payment order, to its sender to give notice of that fact."

147. The suggestion that had originally been made in respect of article 11 that the beneficiary's bank should be responsible for the proper execution of the payment order not only to the beneficiary but also to the sender of the payment order, in particular when the beneficiary's bank was chosen by the originator, was reiterated in the context of article 13.

Article 14. *Liability of beneficiary's bank*

148. The text of article 14 as considered by the Working Group was as follows:

> "A beneficiary's bank that fails to execute a payment order or executes it improperly is liable to the beneficiary to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank]."

149. The Working Group was in agreement with the substance of article 14.

150. It was observed that article 14 had been prepared for the sake of symmetry and completeness of the system of the Model Rules, but that the issue might be thought to be beyond the sphere of application of the Model Rules and that it might be deleted at a later time.

Article 15. *Exemption from liability*

151. The text of article 15 as considered by the Working Group was as follows:

> "Variant A
>
> "A receiving bank and any bank to which the receiving bank is directly or indirectly responsible under article 11 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to an impediment beyond the bank's control and that the bank could not reasonably be expected to have taken into account at the time of the funds transfer or to have avoided or overcome it or its consequences.
>
> "Variant B
>
> "A receiving bank and any bank to which the receiving bank is directly or indirectly responsible under article 11 is exempt from liability for any failure to execute an order or to give notice or for delay in doing so after the required time if the failure or delay was caused by the order of a court, interruption of communication facilities or equipment failure not involving a lack of ordinary care by the receiving bank, suspension of payments by another bank, war, emergency conditions or other circumstances beyond the control of the receiving bank, and the receiving bank exercised the diligence the circumstances required."

152. Under one view, article 15 should be based on variant A. That variant was preferred since it was considered to contain a stricter standard of liability than did variant B, in particular, in that it did not refer to the standard of ordinary care as did variant B. It was suggested that such a standard was of particular importance in respect of equipment failure. It was stated that, under theories of vicarious liability, employers were generally responsible for the failures of their employees. When equipment, including computers, were substituted, the employer should continue to be responsible for any resulting failure.

153. Under another view, article 15 should be based on variant B. It was said that variant A contained concepts, such as "impediment" and "expected to have taken into account", which were unclear and would give rise to disputes. Moreover, the concept of "a lack of ordinary care" in variant B was known in many legal systems and, above all, it indicated that the banks would be subject to a standard that was developing together with the development of the technology of funds transfers. It was suggested that it might be necessary to clarify the issue of burden of proof in similar terms as that in variant A.

154. It was observed that the choice between the two approaches was to some extent a matter of legal tradition and that the application of the two approaches to a given case would not necessarily produce different results. It was thus suggested that consideration should be given to presenting article 15 in two alternative versions so as to allow States to adopt the solution that was suitable to their legal system.

155. During the discussion there was growing support for combining variants A and B. It was noted that the concept of variant A was appropriate as the general principle, but that it would be useful to clarify the operation of that principle by examples pertinent to funds transfers. It was pointed out that the general principle was not based on the concept of negligence and that the examples to be added to the principle should remain within that framework.

156. The Working Group noted its discussion of article 12 on the question whether to delete any reference to liability for indirect loss (paragraphs 115 and 116) and that the primary liability of receiving banks would be the amount of lost interest and loss caused by a change in exchange rates. In view of that it was thought to be acceptable to subject banks to a higher standard of performance than what might otherwise be appropriate.

Article 16. *Payment and discharge of monetary obligations; obligation of bank to account holder*

157. The text of article 16 as considered by the Working Group was as follows:

"(1) Payment of a monetary obligation may be made by a funds transfer [to any account] [to any of the financial institutions in which the creditor has an account] [denominated in the currency of the obligation] [in the country where the obligation is payable], unless [the creditor of the obligation has indicated that] the obligation is to be discharged by payment in a certain way or by transfer to a certain account.

"(2) A creditor may terminate the right to discharge an obligation by payment into any one or more of the accounts indicated in paragraph (1) by notification to the bank or banks in respect of a single obligation, a class of obligations or by blocking the account if done so in such a manner and in sufficient time for the bank to act on it prior to discharge of the obligation under paragraph (3). If a creditor terminates the right to discharge an obligation by payment to an account, the obligation of a debtor who had originated a funds transfer to that account prior to notice of the creditor's action is suspended until the debtor is reimbursed for the funds transferred. The creditor is responsible for any loss and for all costs that arise out of the funds transfer and its termination.

"(3) The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank at the earliest of the following:

"*(a)* the bank receives the payment order, where the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place;

"*(b)* the bank receives both the payment order and notice that cover is available;

"Variant A

"*(c)* the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

"Variant B

"*(c)* the bank gives the beneficiary the [unconditional] right to withdraw the credit or the funds [, whether or not a fee or payment in the nature of interest must be paid for doing so];

"Variant C

"*(c)* the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

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

"(4) If one or more intermediary banks have deducted charges from the amount of the funds transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. The debtor is bound to compensate the creditor for the amount of those charges.

"(5) To the extent that a receiving bank has a right of reimbursement from a sender by debit to an account held by the receiving bank for the sender, the account shall be deemed to be debited [and the obligation of the bank to the sender reduced or the obligation of the sender to the bank increased] when a revocation or amendment of the payment order would no longer be effective under article 9."

Paragraphs (1) and (2)

158. Under one view, paragraph (1) was not necessary. The right of a debtor to discharge a monetary obligation by transferring funds to an account of the creditor, in the absence of any provision to the contrary in the underlying contract, could be left to national law. An example was given of one recent national statute that specifically provided for such a right. Under the prevailing view the existence of such a statute illustrated that the problem was real. Since the Working Group had already agreed that it was proceeding on the working assumption that it was

preparing model legislation, it decided that it would be appropriate to include such a rule.

159. There was general agreement that the words in brackets in paragraph (1) as well as the entire text of paragraph (2) introduced complications that were unnecessary. Therefore, it was agreed to delete paragraph (2) and to restrict paragraph (1) to providing that an obligation could be discharged by means of a funds transfer.

Paragraph (3)

160. The Working Group was agreed that it would not decide at the current session whether it was appropriate to retain in the Model Rules a provision on discharge of the underlying obligation. However, in discussing paragraph (3), it reiterated its position that the rules on discharge, whether under the Model Rules or under national law, and the rules governing finality should be consistent. In that respect, it noted that the Model Rules had been drafted on the basis that those rules would be identical.

161. The Working Group took note of the fact that in some legal systems an underlying obligation was considered to be discharged when the originator gave the payment order with cover to the originator's bank. The discharge was conditional on the completion of the funds transfer. However, since the originator's bank already had cover, it was unlikely that the funds transfer would not be completed. In some other legal systems the same rule applied to certain restricted categories of funds transfers, such as for the payment of insurance premiums. Such a legal doctrine served to restrict the possibility that an insurance policy would lapse because of late payment of the premium.

162. The Working Group decided to consider at a future session what effect such national laws on discharge of the underlying obligation might have on the appropriate rules on finality of the funds transfer.

Paragraph (4)

163. It was suggested that the words "unless otherwise agreed" should be added to the second sentence of paragraph (4) since it was common for beneficiaries (creditors) to agree to be responsible for such charges. When it was pointed out that under the second sentence of paragraph (4) the originator (debtor) would have to send a second payment order, which in turn might have charges deducted from it, it was suggested that the rule might be reversed by deleting the sentence.

Paragraph (5)

164. Concern was expressed as to whether paragraph (5) would work properly in the context of article 9(2). It was suggested that paragraph (5) should state that the debit would be deemed to have been made upon the issue of the payment order, but that if the payment order was revoked, the debit would be reversed.

Additional matters to be covered in the Model Rules

165. It was noted that in the document containing the draft Model Rules (A/CN.9/WG.IV/WP.37, paragraph 7), the secretariat had listed several subjects on which no provision had been included but on which provisions might be included in a future draft. Of those subjects, it was suggested that the secretariat attempt to prepare provision on the conflict of laws for the next session of the Working Group and that that might be done either by the secretariat alone or in conjunction with the Hague Conference on Private International Law. In reply the observer for the Hague Conference stated that the question of whether the subject of conflict of laws in electronic funds transfers should be placed on the programme of work had been considered by a Special Commission in January, and would be on the agenda of the sixteenth session of the Conference in October. At the meeting of the Special Commission it had been thought that it was not yet appropriate to undertake a study of the subject until the substantive rules to be applied were more clearly determined.

III. FUTURE SESSIONS

166. The Working Group noted that the eighteenth session would be held at Vienna from 5 to 16 December 1988 and that the nineteenth session would be held in New York from 10 to 21 July 1989.

B. Draft model rules on electronic funds transfers: report of the Secretary-General[a] (A/CN.9/WG.IV/WP.37) [Original: English]

CONTENTS

[a]Working paper submitted to the Working Group on International Payments at its seventeenth session.