VI. INTERNATIONAL PAYMENTS

A. UNCITRAL Model Law on International Credit Transfers: note by the Secretariat*

(A/CN.9/384) [Original: English]

CONTENTS

INTRODUCTION

1. The UNCITRAL Model Law on International Credit Transfers, adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1992, was prepared in response to a major change in the means by which funds transfers are made internationally. This change involved two elements: the increased use of payment orders sent by electronic means rather than on paper, and the shift from the generalized use of debit transfers to the generalized use of credit transfers. One result was that previous efforts to unify the law governing international debit transfers were not relevant to the new funds transfer techniques. The Model Law offers the opportunity to unify the law of credit transfers by enacting a text that is drafted to meet the needs of modern funds transfer techniques.

I. FUNDS TRANSFERS IN GENERAL

2. Until the mid-1970s a person who wished to transfer funds to another country, whether to pay an obligation or to provide itself with funds in that foreign country, had a limited number of ways in which to proceed. It could send its own personal or corporate cheque to the intended recipient of the funds, but international collection of such items was both slow and expensive. It could purchase from its bank a draft drawn by the bank on the bank's correspondent in the receiving country. Collection of such an international bank draft was faster than collection of a personal or corporate cheque since it was payable in the receiving country and in the funds of the receiving country.

3. A third and even faster procedure had also been available since the mid-nineteenth century. The originator's bank could send a payment order by telegraph to its correspondent bank in the receiving country instructing the receiving bank to pay the intended recipient of the funds. (The payment order could also be transmitted between the banks on paper. This is the common method for making funds transfers in many countries. However, it was less commonly used for international transfers.) While faster than the other two methods, the telegraph was a relatively expensive method of communication and it was prone to error. When telex replaced the telegraph, the basic banking transaction remained the same, but the cost was reduced and accuracy improved. That led to a gradual movement away from the use of bank cheques for international payments. With the introduction of computer-to-computer

*This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes only; it is not an official commentary on the Model Law. A commentary prepared by the secretariat on an earlier draft of the Model Law appears in A/CN.9/346 (reproduced in *United Nations Commission on International Trade Law: Yearbook,* vol. XXII: 1991, part two, I, A).

inter-bank telecommunications in the mid-1970s, the cost dropped still further, while speed and accuracy improved dramatically. The extension of computer-to-computer inter-bank telecommunication facilities to ever-increasing numbers of countries means that the use of bank cheques for international funds transfers has drastically decreased and the role of telex transfers has been significantly reduced.

4. The collection of bank cheques, telex transfers and the newer computer-to-computer transfers have one important element in common: value is transferred from the originator to the beneficiary by a debit to the bank account of the originator and a credit to the bank account of the beneficiary. Settlement between the banks is also accomplished by debits and credits to appropriate accounts. Those accounts may be maintained between the banks concerned or with third banks, including the central bank of one or both countries.

5. There is also a striking difference between, on the one hand, the collection of a bank cheque (or the collection of a personal or corporate cheque) and, on the other hand, a telex or computer-to-computer transfer. The cheque is transmitted to the beneficiary by mail or other means outside banking channels. Therefore, the banking procedures to collect the cheque are initiated by the beneficiary of the funds transfer. A funds transfer in which the beneficiary of the funds transfer initiates the banking procedures is more and more often called a debit transfer. Collection of a bill of exchange or a promissory note is also a debit transfer, since the beneficiary of the funds transfer initiates the funds transfer, and there are other debit transfer techniques available, including some that are based on the use of computers.

6. In telex transfers and computer-to-computer transfers it is the originator of the funds transfer who begins the banking procedures by issuing a payment order to its bank to debit its account and to credit the account of the beneficiary. A funds transfer in which the originator of the funds transfer initiates the banking procedures is often called a credit transfer, and that is the term used in the Model Law.

II. UNIFICATION OF THE LAW

7. As a result of the wide-spread international use of debit transfers arising out of the collection of cheques and bills of exchange, there have been several different efforts at unification of the law governing negotiable instruments and their collection.[1] Conversely, until recently there had been little interest in unifying the law governing the international use of paper-based and telex credit transfers.

8. The situation began to change in 1975 when the first international inter-bank computer-to-computer message system came into service. Concurrently, electronic funds transfer systems for business or consumer use were beginning to appear in a number of countries. Since it was not clear whether the rules governing paper-based funds transfers should or would be applied to electronic funds transfers in whole or in part, UNCITRAL's first effort was to prepare the *UNCITRAL Legal Guide on Electronic Funds Transfers* (A/CN.9/SER.B/1, United Nations publication, Sales No. E.87.V.9). The *Legal Guide* explored the legal issues that would have to be faced in moving from a paper-based to an electronic funds transfer system. Since the focus of the *Legal Guide* was on the impact of the shift from paper to electronics, it discussed both debit and credit transfers.

9. When UNCITRAL authorized the publication of the *Legal Guide* in 1986, it also decided to prepare model legal rules so as to "influence the development of" national practices and laws governing the newly developing means of making funds transfers. Subsequently, it was decided that the model legal rules should be adopted in the form of a model law, and that the model law should be drafted with a view to its adoption by States.

III. SCOPE OF APPLICATION

A. Categories of transactions covered by Model Law

10. As indicated by its title, and in contrast to the *Legal Guide,* the Model Law applies to credit transfers. It does not apply to debit transfers, even when made in electronic form. The Model Law is not restricted to credit transfers made by computer-to-computer or other electronic techniques, even though it was the explosive growth of electronic credit transfer systems that brought about the need for the Model Law. Many credit transfers, both domestic and international, begin with a paper-based payment order from the originator to its bank to be followed by an inter-bank payment order in electronic form. Definition of an electronic credit transfer would, therefore, be difficult and unproductive. The appropriate solution for only a few legal issues seemed to depend on whether a payment order was in electronic or paper-based form. Appropriate rules have been drafted for those situations.

11. While many credit transfers require the services of only the originator's bank and the beneficiary's bank, other credit transfers require the services of one or more intermediary banks. In such a case the credit transfer is initiated by a payment order issued by the originator to the originator's bank, followed by payment orders from the originator's bank to the intermediary bank and from the intermediary bank to the beneficiary's bank. The credit transfer also requires payment by each of the three senders to its receiving bank. As expressed in article 2*(a),* a credit transfer, and therefore the transaction subject to the Model Law, includes the entire "series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary".

[1]The most successful to date have been the Uniform Law on Bills of Exchange and Promissory Notes and the Uniform Law on Cheques, which were adopted by the League of Nations in 1930 and 1931. A more recent effort is the United Nations Convention on International Bills of Exchange and International Promissory Notes, which was prepared by UNCITRAL and adopted by the General Assembly in 1988. The UNCITRAL Convention is designed for optional use in international trade (for information on that Convention see explanatory note in A/CN.9/386). To complement these intergovernmental efforts, the International Chamber of Commerce has formulated the Uniform Rules for Collections (ICC Publication No. 322), which have been adopted by banks in over 130 States and territories to govern the means by which banks collect drafts internationally. The Uniform Rules for Collections are under revision at the time of writing.

12. The Model Law is by its own terms restricted to international credit transfers. In part that decision was taken in recognition of the fact that UNCITRAL was created to unify the law governing international trade. An additional reason was that, while all countries face essentially the same legal and practical problems in implementing international credit transfers, the circumstances in which domestic credit transfers are carried out vary significantly.

13. The criteria set out in article 1 to determine whether a credit transfer is international, and therefore subject to the Model Law, is whether any sending bank and any receiving bank in the credit transfer are in different States. Once there is a sending and a receiving bank in different States, every aspect of the credit transfer is within the scope of the Model Law.

14. Although the means of making domestic credit transfers in some countries vary significantly from the means used for international credit transfers, the Commission recognized that none of the substantive rules in the Model Law were appropriate only for international credit transfers. Therefore, some States might wish to adopt the Model Law to govern their domestic credit transfers as well as their international credit transfers, thereby assuring unity of the law. All that would be necessary would be to change the scope of application in article 1.

15. Credit transfers may be made by individuals for personal reasons as well as by businesses for commercial reasons. Some countries have special consumer protection laws that govern certain aspects of a credit transfer. The footnote to article 1 recognizes that any such consumer protection law may take precedence over the provisions in the Model Law. If an individual is an originator or a beneficiary of a credit transfer, its rights and obligations would be governed by the Model Law, subject to any consumer protection law that might be applicable.

B. Portions of an international credit transfer

16. Once it was decided that the Model Law should be drafted to apply to the entire "series of operations . . . made for the purpose of placing funds at the disposal of a beneficiary", and not just to the payment order that passed from a bank in one country to a bank in another country, it was necessary to decide whether every aspect of a given international credit transfer should be subject to the Model Law as enacted in a given country. It was recognized by all concerned that such a result would be desirable, since it would ensure the application of a single legal regime to the entire credit transfer. At one stage a proposal was made that a rule to that effect should be included in the Model Law. UNCITRAL decided that such a rule, although desirable in the abstract, was neither technically nor politically feasible. Therefore, it was accepted by UNCITRAL that each of the operations carried out in the credit transfer would be subject to the law applicable to that operation. It was hoped, of course, that the Model Law would be widely adopted so that the different operations in a given credit transfer would be subject to a consistent legal regime.

17. Throughout the period that the Model Law was in preparation, UNCITRAL implemented its decision that each of the operations carried out in the credit transfer would be subject to the law applicable to that operation by means of an article on conflict of laws. That article allowed the parties to choose the law applicable to their relationship. Such a choice would probably be included in an agreement that pre-existed the credit transfer in question. In the absence of an agreement, the law of the State of the receiving bank would apply to the rights and obligations arising out of the payment order sent to that bank.

18. At the 1992 session of the Commission when the Model Law was adopted, it was decided to delete the conflict-of-laws provision from the Model Law proper. However, the article was included in a footnote to chapter I of the Model Law "for States that might wish to adopt it".

IV. EXTENT TO WHICH MODEL LAW IS MANDATORY

19. Article 4 provides that "Except as otherwise provided in this law, the rights and obligations of parties to a credit transfer may be varied by their agreement." This simple sentence embodies three propositions:

(a) In principle, the Model Law is not mandatory law. The parties to a credit transfer may vary their rights and obligations by agreement;

(b) The agreement must be between the parties whose rights and obligations are affected. That means, for example, that the agreement of a group of banks in regard to the transactions between them could modify the rights and obligations of those banks as they are set out in the Model Law. However, the agreement would have no effect on the rights and obligations of their customers, unless the customers had also agreed to such a modification of their rights and obligations. This rule is somewhat modified in articles 12(9) and 14(6), both of which provide that specific paragraphs in the Model Law governing the means of making a refund under certain limited circumstances "do not apply to a bank if they would affect the bank's rights or obligations under any agreement or any rule of a funds transfer system";

(c) Certain rights and obligations of the parties may not be varied by agreement, or may be varied only to a limited extent or under limited circumstances. Examples are to be found in articles 5(3), 14(2) and 17(7).

V. SALIENT FEATURES OF THE MODEL LAW

A. Obligations of sender of payment order

20. The sender of a payment order may be the originator of the credit transfer, since the originator sends a payment order to the originator's bank, or it may be a bank, since every bank in the credit transfer chain, except the beneficiary's bank, must send its own payment order to the next bank in the credit transfer chain.

21. Article 5(6) sets out the one real obligation of a sender, i.e., "to pay the receiving bank for the payment order when the receiving bank accepts it". There is a special rule

for payment orders that contain a future execution date; in that case the obligation to pay arises when the receiving bank accepts the payment order, "but payment is not due until the beginning of the execution period".

22. But what if there is a question as to whether the payment order was really sent by the person who is indicated as being the sender? In the case of a paper-based payment order the problem would arise as the result of an alleged forged signature of the purported sender. In an electronic payment order, an unauthorized person may have sent the message but the authentication by code, encryption or the like would be accurate.

23. The Model Law answers the question in three steps. The first step is described in article 5(1): "A sender is bound by a payment order . . . if it was issued by the sender or by another person who had the authority to bind the sender." The question as to whether the other person did in fact and in law have the authority to bind the sender is left to the appropriate legal rules outside the Model Law.

24. The second step described in article 5(2) is the most important:

> "When a payment order . . . is subject to authentication [by agreement between the sender and the receiving bank], a purported sender . . . is . . . bound if
>
> *(a)* the authentication is in the circumstances a commercially reasonable method of security against unauthorized payment orders, and
>
> *(b)* the receiving bank complied with the authentication."

25. The assumption is that, in the case of an electronic payment order, the receiving bank determines the authentication procedures it is prepared to implement. Therefore, the bank bears all the risk of an unauthorized payment order when the authentication procedures are not at a minimum "commercially reasonable". The determination of what is commercially reasonable will vary from time to time and from place to place depending on the technology available, the cost of implementing the technology in comparison with the risk and such other factors as may be applicable at the time. Article 5(3) goes on to say that article 5(2) states an obligation that the receiving bank cannot avoid by agreement to the contrary. Article 5(2) does not apply, however, when the authentication procedure is "a mere comparison of signature", in which case the otherwise applicable law on the consequences of acting on a forged signature must be applied.

26. If the authentication procedure was commercially reasonable and the bank followed the procedure, the purported sender is bound by the payment order. This reflects two judgements. The first is that the bank has no means to distinguish the authorized use of the authentication from the unauthorized use of the authentication. Banks would be unable to offer electronic credit transfers at an acceptable price if they bore the risk that payment orders that were properly authenticated were nevertheless unauthorized. The second is the judgement that if the authentication procedure is commercially reasonable and the bank can show that it followed the procedure, the chances are that it was the sender's fault that someone unauthorized learned how to authenticate the payment order.

27. That introduces the third step in the analysis as described in article 5(4). The sender or the receiving bank, as the case may be, would be responsible for any unauthorized payment order that could be shown to have been sent as a result of the fault of that party. For the rule as to who bears the burden of proof, see article 5(4).

B. Sender's payment to receiving bank

28. It happens, particularly in transfers by individuals, that an originator does not have an account with the originator's bank and that it pays the amount of the credit transfer plus the applicable fees to the originator's bank in cash. However, in most cases the originator, i.e., the sender, will have an account with the originator's bank, i.e., the receiving bank. It also often happens that a sending bank will have an account with the receiving bank. In any such case, payment to the receiving bank will normally be made by a debit to the account of the sender held by the receiving bank. Since the receiving bank is in a position to determine whether there is a sufficient credit balance in the account, or whether it is willing to extend credit to the sender to the extent of the resulting debit balance, article 6*(a)* provides that payment is made when the debit is made.

29. The reverse situation may also occur, that is, that the receiving bank maintains an account with the sending bank. Alternatively, both the sending bank and the receiving bank may maintain accounts with a third bank. Then the sending bank can pay the receiving bank by crediting the receiving bank's account or by instructing the third bank to credit the receiving bank's account, as the case may be. The result in either of those two situations is that the credit balance of the receiving bank with the sending bank or with the third bank is increased, with a concurrently larger credit risk. Normally that would be acceptable to the receiving bank. However, on occasion the credit balance, and the resulting credit risk, may be more than the receiving bank was willing to have with the sending bank or the third bank. Therefore, the Model Law provides in article 6*(b)*(i) and (ii) that payment takes place when the credit "is used [by the receiving bank] or, if not used, on the banking day following the day on which the credit is available for use and the receiving bank learns of that fact". In other words, if the receiving bank does not use the credit and does not wish to bear the credit risk, it has a short period of time to notify the sending bank that the payment is not acceptable to it.

30. When the third bank at which the receiving bank maintains an account is a central bank, whether the central bank of its country or of another country, there is no credit risk (at least when the credit is in the currency of the central bank). Therefore, article 6*(b)*(iii) says that the payment has been made "when final settlement is made in favour of the receiving bank".

31. A fourth principal means of paying the receiving bank is to net the obligation of the sending bank with other obligations arising out of other payment orders. The netting

may be pursuant to a bilateral netting agreement between the two banks. The netting may also be pursuant to "the rules of a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally". If netting takes place under any of these circumstances, article 6(*b*)(iv) provides that payment to the various receiving banks for each of the individual payment orders occurs "when final settlement is made in favour of the receiving bank in accordance with" the agreement or the rules.

32. A caveat should be entered at this point. Netting and the consequences of netting in case of the insolvency of one of the parties is a controversial matter. It is the subject of continuing study at the Bank for International Settlements. The Model Law does not take a position as to whether a netting agreement is valid or effective under the applicable law. All it does is to provide when a sending bank pays the receiving bank for an individual payment order where there is a valid netting agreement.

C. Obligations of receiving bank

33. The obligations of a receiving bank are divided into the obligations that are part of a successful credit transfer and the obligations that arise when something goes wrong. Most payment orders that are received by a bank are executed promptly and the credit transfer is completed successfully. In a real sense, a receiving bank in such a credit transfer never has an unexecuted obligation in regard to the payment order.

34. The Model Law provides in articles 8(2) and 10(1) the obligations of a receiving bank to execute a payment order that it "accepts". The obligation of a receiving bank other than the beneficiary's bank is to issue a payment order that will properly implement the payment order received. The obligation of the beneficiary's bank is to place the funds at the disposal of the beneficiary. Until the receiving bank "accepts" the payment order, it has no obligation to execute it. The rules as to when a receiving bank accepts a payment order are in articles 7(2) and 9(1).

35. In most cases a receiving bank that is not the beneficiary's bank accepts a payment order when it issues its own payment order intended to carry out the payment order received. A beneficiary's bank accepts a payment order when it credits the account of the beneficiary. In those two situations the receiving bank, whether it is or is not the beneficiary's bank, undertakes its primary obligation and discharges that obligation by the same act. However, a receiving bank may accept a payment order in some other way before it executes the payment order received.

36. Some funds transfer systems have a rule that a receiving bank is required to execute all payment orders it receives from another member of the funds transfer system. The Model Law provides that in such a case the receiving bank accepts the payment order when it receives it.

37. A receiving bank that debits the account of the sender as the means of receiving payment or that notifies the sender that it accepts the payment order, accepts the payment order when it debits the account or gives the notice.

38. A final method of accepting a payment order deserves special attention. The philosophy of the Model Law is that a bank that receives a payment order and payment for it must either implement the payment order or give notice of rejection. If the receiving bank does neither within the required time, the receiving bank is deemed to have accepted the payment order and the associated obligations. Article 11 provides that normally the receiving bank must execute the payment order by the banking day after it is received and for value as of the day of receipt.

39. The receiving bank also has obligations when something goes wrong. Some payment orders, or would-be payment orders, are defective. A message received may contain insufficient data to be a payment order or, being a payment order, it cannot be executed because of insufficient data. For example, a payment order that expresses the amount of money to be transferred in two different ways, such as in words and in figures, may indicate the amount in an inconsistent manner. The same thing may occur in identifying the beneficiary, for example, by name and by account number. Where there is insufficient data, the receiving bank is obligated to notify the sender of the problem. Where there is an inconsistency in the data and the receiving bank detects the inconsistency, the receiving bank is also obligated to notify the sender.

40. Other obligations may arise after the receiving bank has issued its own conforming payment order. Completion of an international credit transfer may be delayed and neither the originator nor the beneficiary knows what has happened. To help in such situations article 13 provides that each receiving bank is requested to assist the originator and to seek the assistance of the next receiving bank to complete the banking procedures of the credit transfer.

41. If the credit transfer is not completed, article 14(1) provides that "the originator's bank is obligated to refund to the originator any payment received from it, with interest from the day of payment to the day of refund." The originator's bank can in turn recover what it paid to its receiving bank, with interest, and that bank can recover from its receiving bank. The chain of responsibility for refunding stops at the bank that is unable to complete the credit transfer.

42. In practice, the chain of refunds may stop one bank before the bank unable to complete the credit transfer. A credit transfer may fail because a receiving bank becomes insolvent before it executes the payment order it has received, or because the State has issued an embargo on transfers of the type in question or because of war or unsettled conditions in the receiving bank's country. In those cases the same events that cause the credit transfer to fail may make it impossible for the bank to refund to its sending bank. Sometimes it is evident that use of a particular bank or of banks in a particular country would be risky. In such a situation a bank, and particularly an originator's bank, may refuse to accept the payment order unless it is directed by its sender to use a particular intermediary bank to complete the credit transfer. Where a receiving bank is directed to use a particular intermediary bank and it is unable to obtain a refund from the intermediary bank because that bank has suspended payment or is prevented by

law from making the refund, the receiving bank is not required to make a refund to its sender. However, in order to be sure that such special situations are not used as a pretext to undermine the obligation to refund, a receiving bank that systematically seeks directions from its senders as to the intermediary banks to be used in credit transfers remains obligated to refund in all cases.

D. Bank's liability for failure to perform one of its obligations

43. It has already been noted that the originator's bank must refund to the originator the amount of the transfer plus interest if the credit transfer is not completed. That so-called "money-back guarantee" is, however, in the nature of restitution and is not in the nature of liability for failure to perform an obligation.

44. Upon closer analysis of the credit transfer transaction, it becomes clear that, if the credit transfer is completed, the only kind of failure by a bank that could occur is one that results in a delay in completion of the credit transfer. No matter which receiving bank causes the delay, the originator's account would be debited at the time expected, but the beneficiary's account would be credited later than expected. Therefore, the Model Law takes the position in article 17(1) that the liability of the receiving bank in delay runs to the beneficiary. That position is taken even though the beneficiary does not have a contractual relationship with any bank in the credit transfer chain other than the beneficiary's bank.

45. The liability of the bank for causing delay is to pay interest. It is current practice in many credit transfer arrangements for a bank that delays implementing a payment order received to issue its payment order for the amount of the transfer plus the appropriate amount of interest for the delay. If the bank does so, its receiving bank is obligated to pass on that interest to the beneficiary. Since the delaying bank has acted in a manner calculated to compensate the beneficiary, the delaying bank is discharged of its liability. If the interest is not passed on to the beneficiary as contemplated by article 17, the beneficiary has a direct right to recover the interest from the bank that holds it.

46. If the purpose of the credit transfer was to discharge an obligation owed by the originator to the beneficiary, the beneficiary may have recovered interest from the originator for delay in discharging that obligation. In such a case article 17(3) permits the originator, rather than the beneficiary, to recover interest from the delaying bank.

47. With one exception, the remedy of recovery of interest stated in article 17 is the exclusive remedy available to the originator or the beneficiary. No other remedy that may exist under other doctrines of law is permitted. According to article 18 the one exception is when the failure to execute the payment order, or to execute it properly, occurred "*(a)* with the specific intent to cause loss, or *(b)* recklessly and with actual knowledge that loss would be likely to result". In those unusual circumstances of egregious behaviour on the part of the bank, recovery may be based on whatever doctrines of law may be available in the legal system outside the Model Law.

E. Completion of credit transfer and its consequences

48. According to article 19(1), "a credit transfer is completed when the beneficiary's bank accepts a payment order for the benefit of the beneficiary". At that point the banking system has completed its obligations to the originator. The beneficiary's bank's subsequent failure to act properly, if that should occur, is the beneficiary's concern. It is not covered by the Model Law but is left to the law otherwise regulating the account relationship.

49. Article 19(1) further provides that, "when the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it". The Model Law does not enter into the question as to when the beneficiary's bank must credit the beneficiary's account or when it must make the funds available. Those are matters to be governed by the otherwise applicable law governing the account relationship, including any contractual arrangements between the beneficiary and the beneficiary's bank.

50. In many credit transfers the originator and the beneficiary are the same person; the bank customer is merely shifting its funds from one bank to another. In such a case completion of the credit transfer obviously does not change the legal relationship between the originator and the beneficiary. Completion of the credit transfer changes only the relationships between the customer as originator and the originator's bank and between the customer as beneficiary and the beneficiary's bank.

51. Other credit transfers are for the purpose of discharging an obligation due from the originator to the beneficiary. Many delegates to UNCITRAL thought that the Model Law should provide that completion of the credit transfer would discharge the obligation to the extent that the obligation would be discharged by payment of the same amount in cash. Other delegates did not think the Model Law should contain such a rule, either because they did not believe that a rule on discharge of an obligation arising out of contract or otherwise should be included in a law on the banking transaction or because they did not believe that the rule proposed was correct. The position finally taken in UNCITRAL was to include the rule in a footnote to article 19 "for States that may wish to adopt it".

Further information about the Model Law may be obtained from the UNCITRAL secretariat.