# Facilitating International Trade Between Turkey and China by International Payments Via Electronic Funds Transfer: Problems and Possible Solutions under the UNCITRAL Model Law on International Credit Transfers

**Burcu YÜKSEL** [1]
*Law School of Ankara University*

## A. Introduction

In October 2010, Turkey and China announced a strategic partnership for the deepening and development of bilateral relations.[2] Since then, as Chinese Vice President Mr. Xi Jinping underlined in his speech at the Turkey-China Economic & Trade Cooperation Forum in Istanbul in February 2012, the economic and trade cooperative relations between the two countries have experienced the best period in history as reflected in "the fast-growing bilateral trade, accelerating growth of mutually beneficial economic cooperation and further optimization and improvement of institutional arrangements".[3] In this regard, the two sides also signed a series of cooperation documents.[4] One of them is the bilateral local currency swap agreement which was signed between the Central Bank of the Republic of Turkey and China's Central Bank in the amount of 3 billion Turkish liras (10 billion Chinese yuans) for an extendable three year period in order to facilitate bilateral trade in the local currencies of the two countries.[5]

---

1 LL.B. (Ankara), LL.M. (London Metropolitan), PhD student at Ankara University Institute of Social Sciences; research assistant at the Department of Private International Law, Ankara University Faculty of Law. The author would like to thank Professor Paul Beaumont for his valuable comments on an earlier draft of this article. All errors that remain are the author's.

2 See http://www.fmprc.gov.cn/eng/zxxx/t908092.htm (accessed 31 July 2012).

3 *Ibid.*

4 http://www.fmprc.gov.cn/eng/zxxx/t907843.htm (accessed 31 July 2012).

5 http://www.tcmb.gov.tr/yeni/announce/2012/ANO2012-09.htm (accessed 31 July 2012); http://www.pbc.gov.cn/publish/english/955/2012/20120227172942258815977/20120227172942258815977_.html (accessed 31 July 2012).

In the light of these developments, it is obvious that banking and finance are at the centre of the target of further deepening Turkey-China economic and trade cooperation. It has been well reflected in the efforts of the major banks in Turkey, such as Akbank and İş Bankası, to make arrangements with the banks in China for the start of banking transactions in Turkish lira and Chinese yuan which aim to protect the manufacturers and exporters in these two countries against exchange rate fluctuations and to affirm support for using the local currencies in trade between them.[6] The arrangements entail opening accounts of Turkish lira and Chinese yuan and transferring funds between the two countries.[7] By these arrangements, the financial institutions in Turkey have started to take part in "more than 1,050 financial institutions in over 90 countries already doing business in the Chinese currency" which had "the most spectacular growth and continues" between October 2010 and July 2012 "compared to any other top 20 payments currency".[8]

On the other hand, neither Turkey nor China has yet established a comprehensive legal regime governing international electronic funds transfers ('EFT's).[9] In this regard, this paper aims to consider international payments by way of EFTs, addressing some of the problems that can be faced and discussing solutions, paying particular attention to the major international legal document dealing with this subject adopted in 1992 by the United Nations Commission on International Trade Law, namely the Model Law on International Credit Transfers ('UNCITRAL Model Law' or 'Model Law').[10] In this context, the paper focuses on the technical and legal aspects of EFTs in general, including the operations of banking transactions

---

6 See Akbank Annual Report 2010, available at http://www.akbank.com/en/content/Akbank_Annual_Report_2010.pdf (accessed 31 July 2012), 9 and 49; http://www.isbank.com.tr/content/TR/Bizi_Taniyin/Bizden_Haberler/Detay/Is_Bankasi_Rusya_ve_Cin_ile_Ticarette_Musterilerine_Kolaylik_Sagliyor-562-2087.aspx (accessed 31 July 2012).

7 *Ibid*.

8 The statistics are borrowed from http://www.swift.com/products/renminbi/overview and http://www.swift.com/resources/documents/SWIFT_RMB_Tracker_July_2012.pdf (accessed 31 July 2012). On the issue of the internationalisation of Chinese yuan, see also http://www.swift.com/products/renminbi/reports (accessed 31 July 2012).

9 The relevant legislation and the regulations of the central banks' of the two countries mainly concern domestic EFTs. For Turkey, see http://www.bddk.org.tr/WebSitesi/english/Legislation/Legislation.aspx; http://www.tcmb.gov.tr/yeni/eng/ (accessed 31 July 2012). For China, see http://www.pbc.gov.cn/publish/english/964/index.html (accessed 31 July 2012); W Li, "Stones from other Hills: Finality Rules within the Law of International Large Value Electronic Credit Transfers in China", 2007 21(3) *International Review of Law Computers & Technology* 335, 337.

10 http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1992Model_credit_transfers.html (accessed 31 July 2012).

in the funds transfer chain and the legal relations between the parties to the transfer. Furthermore, for the purpose of promoting the use of international EFT in international trade between Turkey and China by enhancing legal certainty for the parties to the transfer, the paper examines the potential problems raised by EFTs particularly in the cases of unauthorised payment orders and of failed, erroneous or delayed funds transfers and discusses the possible solutions in the light of the provisions of the UNCITRAL Model Law.

## B. International Payments Via Electronic Funds Transfers in General

### 1. Definitions and Terminology

EFT is one of the most common ways of making international payments.[11] However, there is no single definition of it.[12] According to the UNCITRAL Legal Guide on Electronic Funds Transfers,[13] it is "a funds transfer in which one or more of the steps in the process that were previously done by paper-based techniques are now done by electronic techniques."[14] As the term EFT is used in this paper, it refers to "the movement of capital between two points by electronic means".[15] However, it is not a physical movement of money but "the transfer of value"[16] by adjusting the balances of the relevant bank accounts.[17]

---

11 For the other ways such as foreign cash payments; travellers' cheques and cards; credit, charge and debit cards; cheques, drafts and money orders; formal and informal remittance systems; online payment systems such as PayPal, and letters of credit, see eg R Bollen, "An Overview of the Operation of International Payment Systems with Special Reference to Australian Practice: Part 1", (2007) 22(7) *Journal of International Banking Law and Regulation* 373, 375.

12 For instance, Geva defines an EFT as "the transmission of funds which is either initiated electronically (whether on-line or off-line) or carried out pursuant to payment instructions (or messages) sent over an electronic payment system" in *The Law of Electronic Funds Transfers* (New York, Matthew Bender, 1994), 1-26.

13 For the UNCITRAL Legal Guide on Electronic Funds Transfers ('Legal Guide') see http://www.uncitral.org/pdf/english/texts/payments/transfers/LG_E-fundstransfer-e.pdf (accessed 31 July 2012).

14 See *ibid* para 6, 6.

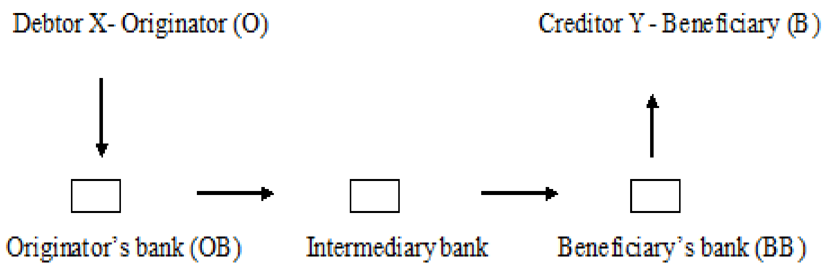
15 For this definition see S Karageorgiou, *Electronic Funds Transfers: Technical & Legal Overview* (London, University of London Queen Mary and Westfield College, 1990), 33.

16 EP Ellinger, E Lomnicka & CVM Hare, *Ellinger's Modern Banking Law* (Oxford University Press, 5th ed., 2011), 560.

17 *Ibid*, 559-60; A Kocaman, "Banka Havalesi –Kavram ve İşlemin Köşeleri Arasındaki İlişkiler", *Prof. Dr. Fikret Eren'e Armağan* (Ankara, Seçkin, 2006) 693, 693-4; A Kocaman, "Banka Havalesinde Ciro Sözleşmesi Çerçevesinde Verilen Ödeme Talimatının Hukuki Niteliği" (2000) XX(3) *Batider* 17, 18; A Türk, *Hukuki Yönden Banka Havalesi* (Ankara, Yetkin, 2007), 178-9.

As illustrated by diagram 1 below, the main parties to the transfer are the 'originator', the 'originator's bank', the 'beneficiary', the 'beneficiary's bank 'and depending on the operation of the transfer, the 'intermediary bank'.[18] In an example where debtor X wants to make a payment to creditor Y by way of a fund transfer between the bank accounts, X is the originator, X's bank is the originator's bank, Y is the beneficiary and Y's bank is the beneficiary's bank and the banks other than the originator's and beneficiary's involved in the transfer are the intermediary banks.[19] Any bank issuing a payment order is the 'sending bank' and receiving the payment order is the 'receiving bank'.[20]

**Diagram 1: Parties to the transfer**




The transfer of funds can be operated as a credit transfer or as a debit transfer depending on the way in which the payment instructions are communicated to the originator's bank.[21] In the credit transfer, the funds are pushed from the originator to the beneficiary since the originator's bank is instructed directly by the originator, whereas in the debit transfer, the funds are pulled from the originator to the beneficiary because the originator's bank is instructed by the beneficiary through the beneficiary's bank to collect funds from the originator.[22] It is to be noted that "most international funds transfers are credit transfers"[23].

---

18 This is the terminology used in Article 2 of the Model Law.

19 For this illustration see Prefatory Note ('Prefatory Note') to Article 4A of the Uniform Commercial Code ('UCC'), available at http://www.law.cornell.edu/ucc/4A/overview.html# PART 1 (accessed 31 July 2012).

20 *Supra* n 17.

21 See the Legal Guide, *supra* n 12, 12; Geva, *supra* n 11, 1-21; Ellinger, Lomnicka & Hare, *supra* n 15, 562; R Hooley & J Taylor, "Payment by Funds Transfer" in M Brindle & R Cox (eds), *Law of Bank Payments* (London, Sweet & Maxwell, 2004), 50.

22 See the Legal Guide, *supra* n 12, 12-4; Geva, *supra* n 11, 1-21-22; Ellinger, Lomnicka & Hare, *supra* n 15, 562; Hooley & Taylor, *supra* n 20, 50-3.

23 Ellinger, Lomnicka & Hare, *supra* n 15, 569; Hooley & Taylor, *supra* n 20, 58.

The transfer can be a large/high value transfer (wholesale payment) from business to business or a low/small value transfer (retail payment) available to consumers.[24]

Although different definitions and categories exist, "any transfer of funds involving either banks located in more than one country or at least one bank located in a country other than that of the currency of the transfer is an international funds transfer."[25] Therefore, a funds transfer between a bank in Turkey and another bank in China is international no matter what currency is used. Similarly, a transfer in Chinese yuan between two banks in Turkey or in Turkish lira between two banks in China is international as well. In this context, cross border or overseas branches and separate offices of a bank in different States are considered as separate banks.[26] Thus, when the endeavours of opening a Turkish bank's branch in China and Bank of China's branch in Turkey[27] are once realised, the former would be treated as a Chinese bank, whereas the latter would be considered as a Turkish bank. If either the originator's bank or the beneficiary's bank is located in the country of the currency of the transfer, it is an 'onshore' transfer; otherwise it is 'offshore'.[28]

## 2. Technical Aspects of Electronic Funds Transfers

An EFT is initiated by a payment order given by the originator or under his authority to his bank that instructs the bank to debit his account and to credit the beneficiary's account with the amount specified. In cases where these two accounts are held at one and the same bank, the transfer is "in-house"[29] where the bank would act as both the originator's bank and

---

[24] For these two groups see eg DB Humphrey, *Payment Systems: Principles, Practice, and Improvements* (Washington, World Bank Technical Paper No: 260, 1995), chapters 3 and 4; Bollen *supra* n 10; B Geva, "The Wireless Wire: Do M-Payments and UNCITRAL Model Law on International Credit Transfers Match?", (2012) *Banking & Finance Law Review* 249.

[25] This definition is of Geva's made in *supra* n 11, 4-5. It is also adopted in Ellinger, Lomnicka & Hare, *supra* n 15, 569 and Hooley & Taylor, *supra* n 20, 58.

[26] Geva, *supra* n 11, 4-6; Ellinger, Lomnicka & Hare, *supra* n 15, 569; Hooley & Taylor, *supra* n 20, 58.

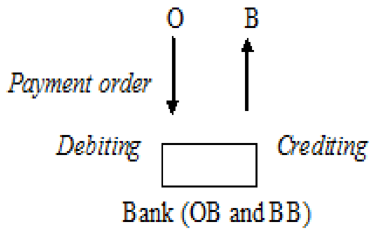
[27] For the announcement of these endeavours see http://www.invest.gov.tr/en-US/infocenter/news/Pages/020611-bank-of-china-office-opening-turkey.aspx (accessed 31 July 2012).

[28] For this classification see Geva, *supra* n 11, 4-6-18. It is also adopted by Hooley & Taylor, *supra* n 20, para 3-009 and Ellinger, Lomnicka & Hare, *supra* n 15, 569.

[29] See *Libyan Arab Foreign Bank v Bankers Trust Co*, ('*Libyan*') [1989] Q.B. 728, 751; B Geva, *Bank Collections and Payment Transactions* (Oxford University Press, 2001), 187.

beneficiary's bank and execute the transfer by adjusting the relevant accounts[30] as illustrated by diagram 2 below.

**Diagram 2: In-house transfer**




However, where the accounts are not held at the same bank, in order to carry out the originator's payment order, the originator's bank needs to issue another payment order either directly to the beneficiary's bank or in the absence of any correspondent relationship between them to an intermediary bank that will issue its own payment order to the beneficiary's bank for executing the order it has received.[31] In this case, the transfer is "inter-bank".[32] In the transfer chain, each sending bank makes payment for its payment order to its receiving bank.[33]

The process of exchanging payment orders between the banks is known as clearing which can be bilateral between the two respective banks or multilateral through a centralised clearing house.[34] The banks mostly use Society for Worldwide Interbank Financial Telecommunication ('SWIFT') to exchange financial messages.[35]

---

30 Ellinger, Lomnicka & Hare, *supra* n 15, 564.

31 *Ibid*; Hooley & Taylor, *supra* n 20, para 3-006.

32 Geva, *supra* n 28, 187; Ellinger, Lomnicka & Hare, *supra* n 15, 564; Hooley & Taylor, *supra* n 20, para 3-006. The inter-bank transaction could also be categorised as a "correspondent transfer" or a "complex transfer" depending on the existence of a correspondent relationship between the originator's bank and the beneficiary's bank, see the *Libyan* case, *supra* n 28.

33 Ellinger, Lomnicka & Hare, *supra* n 15, 564.

34 *Ibid*. In a broader sense, by encompassing the settlement of obligations, clearing is defined by Geva as "the interbank exchange and processing of payment instructions, which may be in execution of customers' instructions, with the view of calculating and establishing respective bank debit and credit positions available for settlement", see Geva, *supra* n 28, 4; B Geva, "The Clearing House Arrangement", (1991) 19 *Canada Business Law Journal* 138, 138.

35 SWIFT is a company founded in 1973 in Brussels with the purpose of "creating a shared worldwide data processing and communications link and a common language for international financial transactions", see http://www.swift.com/about_swift/company_information/swift_history.page?lang=en (accessed 31 July 2012). It offers its customers "to

Clearing is followed by settlement which is "payment of the interbank obligations arising from the respective debit and credit positions resulting from the clearing".[36] The settlement is bilateral where the two banks are correspondents holding an account with the other,[37] as illustrated by diagram 3 below. That account is *nostro* (yours)/due from on the books of the depositor's and *vostro* (ours)/due to on the books of the funds holder and the settlement takes place through the respective account of the two correspondent banks.[38] Where the accounts of the sending bank and the receiving bank are held at a third bank which could be a common correspondent or a central bank in a funds transfer system, the settlement is multilateral[39] as illustrated by diagram 4 below. In this case, the settlement takes place on the books of the common correspondent or of the central bank.[40] If each payment order is settled separately between the banks irrespective of their mutual payment obligations, the settlement is gross; however, in cases where those obligations are settled periodically and only the net balance is paid, it is a net settlement.[41]

---

automate and standardise financial transactions, thereby lowering costs, reducing operational risk and eliminating inefficiencies from their operations", see http://www.swift.com/about_swift/company_information/index.page? (accessed 31 July 2012). Banks in Turkey have been members of SWIFT since 1989, see https://docs.google.com/viewer?a=v&q=cache:TjJn3ev7oTcJ:www.tbb.org.tr/Dosyalar/userfiles/file/TBB/SWIFT_ile_%25C4%25B0liskiler/Country_Report_Turkey_20040301.doc+user+member+of+SWIFT+TURKEY+1989&hl=tr&gl=tr&pid=bl&srcid=ADGEESh7oHK0NVTIpmJ44AXLNt_LHJixjcxqVV6yePcZj5828jdb1Thll2yEHxU35pVGdE9xjY4ksYayC7Ao8sGdIW8yPmNplmIE2eYk-AywXX95rGe_-0fkrtgqOkHr-yB8eprrj_U6&sig=AHIEtbQlUcIr3yKwzetysvoNeMd6DBTigA (accessed 31 July 2012). On the other hand, SWIFT and the Chinese Central Bank declared their collaboration to facilitate China's integration in the international financial market in 2010, see http://www.swift.com/news/standards/Chinese_central_bank_urges_local_banks (accessed 31 July 2012). Besides, SWIFT has recently announced its first ever board member from China- Mr Yongli Wang, see http://www.swift.com/about_swift/company_information/swift_history.page?lang=en (accessed 31 July 2012). For the press release see also http://www.swift.com/news/press_releases/new_board_members (accessed 31 July 2012).

36 See Geva, *supra* n 28, 4.

37 Geva, *supra* n 11, 1-28; Ellinger, Lomnicka & Hare, *supra* n 15, 564; Hooley & Taylor, *supra* n 20, para 3-006.

38 Geva, *supra* n 11, 4-10-11; Hooley & Taylor, *supra* n 20, para 3-006; Bollen, *supra* n 10, 384.

39 Geva, *supra* n 11, 1-28; Ellinger, Lomnicka & Hare, *supra* n 15, 564; Hooley & Taylor, *supra* n 20, para 3-006.

40 *Ibid*.

41 Ellinger, Lomnicka & Hare, *supra* n 15, 564.

**Diagram 3: Bilateral settlement**

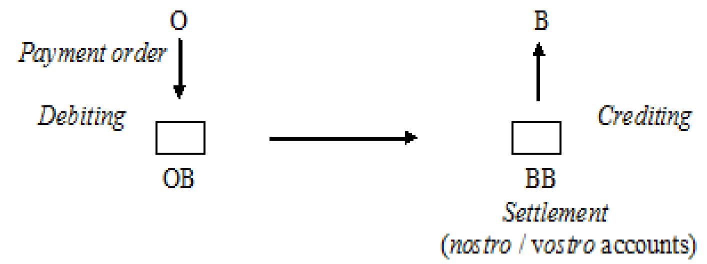
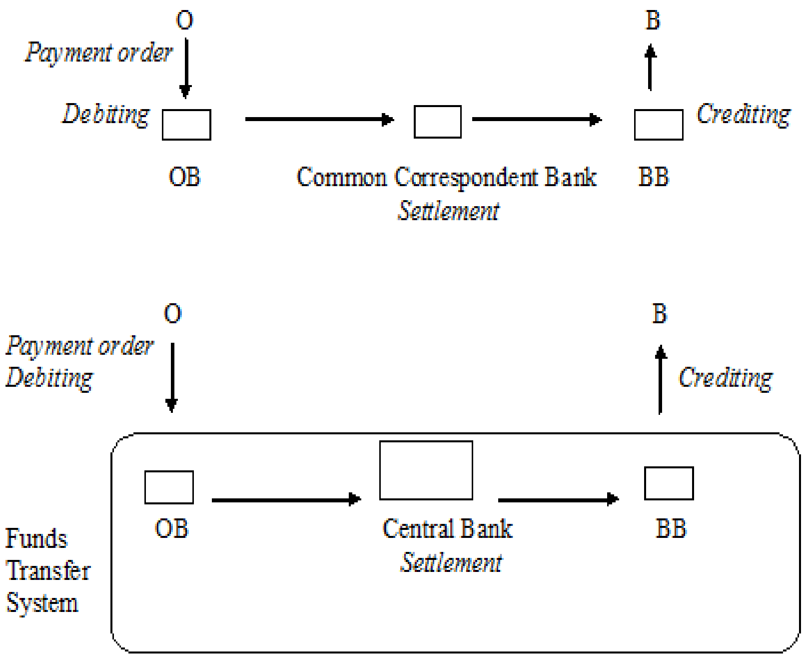



**Diagram 4: Multilateral settlement**




The operation of an international EFT is processed similarly to that of a domestic funds transfer although it is more complex due to the involvement of parties (particularly intermediary banks) from different States, foreign currency exchanges, multiple legal systems, jurisdictions and time-zones to the transfer.[42] However, international funds transfer is carried out by a series of domestic transactions and in most cases only one leg of the transfer

[42] Ellinger, Lomnicka & Hare, *supra* n 15, 568; Hooley & Taylor, *supra* n 20, para 3-009; Bollen, *supra* n 10, 373.

chain is truly international.[43] An example is illustrated by diagram 5 below where a buyer in Turkey wants to make a payment from his bank account held at İş Bankası to an account of a seller in China held at China Development Bank ('CDB'). The buyer in Turkey initiates the international EFT by giving his bank a payment order orally, in writing or electronically to transfer the amount specified in Chinese yuan to the seller's bank account. Next, İş Bankası debits the buyer's account and sends a payment message to CDB via SWIFT. Since İş Bankası and CDB are correspondents,[44] the settlement could take place on a bilateral basis on the books of CDB by debiting the account of İş Bankası with the amount it would credit the seller's account. In the example, if the beneficiary's bank would be another bank other than CDB with which İş Bankası did not have any correspondent relationship, CDB would act as an intermediary bank. Once it would receive the payment order from İş Bankası, the transfer would further be processed through China's National Advanced Payment System ('CNAPS')[45] as a domestic payment within China.[46]

---

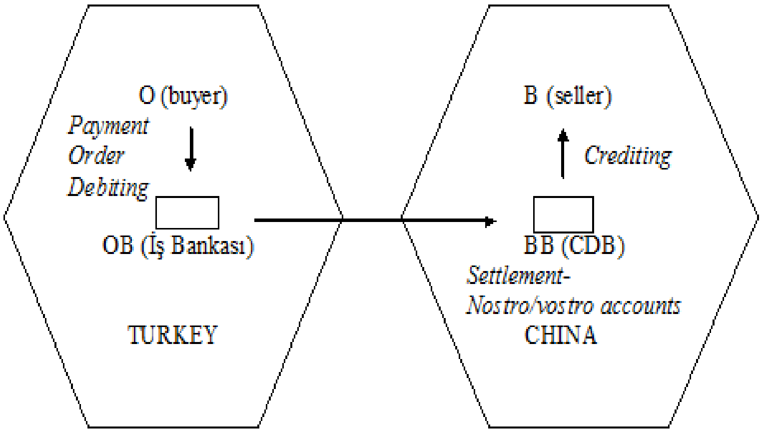
43 M Pelichet, "Note on the Problem of the Law Applicable to International Credit Transfers", Preliminary Document No 1 of November 1991, in Permanent Bureau of the Hague Conference on Private International Law (ed), *Proceedings of the Seventeenth Session 10 to 29 May 1993* (The Hague, SDU Publishers, 1995) 63, 65.

44 See http://www.isbank.com.tr/English/content/EN/International_Banking/Correspondent_Banks/CHINA.aspx (accessed 31 July 2012).

45 CNAPS, which consists of the high large value payment system and the bulk electronic payment system that enable instant clearing across the banks nationwide and real-time inter-bank bond transactions, was established in 2007, see http://www.gov.cn/english/2007-08/29/content_731337.htm (accessed 31 July 2012). For the initiatives to upgrade CNAPS, see also L Wei, "China is Easing Yuan-Pay System", available at http://online.wsj.com/article/SB10001424052970203513604577139981921915046.html#articleTabs%3Darticle (accessed 31 July 2012). In Turkey, it is Turkish Interbank Clearing and Funds Transfer System ('TIC-RTGS'), a real time gross settlement system that transfers and settles payments in Turkish Lira either for participants themselves, ie any bank acting in accordance with the Banking Law No 5411, or for their customers. TIC-RTGS has been owned and operated by the Central Bank since 1992. On TIC-RTGS, see *Electronic Funds Transfer System and Electronic Securities Transfer System* (Ankara, The Central Bank of the Republic of Turkey, 2002), available at http://www.tcmb.gov.tr/yeni/osi/documents/TIC-Booklet.pdf (accessed 31 July 2012).

46 For Chinese payment systems, see eg LL He & R Sappideen, "The Payment System in China", (2008) 23(3) *Journal of International Banking Law and Regulation* 168; *People's Republic of China: Detailed Assessment Report: CPSS Core Principles for Systemically Important Payment Systems*, IMF Country Report No. 12/81, (Washington, International Monetary Fund, 2012), available at http://www.imf.org/external/pubs/ft/scr/2012/cr1281.pdf (accessed 31 July 2012).

Diagram 5: Operation of an International EFT




## 3. Legal Aspects of Electronic Funds Transfers

### a. The Matter of Characterisation

An EFT consists of a series of transactions which aim to realise one single economic purpose. Depending on the matter of characterisation of an EFT, one could see it as a single transaction under "the unitary approach" or as a series of successive bilateral operations under "the segmented approach".[47] It is true that from the perspective of the originator and the beneficiary, there is only one single transaction which credits and debits their respective accounts, whereas from the perspective of banks involved in an international funds transfer, there is a series of individual payment orders.[48] Generally speaking, jurisdictions which do not have specific

[47] The terms of "the unitary approach" and "the segmented approach" are adopted from Geva, *supra* n 28, 211. On this issue, see also D Mavromati, *The Law of Payment Services in the EU: The EC Directive on Payment Services in the Internal Market* (the Netherlands, Kluwer Law International, 2008), 158.

[48] "International Credit Transfers: Comments on the draft Model Law on International Credit Transfers", A/CN.9/WG.IV/WP.49, (1991) XXII *Yearbook of UNCITRAL* 214, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1991-e/yb_1991_e.pdf (accessed 31 July 2012), Comment 4, 259; EE Bergsten, "A Payments Law for the World: UNCITRAL Model Law on International Credit Transfers", in RC Effros (ed), *Payment Systems of the World* (New York, Oceana Publications Inc, 1994) 409, 494. One of the results of this dichotomy would appear in determining the law applicable to international EFT. The unitary approach leads to the application of a single law to the whole transfer. On the other hand, the segmented approach gives rise to the possibility of subjecting the different legs of the transfer to different laws. On this issue, see B Yüksel, "The Law Applicable to Electronic Funds Transfer", at the Research Seminar at the Centre for Private International Law, University of Aberdeen, 26 June 2012, UK (abstract available at http://www.abdn.ac.uk/law/private-international-law/events.shtml, accessed 31 July

legislation on payments law follow the former approach, whereas the others such as the US[49] accept the latter.[50]

### b. Legal Relationships Between the Parties

The process of an international EFT involves a diversity of legal relationships between the parties to the transfer.[51] These legal relationships can be either direct or indirect depending on "the cause of the transfer and the kind of association that connects the parties".[52]

The direct relationships are mostly contractual and they exist before the transfer.[53] In this regard, there is a direct relationship between the bank and its customer established upon the bank account agreement. Similarly, the banks which are correspondents have a direct relationship based on the correspondent banking agreement between them. In cases where the transfer is processed through a funds transfer system, the legal relationships of participating banks with each other and with the system itself are considered direct which are subject to the rules and regulations of the funds transfer system. The relationship between the originator and the beneficiary is also a direct legal relationship which reveals the purpose of making an EFT. On the other hand, indirect relationships are based on dealings between the parties to the transfer and derived from participating in it at some stage such as the relationship between the originator and the beneficiary's bank.[54]

---

2012); LGR di Brozolo, "International Payments and Conflicts of Laws", (2000) 48 *American Journal of Comparative Law* 308; R Bollen, "Harmonisation of International Payment Law: A Survey of the UNCITRAL Model Law on Credit Transfers: Part 1", 2008 23(2) *Journal of International Banking Law and Regulation* 44, 57-8.

49 For the States that have adopted Article 4A of the UCC, *supra* n 18, see http://www.law.cornell.edu/uniform/ucc.html#a4a (accessed 31 July 2012).

50 Geva, *supra* n 28, 211; Mavromati, *supra* n 46, 158. For a detailed comparative analysis on the law of credit transfers in some jurisdictions, see Geva, *supra* n 28, 210-317.

51 M Gill, "Responsibility and Electronic Fund Transfers", (1994) 13(7) *International Banking and Financial Law* 4, 7.

52 For this categorisation, see Karageorgiou, *supra* n 14, 83.

53 *Ibid*. For a detailed analysis of direct legal relationships between the parties in Turkish see also Kocaman, *supra* n 16, 693; Kocaman, *supra* n 16, 17; Türk, *supra* n 16, §10.

54 For other examples of indirect relationships see Karageorgiou, *supra* n 14, 95. However, depending on the legal status given to the parties to a transfer in different legal systems, a party may bring an action against the other party even though the relationship between them is not direct. For a detailed comparative analysis on the issue which considers various legal systems, see Geva, *supra* n 28, 213-317.

### C. Some Legal Problems Raised by Electronic Funds Transfers and Possible Solutions under the UNCITRAL Model Law on International Credit Transfers

#### 1. General Overview of the UNCITRAL Model Law [55]

The Model Law on International Credit Transfers was adopted in 1992 by UNCITRAL[56] as a result of its work in the field of international payments law.[57] The UNCITRAL Model Law is considered as "the major international legal document dealing with the subject of EFTs."[58]

Since it is drafted in the form of a 'model law' as "a legislative text that is recommended to states for adoption as their national law",[59] there is flexibility for States to incorporate its text as a whole into their legal system or to adopt it by adding to it or by leaving out some of its provisions.[60]

In the European Union, the Cross Border Credit Transfers Directive of 1997[61] repealed by the Payment Services Directive of 2007[62] was based on

---

55 A bibliography on the UNCITRAL Model Law on International Credit Transfers prepared by the Secretariat yearly is available at http://www.uncitral.org/uncitral/publications/bibliography_consolidated.html (accessed 31 July 2012).

56 UNCITRAL was established in 1966. It is the core legal body of the UN system in international trade law, working with the purpose of the modernisation and harmonisation of rules on international business by preparing and promoting the use and adoption of legislative and non-legislative instruments in key areas of commercial law. On UNCITRAL, see http://www.uncitral.org/uncitral/en/about_us.html (accessed 31 July 2012); *The UNCITRAL Guide: Basic Facts About the United National Commission on International Trade Law* (United Nations Publication, Vienne, 2007), available at http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf (accessed 31 July 2012).

57 International payments law has been one of the main interests of UNCITRAL since its first session in 1968 and it has been given a priority along with the topics of international sale of goods and international commercial arbitration, see "Methods of Work For Priority Topics", A/CN.9/9, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N68/048/59/PDF/N6804859.pdf?OpenElement (accessed 31 July 2012), para 2; "Report of the United Nations Commission on International Trade Law on the work of its first session", A/7216, (1970) 1 *Yearbook of UNCITRAL* 71, available at http://www.uncitral.org/pdf/english/travaux/sales/limit/a7216-e.pdf (accessed 31 July 2012), para 48, 78; Bergsten, *supra* n 47, 409. For the work of UNCITRAL in the field of international payments law, see also http://www.uncitral.org/uncitral/en/uncitral_texts/payments.html (accessed 31 July 2012).

58 See Prefatory Note to Article 4A of UCC, *supra* n 18.

59 See L Bojer, "International Credit Transfers: The Proposed EC Directive Compared with UNCITRAL Model Law", 1995 10(6) *Journal of International Banking Law* 223, 223; CJ Cheng, "UNCITRAL Developments and Banking Operations", in JJ Norton, CJ Cheng & I Fletcher (eds), *International Banking Operations and Practices: Current Developments* (London, Graham & Trotman/ Martinus Nijhoff, 1994) 261, 269.

60 *Ibid*.

61 Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on Cross-Border Credit Transfers, [1997] OJ L43/25, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0005:EN:NOT (accessed 31 July 2012).

62 Directive of the European Parliament and of the Council of 13 November 2007 on Payment

the principles of the Model Law.[63] Although the Model Law has not been adopted by any national States yet, it is applied as the *lex mercatoria* by arbitrators[64] and by the courts of some States as well.[65] It is also interesting to note that recently the Model Law has been taken into account by the United States Court of Appeals for the 7th Circuit.[66]

The Model Law consists of four chapters, which are general provisions, the obligations of the parties, the consequences of failed, erroneous, or delayed credit transfers and completion of the credit transfer. Since the purpose of this article is limited to unauthorised payment orders and failed, erroneous or delayed funds transfers, all provisions of the Model Law are not examined hereunder.[67] However, there is a need to consider briefly the

---

Services in the Internal Market, [2007] OJ L319/1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0064:EN:NOT (accessed 31 July 2012).

63 See http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1992Model_credit_status.html (accessed 31 July 2012).

64 For the cases referred to the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce ('FTCA') the UNCITRAL Model Law is applied as the *lex mercatoria* in deciding on the interest rate in accordance with international payment usages, see eg FTCA Award of 4 November 2010 [Proceedings No. T- 5/10], available at http://cisgw3.law.pace.edu/cases/101104sb.html (accessed 31 July 2012); FTCA Award of 30 September 2008 [Proceedings No. T- 19/2007], available at http://cisgw3.law.pace.edu/cases/080930sb1.html (accessed 31 July 2012); FTCA Award of 30 September 2008 [Proceedings No. T- 2/2008], available at http://cisgw3.law.pace.edu/cases/080930sb2.html (accessed 31 July 2012); FTCA Award of 23 January 2008 [Proceedings No. T- 9/07], available at http://cisgw3.law.pace.edu/cases/080123sb.html (accessed 31 July 2012); FTCA Award of 1 June 2005 [Proceedings No. T- 40/2003], available at http://cisgw3.law.pace.edu/cases/050601sb.html (accessed 31 July 2012). See also FTCA Award No T-16/04, July 18, 2005; FTCA Award No T-09/02, March 24, 2003; FTCA Award No T-17/06, September 10, 2007; FTCA, Award No T-08/05, March 28, 2006; FTCA Award No. T-03/06, September 14, 2006 as cited by V Pavic & M Djordjevic, "Application of the CISG Before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce - Looking Back at the Latest 100 Cases", (2009) *Journal of Law and Commerce* 1, available at http://www.cisg.law.pace.edu/cisg/biblio/pavic-djordjevic.html#196 (accessed 31 July 2012). For the comments on some of these cases, see *ibid*.

65 The information on the application of the Model Law as the *lex mercatoria* by courts was given by CG Corte, "Lex mercatoria, independent guarantees and non-state enforcement", at the Journal of Private International Law Conference, 16 April 2011, Milan, Italy (unpublished).

66 See *Griffin Trading Company*, [2012] 683 F.3d 819 (7th Circuit). Regarding a breach of fiduciary duty in relation to an improper wire transfer, the judges found that the bankruptcy and district courts erred in applying the law of Illinois and therefore UCC where they should have applied foreign law instead, see *ibid* 823. Thereafter, the judges considered the relevant provisions of the Model Law on the revocation of a payment order, besides those of the Payment Services Directive *supra* n 61, in reaching the conclusion that there is no real difference among legal systems, see *ibid*.

67 For finality rules in the Model Law and for aspects of these rules which are "time of completion of payment", "discharge of underlying obligation owed by the originator to the

scope of application of the Model Law and the obligations of the parties under it before addressing the problems and solutions.

### a. Scope of Application of the UNCITRAL Model Law

#### i. Territorial Scope of Application

There is no provision that deals directly with the territorial scope of the application of the UNCITRAL Model Law. As it is consistently stated in the reports of the Secretary General,[68] the territorial application of the Model Law is determined and limited by the first paragraph of the conflict of laws rule contained in Article Y in the footnote.[69]

According to Article Y(1)[70], "The rights and obligations arising out of a

beneficiary", "access to funds" and "revocation", see Li, *supra* n 8 where the author suggests that the Chinese EFT law should adopt them.

68 See "International credit transfers: Comments on the draft Model Law on International Credit Transfers", A/CN.9/WG.IV/WP.41, (1990) XXI *Yearbook of UNCITRAL* 42, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1990-e/yb_1990_e.pdf (accessed 31 July 2012), para 8; "International credit transfers: Major issues to be considered by the Working Group", A/CN.9/WG.IV/WP.42, (1990) XXI *Yearbook of UNCITRAL* 60, available at *ibid*, paras 71-2; "International credit transfers: comments on the draft Model Law on International Credit Transfers", A/CN.9/WG.IV/WP.44, (1990) XXI *Yearbook of UNCITRAL* 90, available at *ibid*, para 12, 93; "International credit transfers: comments on the draft Model Law on International Credit Transfers", A/CN.9/WG.IV/WP.46 and Corr.1, (1991) XXII *Yearbook of UNCITRAL* 162, available at *supra* n 47, para 9; "International Credit Transfers: Comments on the draft Model Law on International Credit Transfers", A/CN.9/WG.IV/WP.49, *supra* n 47, para 13; "International credit transfers: comments on the draft Model Law on International Credit Transfers", A/CN.9/346, (1991) XXII *Yearbook of UNCITRAL* 52, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1991-e/vol22-p51-102-e.pdf (accessed 31 July 2012), para 14, 55.

69 For the criticism made by the Permanent Bureau of the Hague Conference regarding the legislative technique in the Model Law that is "adopting in a substantive law a conflict rule whose aim is specifically to determine the application of that law" which is unfamiliar to the civil law systems despite of its using in some legal systems, such as the US and UCC §4A-707, see "Model Law on International Credit Transfers: compilation of comments by Governments and international organizations", A/CN.9/347 and Add.1, (1991) XXII *Yearbook of UNCITRAL* 103, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1991-e/vol22-p102-144-e.pdf (accessed 31 July 2012), (a), 134; Pelichet, *supra* n 42, 67-71.

70 In the draft Model Law as adopted by the Working Group at the close of its twenty second session in 1990 (see "Report of the Working Group on International Payments on the work of its twenty-second session", A/CN.9/344, (1991) XXII *Yearbook of UNCITRAL* 195, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1991-e/vol22-p195-214-e.pdf, accessed 31 July 2012), the conflict of laws rule was in the main body of text under Article 18. After the discussion of Article 18 at the twenty fifth session of the Commission in 1992, due to the lack of a consensus on the deletion or the retention of it, the Commission decided to place Article 18 in a footnote with the aim of emphasising its optional nature for national legislators. For the decision and the reasoning of the Commission, see "Report of the United Nations Commission on International Trade Law

payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply."[71] On this basis, where a dispute related to an international credit transfer within the scope of the Model Law is brought before a court in a State that has adopted the Model Law, including Article Y, the Model Law would be applied if the law of the country applicable under Article Y(1) is a country that has adopted it.[72] On the other hand, where the dispute is brought before a court in a State that has not adopted the Model Law, its substantive provisions could be applied if the applicable law determined by the conflict of laws rules of the forum is of a State which has adopted the Model Law into its national legislation.

### ii. Material Scope of Application

The material scope of the UNCITRAL Model Law is determined by Article 1. Article 1(1) sets out the general rule for the application of the Model Law, whereas footnote 2 to Article 1 and Article 3 exclude certain matters from the scope.

Under Article 1(1), the material scope of application is limited to "credit transfers where any sending bank and its receiving bank are in different

---

on the work of its twenty-fifth session", A/47/17, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/359/28/IMG/N9235928.pdf?OpenElement (accessed 31 July 2012), para 61. Consequently, the text of Article 18 was moved to the footnote and labelled Article Y for the States that might wish to adopt it, see *ibid*, para 74.

[71] This is a reflection of segmented approach, see *supra* n 47. For the criticism of the conflicts rule in the Model law made by the Permanent Bureau of the Hague Conference, see A/CN.9/347 and Add.1, *supra* n 68, (a) and (b), 133-4; Pelichet, *supra* n 42, 67-71. The law applicable to international credit transfers had been started to be considered by the Hague Conference in 1987, see M Pelichet, "Note on Conflicts of Law Occasioned by Trans-frontier Data Flows", Preliminary Document No 5 of November 1987, in Permanent Bureau of the Hague Conference on Private International Law (ed), *Proceedings of the Sixteenth Session 1988* (The Hague, SDU Publishers, 1988) 112-23. Although a work on the subject had placed on the Hague Conference's agenda in 1991 which had supported application of a single law to the transfer as a whole, it was removed from the agenda afterwards without finalising in any legal document. The Hague Conference's co-operation with UNCITRAL is in work in progress and both UNCITRAL Model Law on International Credit Transfers and the Legal Guide, *supra* n 12, are referred to in the overview of conventions and other instruments drawn up under the auspices of UNCITRAL in the field of commercial law and finance law, see http://www.hcch.net/index_en.php?act=progress.cats and http://www.hcch.net/upload/wop/gap11info1e.pdf (accessed 31 July 2012). However, the topic of international credit transfers is currently not on the agenda of the Hague Conference.

[72] As di Brozolo, *supra* n 47, states at 311, this would be the case unless the State adopted the Model Law considers the rules of it applicable to any international credit transfer.

States".[73] This limitation has two main elements, ie. 'credit transfers' and 'internationality'.

The Model Law applies only to credit transfers.[74] Both paper-based and electronic credit transfers are in its scope.[75] The term 'credit transfer' is defined under Article 2(a) as "the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary" and it includes "any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order". On this basis, the Model Law applies not only to interbank relationships but also to the rights and obligations of the bank customers,[76] from the moment that the originator gives his payment order to his bank.[77] However, it does not apply to the relationship between the beneficiary and the beneficiary's bank in principle[78] as the credit transfer is completed once the beneficiary's bank accepts a payment order for the benefit of the beneficiary.[79]

---

73 It is to be noted that, according to Article 1(2), the Model Law also applies to "other entities that as an ordinary part of their business engage in executing payment orders in the same manner as it applies to banks". The provision reflects the intention of governing a service rather than a particular system, see "Report of the Working Group on International Payments on the work of its eighteenth session", A/CN.9/318, (1989) XX *Yearbook of UNCITRAL* 69, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1989-e/vol20-p69-88-e.pdf (accessed 31 July 2012), paras 50-2; "Report of the Working Group on International Payments on the work of its twentieth session", A/CN.9/329, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V89/625/98/PDF/V8962598.pdf?OpenElement (accessed 31 July 2012), para 66.

74 Debit transfers are excluded from the scope by Article 2(b)(ii) with the requirement that for being a payment order an instruction should not provide that "the payment is to be made at the request of the beneficiary", see "Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session", A/46/17, (1991) XXII *Yearbook of UNCITRAL* 3, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1991-e/vol22-p3-45-e.pdf (accessed 31 July 2012), para 47; Bergsten, *supra* n 47, 424.

75 See Explanatory Note prepared by the UNCITRAL Secretariat on the UNCITRAL Model Law on International Credit Transfers ('Explanatory Note') for informational purposes, available at http://www.uncitral.org/pdf/english/texts/payments/transfers/ml-credittrans.pdf (accessed 31 July 2012), para 10.

76 "Report of the Working Group on International Payments on the work of its sixthteenth session", A/CN.9/297, (1988) XIX *Yearbook of UNCITRAL* 25, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1988-e/vol19-p25-35-e.pdf (accessed 31 July 2012); Bergsten, *supra* n 47, 439.

77 *Ibid*, 425.

78 For the exceptions where the Model Law refers to this relationship see Articles 10(1) and (5), 11(1) and (2), 17(2) and 19(1); Bergsten, *supra* n 47, 426-8.

79 See Article 19; Bergsten, *supra* n 47, 426; J Kišš, "International Payments Law Reform: Introduction of Global Code of Payments", (2010) 25(3) *Banking & Finance Law Review* 405, 413. Therefore, the relationship between the beneficiary and the beneficiary's bank is governed by the law applicable to that relationship which would be determined by the

The Model Law applies only to international transfers.[80] The test of internationality is based on the location of any sending bank and its receiving bank. As long as these banks are in different countries, the Model Law applies to every aspect of the credit transfer.[81] Since for the purpose of determining the sphere of application of the Model Law, branches and separate offices of a bank in different States are considered as separate banks under Article 1(3), a transfer is within the scope of application even it is made between the accounts of the same bank kept in the branches in different States.[82]

On the other hand, issues related to the protection of consumers are excluded from the scope. Although the Model Law covers international credit transfers made by consumers for personal reasons,[83] due to the

conflict of laws rules of the forum. In most cases, in the absence of any choice by the parties, the law applicable to the bank-customer relationship, particularly when the services provided by the bank are linked to an account like it is in EFTs, would be the law of the bank's branch where the account is kept. This choice of law rule is widely accepted in both common law and civil law jurisdictions, see eg L Collins *et al*, *Dicey, Morris & Collins on the Conflict of Laws* (London, Sweet & Maxwell, 14th ed, 2006), 1785- 800; Hooley & Taylor, *supra* n 20, para 3-0015. For the perspective of European private international law of obligations affirming the rule, see also Article 4(1)(b) of the Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L177/6 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0006:en:PDF, accessed 31 July 2012) which provides that "a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence"; the Report on the Convention on the law applicable to contractual obligations by M Giuliano and P Lagarde [1980] OJ C282/1, 21; P Beaumont & P McEleavy, *Anton's Private International Law* (Edinburgh, W Green/ Sweet & Maxwell, 3rd ed, 2011), 466-8 and 479.

80 One of the reasons for this restriction stated in the Explanatory Note, *supra* n 74, para 12 is the mandate of UNCITRAL to unify the law governing international trade. However, it is also underlined at para 14 that for the purpose of providing unity of the law, States that might wish to adopt the Model Law to govern domestic credit transfers as well as international ones could do so by changing the scope of application in Article 1.

81 The Explanatory Note, *supra* n 74, para 13; A/CN.9/346, *supra* n 67, para 12, 55; Geva, *supra* n 11, 4-147. It is to be noted that the test for internationality could raise the problem of foreseeability. For instance, in the case of a credit transfer in a foreign currency between two banks in the same State, the involvement of an intermediary bank in a different State makes the transfer international and initiates the application of the Model Law which would not always be able to be known or predicted by the originator, see A/46/17, *supra* n 73, para 17. This was touched upon by the Commission at its twenty fourth session and it was suggested that the problem could be mitigated by the originator's bank by specifying the transfer's route, see *ibid*.

82 A/CN.9/346, *supra* n 67, para 12.

83 The Explanatory Note, *supra* n 74, para 14; Geva, *supra* n 11, 4-418; Karageorgiou, *supra* n 14, 432. On the issue of consumer wireless mobile payments and the Model Law see Geva, *supra* n 23 where the author concludes that the Model Law is appropriate to cover these transactions and only a few adjustments to some of the provisions of the Model Law should be considered.

existence of special consumer protection legislation applicable to credit transfers in some States,[84] it gives them precedence over its rules.[85]

In principle, conditional instructions are also excluded from the scope under Article 3.[86] However, according to Article 3(1), if such a conditional instruction is executed by the receiving bank by issuing an unconditional payment order, thereafter the instruction is treated as unconditional and initiates the application of the Model Law.[87] With this provision, the Model Law covers the conditional instructions issued by the originator.[88] In that case, the sender of the instruction has the same rights and obligations as the sender of a payment order and the beneficiary designated in the instruction is treated as the beneficiary of a payment order.[89]

### b. Obligations of the Parties

Chapter 2 of the Model Law deals with the obligations of the sender and receiving bank. Since Article 2(f) of the Model Law defines a receiving bank as "a bank that receives a payment order", the receiving bank could be the beneficiary's bank or the receiving bank other than the beneficiary's bank.

#### i. Obligations of Sender

The obligations of the sender are set out under Article 5. As the sender is "the person who issues a payment order, including the originator and any

---

[84] See the US example of the Electronic Fund Transfer Act of 1978 and implementing Regulation E which intend to protect individual consumers engaging in EFTs, available at http://www.federalreserve.gov/boarddocs/caletters/2008/0807/08-07_attachment.pdf (accessed 31 July 2012).

[85] The Explanatory Note, *supra* n 74, para 14. It is rightly pointed out that since the Model Law deals with the protection of originators and beneficiaries who may be consumers under the relevant applicable national law, the exclusion relates to the protection of consumers "as a special class", see Bergsten, *supra* n 47, 433; Bojer, *supra* n 58, 224; Kišš, *supra* n 78, 413.

[86] See also Article 2(b) which expressly states that "payment order means an unconditional instruction".

[87] A/46/17, *supra* n 73, para 42; Bojer, *supra* n 58, 225.

[88] A/46/17, *supra* n 73, para 42; Bergsten, *supra* n 47, 432; Bojer, *supra* n 58, 225. Although the Commission also considered conditional instructions issued to intermediary banks, it recognised the concern that "the Model Law should not impose responsibility on banks further down the chain": see A/46/17, *supra* n 73, para 42. Article 3 does not apply to conditional instructions issued to the beneficiary's bank either since the beneficiary's bank would not issue any payment order, see Bergsten, *supra* n 47, 432.

[89] Article 3(1). However, the Model Law does not regulate the time of execution of a conditional instruction or the rights or obligations of the sender of that instruction which depends on whether the condition has been satisfied, see Article 3(2).

sending bank",[90] Article 5 applies to both the originator and the banks other than the beneficiary's bank.[91]

According to Article 5(6), the main obligation of the sender is "to pay the receiving bank for the payment order".[92] However, it is to be noted that the sender's obligation arises only when the receiving bank accepts the payment order and if the sender is bound by it.[93]

### ii. Obligations of Receiving Bank

The obligations of a receiving bank other than the beneficiary's bank are set out under Article 8, whereas the obligations of the beneficiary's bank are regulated under Article 10. These obligations are provided by considering both successful and unsuccessful transfers.[94]

In principle the obligations of the receiving bank arises only if and when[95] the receiving bank accepts the payment order.[96] The acceptance and the rejection of a payment order by the receiving bank are dealt with under Articles 7 and 9. Although the receiving bank has a full discretion in accepting or rejecting a payment order it received,[97] it is obligated either to execute the payment order or to give notice of rejection[98] within the time

---

90 See Article 2(e).

91 The Explanatory Note, *supra* 74, para 14.

92 For the time and situations when the payment is made by the sender to its receiving bank, see Article 6.

93 Bergsten, *supra* n 47, 442. On the issue when a sender is bound by a payment order, see *infra* part 2.1.

94 The Explanatory Note, *supra* n 74, para 33.

95 For the time and situations a payment order is accepted by the receiving bank other than the beneficiary's bank, see Article 7(2) and by the beneficiary's bank, see Article 9(1) of the Model Law.

96 The Explanatory Note, *supra* n 74, para 34. However, it is stated that there are also some obligations on giving notice under certain circumstances which arise even though the receiving bank does not accept the payment order, see Bergsten, *supra* n 47, 453. These are giving notice of rejecting the payment order under Articles 7(3) and 9(2), of insufficient data contained in the payment instruction under Articles 8(4) and 10(2), and of inconsistency in the information relating to the amount of the transfer or intended to identify the beneficiary under Articles 8(4), 10(3) and (4), see *ibid*.

97 EE Bergsten, "UNCITRAL Model Law on International Credit Transfers", (1991) 6(7) *Journal of International Banking Law* 276, 280-1.

98 A/CN.9/297, *supra* n 75, para 49; "Report of the Working Group on International Payments on the work of its seventeenth session", A/CN.9/317, (1989) XX *Yearbook of UNCITRAL* 41, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1989-e/vol20-p41-56-e.pdf (accessed 31 July 2012), para 81. However, as provided by Articles 7(3) and 9(2), where the receiving bank has received the payment order but not payment for that order or where the information to identify the sender is insufficient, it is not obligated to give the notice of rejection. For the discussion on this issue at the 1991 Commission session, see A/46/17, *supra* n 73, para 145.

required.[99] Failure to give such a notice results in the acceptance of the payment order by the receiving bank automatically according to Articles 7(2)(e) and 9(1)(h).[100]

Upon its acceptance of a payment order, the main obligation of the receiving bank in Articles 8(2) and 10(1) is to execute the order.[101] Fulfilling this obligation differentiates between the receiving banks. A receiving bank other than the beneficiary's bank[102] fulfils its obligation by issuing a payment order either to the beneficiary's bank or to an intermediary bank within the time required by the Model Law.[103] That payment order should be consistent with the contents of the payment order it received[104] and contain the instructions necessary to implement the credit transfer in an appropriate manner.[105] There could be cases where the sender has specifically designated an intermediary bank or funds transfer system to be used in carrying out the credit transfer in its instruction. According to Article 8(3), if the receiving bank determines that it is not feasible to follow the instruction or it would cause excessive costs or delay in completing the transfer, provided that the receiving bank asks the sender what further actions it should take before the end of the execution period, the bank is considered to have complied with its obligation.[106] On the other hand, the beneficiary's bank fulfils its obligation by placing "the funds at the disposal of the beneficiary, or otherwise to apply the credit, in accordance with the payment order and the law governing the relationship between the bank and the beneficiary" under Article 10(1).

---

99 According to Articles 7(3) and 9(2), the notice should be given "no later than on the banking day following the end of the execution period". Considering Article 2(k) and Article 11(1) and (2) together, the period of giving notice is normally not later than the second banking day following the receipt of the payment order, see Bergsten, *supra* n 96, 281.

100 Geva, *supra* n 11, 4-149 and 4-152. Therefore, the bank is deemed to have accepted the payment order and obligations associated with it, see the Explanatory Note, *supra* n 74, para 38.

101 *Ibid*, para 34. For the other obligations in the case of failed, erroneous or delayed funds transfers see *infra* part 2.2.

102 Article 8(1).

103 Article 8(2). The time is set out under Article 11(1) and in principle it is the banking day or the banking day after the order is received.

104 The question whether the receiving bank is obligated to execute the transfer in the currency stipulated by the sender is left open intentionally after the discussions at 1991 and 1992 Commission sessions since it was preferred not to deal with the foreign exchange issues in the Model Law so as not to interfere with existing rules and practices on the issue. For the respective discussions and reasoning of the preference, see A/46/17, *supra* n 73, paras 154-6; A/47/17, *supra* n 69, para 70.

105 Article 8(2).

106 Alternatively if the receiving bank has not accepted the payment order, it could also reject it, see Bergsten, *supra* n 47, n 188, 462.

### 2. Possible Solutions to Unauthorised Payment Orders and Failed, Erroneous or Delayed Funds Transfers under the Model Law

Unauthorised payment orders and failed, erroneous or delayed funds transfers are serious problems that can be faced in international payments. The Model Law provides comprehensive provisions with respect to these problems under Article 5 and Chapter 3.

#### a. Unauthorised Payment Orders

It has already been stated that the sender's obligation to pay the receiving bank arises only if the sender is bound by it.[107] Under Article 5, in principle, "a sender is bound by a payment order or an amendment or revocation of a payment order if it was issued by the sender or by another person who had the authority to bind the sender."[108] Furthermore, the sender who is bound by the payment order, in principle, is bound by the terms of it as received by the receiving bank.[109] On the other hand, the sender is not bound by an erroneous duplicate of a payment order or an order that contains an error or discrepancy if he and the receiving bank have agreed upon a procedure for detecting those defects and use of the procedure by the receiving bank revealed or would have revealed them.[110]

However, there are cases where the payment order received by a bank has not been really sent by the person or by the bank that is indicated as the sender. Therefore, the question arises as to who would bear the risk of forgery here.

Departing from Article 5(1), one could conclude that the purported sender is not bound by the payment order if it wasn't sent by himself or under his authority.[111] However, the answer indeed depends on the

[107] See *supra* part 1.2.1.

[108] It is to be noted that the Model Law does not deal with the question whether the actual sender of the payment order has the authority to bind the purported sender, see the Explanatory Note, *supra* n 74, para 23. Therefore, this question is left to the applicable law. Since the choice of law rules suggested in Article Y do not apply to this matter (see Article Y(2)), the applicable law is to be determined according to the conflict of laws rules of the forum. On this issue, see also Bergsten, *supra* n 47, 442.

[109] Article 5(5). See also Geva, *supra* n 23, where the author assesses, as regards consumer wireless mobile payments, that there is a need to address a scheme allocating loss between the sender and the receiving bank for the errors of the mobile network.

[110] See Article 5(5)(a) and (b). If the error or discrepancy is in the amount of the payment order, the sender is bound only to the extent of the amount that was intended, see Article 5(5).

[111] Bergsten, *supra* n 47, 442-3.

authentication procedure "established by agreement to determine whether a payment order or an amendment or revocation of a payment order was issued by the person indicated as the sender".[112] In cases where a payment order is subject to authentication by means of a mere comparison of signatures, which generally arises in paper based transfers rather than electronic ones, the traditional rule that the receiving bank bears all the risks of an unauthorised payment order is retained under the Model Law.[113]

On the other hand, where the authentication procedure is something else, provided that it is "in the circumstances a commercially reasonable method of security against unauthorized payment orders and the receiving bank complied with it", the purported sender is bound by the payment order under Article 5(2).[114] It is stated that at that point the bank has no means to distinguish the authorised use of the authentication from the unauthorised use of it and that the unauthorised payment order probably has resulted from the sender's fault.[115] However, by proving that the unauthorised payment order has been sent as a result of the actions of the other party, the sender or the receiving bank can shift the risk to the other party.[116]

---

[112] Article 2(i). On the authentication procedure see also A/46/17, *supra* n 73, paras 66-71.

[113] *Ibid*, para 108; Bergsten, *supra* n 47, 443.

[114] See A/46/17, *supra* n 73, paras 106-9. Since the Model Law does not define the commercial reasonableness, the determination would vary according to time and place depending on various factors such as the technology available, the amount of the transfer and the risk it involves, see the Explanatory Note, *supra* n 74, para 25; Bergsten, *supra* n 47, 444; Bollen, *supra* n 47, 48. *Cf.* UCC §4A-202(c), *supra* n 18, which provides that "...A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer."

[115] The Explanatory Note, *supra* n 74, para 26.

[116] See Article 5(4) which provides that:
"A purported sender is, however, not bound under paragraph (2) if it proves that the payment order as received by the receiving bank resulted from the actions of a person other than
(a) a present or former employee of the purported sender, or
(b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.
The preceding sentence does not apply if the receiving bank proves that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender."
See also Geva, *supra* n 23, where the author assesses that this is a heavy burden on consumers. For rethinking and redrafting, Geva addresses the absence of any ceiling on the purported sender's liability and of any provision providing liability directly dependent on the purported sender's negligence rather than its fault which he finds not appropriate for consumers in the case of unauthorised transfers, see *ibid*.

Since it is assumed that it is the receiving bank that determines the authentication procedure in an electronic transfer, the risk of forgery has been left on that bank if the procedure is not commercially reasonable.[117] Furthermore, the bank is precluded by Article 5(3) from the possibility of avoiding this by making an agreement to the contrary.

### b. Failed, Erroneous or Delayed Funds Transfers

Chapter 3 of the Model Law deals with the consequences of failed, erroneous or delayed credit transfers and regulates the issues of duty of assistance, the duty of refund, correction of underpayment and restitution of overpayment and the liability.

#### i. Assistance

It is a fact that when the completion of an international transfer is delayed, neither the originator nor the beneficiary knows anything about the problem since they are only in contact with their own banks but not with the intermediary banks.[118] In order to collect information with respect to the location of the funds or the cause of the failure,[119] Article 13 of the Model Law requires each receiving bank "to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the banking procedures of the credit transfer" until it is completed.[120] However, the Model Law does not provide any sanctions for the breach of the duty to assist.[121]

#### ii. Refund

In cases where the transfer is not completed because of any reason such as the insolvency of a receiving bank before executing the payment order it received, an embargo issued on the transfer or because of war or unsettled conditions in the country of the receiving bank,[122] Article 14 of the Model Law provides a 'money-back guarantee' and a chain of

---

[117] The Explanatory Note, *supra* n 74, para 25.

[118] *Ibid*, para 40; Bergsten, *supra* n 47, 463.

[119] See A/46/17, *supra* n 73, para 246.

[120] For the divergent views concerning the duty of assist, see *ibid*, paras 244-6. Since the scope of the duty is limited to the banking procedures of the transfer, it does not include any other obligations such as joining the legal procedures that the originator would start due to the failure, see *ibid*, para 248.

[121] See *ibid*, para 249.

[122] The Explanatory Note, *supra* n 74, para 42.

responsibility.[123] According to Article 14(1), "if the transfer is not completed, 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."[124] It is stated that the obligation is not dependent on whether or not the originator's bank has got a refund from its receiving bank.[125] Furthermore, "the originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund" as well.[126]

Although it is assumed that this chain of responsibility stops at the bank which is unable to complete the transfer, the chain may stop earlier because of the reasons mentioned above and it could be more appropriate to make a refund to another sender in the chain.[127] The Model Law offers a practical solution for those cases by the 'skip rule" in Article 14(4) which enables a bank to be discharged from its obligation to make a refund to its sender to the extent that it makes the refund direct to a prior sender.[128] In addition, considering the interests of the originator, Article 14(5) allows him to recover from any bank that is obligated to make a refund to the extent that any of the banks have not previously refunded him.[129] If there was no skip rule, making a refund to an insolvent intermediary bank which might not be able to make the next refund could have been prevented only by way of bringing legal actions.[130]

123 *Ibid*, para 43.

124 It is not clear whether the refund is to be made in the original amount and the currency of the sender's payment or in the current value of the currency of the transfer, see Bergsten, *supra* n 47, 479. By taking into account the wording of Article 14(1), Bergsten concludes that the refund has to be made in the former which leaves any loss or profit arising out of the change of the foreign exchange currency rate on the originator's bank that has made the currency conversion, see *ibid*, 480.

125 See *ibid*, 475.

126 Article 14(1).

127 The Explanatory Note, *supra* n 74, para 42.

128 For the skip rule, see also A/46/17, *supra* n 73, paras 228-35 and 266-8. The second sentence of Article 14(4) further provides that "any bank subsequent to that prior sender is discharged to the same extent."

129 Article 14(5) further provides that "a bank that is obligated to make a refund is discharged from that obligation to the extent that it makes the refund direct to the originator. Any other bank that is obligated is discharged to the same extent."

130 See A/46/17, *supra* n 73, paras 235 and 266. It is also to be stated that according to Article 14(6) the skip rule does not apply to a bank if it would affect the bank's rights or obligations under any agreement or any rule of a funds transfer system. Therefore, the principle in Article 4 that the rules of Model Law are not mandatory and may be varied by the agreement of the parties is modified in Article 14(6). For the extent of the mandatory nature of the Model Law, see the Explanatory Note, *supra* n 74, para 19.

In principle, the obligation to refund can not be varied by the agreement of the parties.[131] However, there are two exceptions. The first exception to the money back guarantee is found in Article 14(2) under a limited case where "a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfer."[132] This significant risk could be in a particular bank or country due to economic, political or legal reasons.[133] In such cases, the bank can either reject the payment order or carry out the transfer by shifting the risk to its customer.[134] The second exception is found in Article 14(3) where the receiving bank has been directed by its sender to use a particular intermediary bank in the transfer. If the receiving bank that has followed this instruction is unable to obtain a refund because that intermediary bank has suspended payment or is prevented by law from making the refund, the bank is not required to make a refund to its sender.[135] However, in order to ensure that the rule is not used to escape the duty of refund, the bank is required to prove that "it does not systematically seek such directions in similar cases."[136]

### iii. Correction of Underpayment and Restitution of Overpayment

Another problem with respect to EFTs is the difference that occurs between the amounts of the payment orders that the receiving bank accepts and executes. According to Article 15, "if the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted, other than as a result of the deduction of its charges, it is obligated to issue a payment order for the difference."

On the other hand, under Article 16, "if the credit transfer is completed, but the amount of the payment order executed by a receiving bank is greater than the amount of the payment order it accepted, it has such rights to recover the difference from the beneficiary as may otherwise be provided by law."

---

[131] Article 14(2).

[132] For the discussion on the issue, see A/46/17, *supra* n 73, paras 252-8.

[133] For the types of risk in EFTs, see eg R Sappideen, "Cross-border electronic funds transfers through large value transfer systems, and the persistence of risk", (2003) November *Journal of Business Law* 584, 589-99.

[134] Bergsten, *supra* n 47, 477.

[135] The Explanatory Note, *supra* n 74, para 42. For the discussion on this issue, see also A/46/17, *supra* n 73, paras 263-4.

[136] See Article 14(3); the Explanatory Note, *supra* n 74, para 42; A/46/17, *supra* n 73, para 265.

### iv. Liability

***(i) Liability to Pay Interest***

As stated above, if the transfer is not completed, the originator's bank is obligated to refund the amount of the transfer with interest to the originator under Article 14 in the concept of a money-back guarantee.[137] However, there also cases that a credit transfer is completed but later than expected. Article 17 deals with the liability of the receiving bank to pay interest to the beneficiary, or the originator in certain cases, due to *inter alia* the delay in completion of the credit transfer.[138]

If it is the receiving bank other than the beneficiary's bank which causes delay by non-compliance with its obligation to execute the payment order it accepted within the time required by the Model Law,[139] it is liable to the beneficiary to pay interest on the amount of the payment order for the period of delay under Article 17(1).[140] Interest is "the time value of the funds or money involved, which, unless otherwise agreed, is calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved."[141]

Since, in a delayed transfer, the originator's account is debited on time but it is the beneficiary's account which is credited later than expected, the liability is provided against the beneficiary rather than the originator even though the beneficiary does not have a contractual relationship with the other receiving banks in the transfer chain.[142] The liability of the bank causing delay can be discharged by making payment either to its receiving bank which would pass the payment to the next receiving bank or directly to the beneficiary.[143] It is stated that if the interest is not passed on to the

---

137 See *supra* part 2.2.2.

138 The liability to pay interest to the sender is also available under Article 17(4), (5) and (6) for the receiving bank that fails to give notice under certain circumstances.

139 See *supra* n 102.

140 Article 17(1) further provides, "if the delay concerns only part of the amount of the payment order, the liability shall be to pay interest on the amount that has been delayed."

141 Article 2(m).

142 The Explanatory Note, *supra* n 74, para 44. For the discussions on the question who should receive the interest see "Report of the Working Group on International Payments on the work of its nineteenth session", A/CN.9/328, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V89/585/78/PDF/V8958578.pdf?OpenElement (accessed 31 July 2012), paras 122-31; "Report of the Working Group on International Payments on the work of its twenty-first session", A/CN.9/341, (1991) XXII *Yearbook of UNCITRAL* 144, available at http://www.uncitral.org/pdf/english/yearbooks/yb-1991-e/vol22-p144-161-e.pdf (accessed 31 July 2012), paras 118-23; A/CN.9/344, *supra* n 69, paras 43-55.

143 Article 17(2).

beneficiary, he has a direct right to recover the interest from the bank holding it.[144]

However, where the credit transfer was made to discharge an obligation owed by the originator to the beneficiary such as making payment for a sale contract between them, the beneficiary may have already recovered interest from the originator for the delay in discharging the underlying obligation.[145] In such cases, the originator rather than the beneficiary may recover the interest under Article 17(3) to the extent that he has paid interest to the beneficiary due to the delay.

If it is the beneficiary's bank which fails to perform its obligation to place the funds at the disposal of the beneficiary, it is liable to him for this failure under Article 17(6) to the extent provided by the law applicable to the relationship between the bank and the beneficiary.[146]

Although the provisions of Article 17 may be varied by agreement to the extent that the liability of one bank to another bank is increased or reduced, in cases where the originator or the beneficiary is not a bank, the bank may only increase its liability but not reduce it.[147]

***(ii) Liability for Consequential Damages***

The Legal Guide rightly points out that consequential or indirect damages are "the least frequent but potentially the most serious losses"[148] faced as a result of failed, erroneous or delayed credit transfers. In those cases, if the transfer was made for the purpose of fulfilling an obligation arising out of a contract between an originator and a beneficiary, the contract could be cancelled and/or a penalty stipulated in the contract or lost profit could be incurred due to the failure which amounts to a much larger value than the transfer.[149] As a result, for instance, the failure of a negligent intermediary bank to make a funds transfer with the amount of $27,000 may open the discussion of the extent of the bank's liability to the originator for $2.1 million in consequential damages due to the lost value of the originator's ship charter as it was in *Evra Corporation v. Swiss Bank Corporation*.[150]

---

[144] The Explanatory Note, *supra* n 74, para 45.
[145] *Ibid*, para 46.
[146] For the law applicable to this relationship see *supra* n 78.
[147] See Article 17(7).
[148] The Legal Guide, *supra* n 12, para 98.
[149] *Ibid*.
[150] [1982] 673 F.2d 951 (7th Circuit). In this case, prior to Article 4 of the UCC, the court applied common law principles and relied on *Hadley v. Baxendale* ([1854] 9 Ex. 341, 156 Eng. Rep. 145) as "the leading common law case on liability for consequential damages

Under the Model Law, in principle, the remedy of recovery of interest provided in Article 17 is exclusive and no other remedy that may exist under the applicable law outside the Model Law is permitted by Article 18. Therefore, consequential damages for any breach by a receiving bank are not recoverable.[151] The only exception is the unusual situation "when a bank has improperly executed, or failed to execute, a payment order (a) with the specific intent to cause loss, or (b) recklessly and with actual knowledge that loss would be likely to result." In that case, recovery may be available based on the legal system outside the Model Law.[152]

## D. Conclusion

With the start of banking transactions in Turkish lira and Chinese yuan between the banks in Turkey and China as one of the results of the economic and trade cooperation relations between the two countries, international EFT has become increasingly important for manufacturers and exporters offering easy, safe, secure and less expensive payments.

In order to provide clearer remedies and enhance legal certainty for the parties to the transfer concerning their rights and obligations particularly in the cases of unauthorised payment orders and failed, erroneous or delayed funds transfers, a legal regime governing international EFTs in Turkey and China should be established. There is already a comprehensive law on the issue at international level providing solutions to these serious problems, ie UNCITRAL Model Law on International Credit Transfers.

---

caused by failure or delay in carrying out a commercial undertaking", see *ibid*, 955. The court decided that "consequential damages will not be awarded unless the defendant was put on notice of the special circumstances giving rise to them" and that there was not such a notice in the case, see *ibid*, 955-6 and 958. Although the Swiss Bank was not held liable for the consequences of negligently failing to transfer the funds, *Evra* is considered as the case which preceded the Model Law and Article 4A by questioning the need for a legal regime for EFTs, see C Felsenfeld, "Strange Bedfellows to Electronic Funds Transfers: Proposed Article 4A of the Uniform Commercial Code and the UNCITRAL Model Law", (1991) 42(2) *Alabama Law Review* 723, 729; C Felsenfeld, "The Compatibility of the UNCITRAL Model Law on International Credit Transfers with Article 4A of the UCC" (1991-92) 60 *Fordham Law Review* S53, S67. For the *Evra* case and an assessment of the judgment, see also L Teal, "Evra Corp. V. Swiss Bank Corp.: A Limitation on Recovery of Consequential Damages in an Electronic Funds Transfer" (1982-1983) 8 *North Carolina Journal of International and Commercial Regulation* 103.

[151] See Geva, *supra* n 11, 4-157; Bergsten, *supra* n 96, 283 Bollen, *supra* n 47, 56.

[152] The Explanatory Note, *supra* n 74, para 47. See also Geva, *supra* n 23, where the author addresses the consequential damages in consumer wireless mobile payments which are in a smaller amount and made for non business purposes, and opens the discussion of the receiving bank's liability in those cases.

For unauthorised payments, the Model Law considers a rule depending on the authentication procedure under Article 5. If the authentication procedure is other than a mere comparison of signatures, as far as it is a commercially reasonable method of security against unauthorised payment orders in the circumstances of the case and the receiving bank complied with it, the purported sender is bound by the payment order. Although the risk of forgery remains with the sender in that case, it could be shifted to the bank by proving that the unauthorised payment order resulted from the bank's action. On the other hand, if the procedure is not commercially reasonable, the risk is on the bank. As regards failed, erroneous or delayed credit transfers, besides the duty of assistance, correction of underpayment and restitution of overpayment, the Model Law provides a money back guarantee to the originator and a chain of responsibility under Article 14 if the transfer is not completed. In that case, the originator's bank is obligated to refund to the originator any payment received from it with interest. In order to ensure this result, the skip rule is also accepted by the Model Law. There are two exceptions to the money back guarantee, where a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfer and where the receiving bank has been directed by its sender to use a particular intermediary bank. In delayed transfers, the Model Law also sets out the liability to pay interest of the receiving bank to the beneficiary on the amount of the payment order for the period of delay under Article 17. However, consequential damages for any breach by a receiving bank are not recoverable unless the bank has acted with the specific intent to cause loss or recklessly and with actual knowledge that loss would be likely to result.

It is concluded that in facilitating international trade between Turkey and China by the use of international EFTs, it is time for both countries to consider the provisions of the UNCITRAL Model Law on International Credit Transfers to be adopted or to be developed in creating their legal regime on the subject.