Strange Bedfellows for Electronic Funds Transfers: Proposed Article 4A of the Uniform Commercial Code and the UNCITRAL Model Law
Symposium: Revised U.C.C. Articles 3 & (and) 4 and New Article 4A

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Strange Bedfellows for Electronic Funds Transfers: Proposed Article 4A of the Uniform Commercial Code and the UNCITRAL Model Law

Carl Felsenfeld*

I. Introduction

Two pieces of proposed legislation that will affect the same subject matter are proceeding down parallel tracks. If all goes as planned, the tracks will at some time turn inward and there may be a collision.

Each piece has as its core concern the subject of electronic funds transfers ("EFTs"), the modern device that has overtaken checks as the principal form of money transfer.¹ Basically, however, before the promulgation of Article 4A there was no legislation, either in the United States or abroad, that governed EFTs in the way that Articles 3 and 4 of the Uniform Commercial Code ("U.C.C.") govern check transfers in the United States and that the Geneva Convention Providing a Uniform Law for Cheques² governs checks in Europe.³ The vacuum creates untold risks

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1. Electronic payments commonly exceed $1 trillion per day in the United States alone. Brandel & Davenport, Modernizing U.S. Payment Systems Law, 9 BUS. LAW UPDATE 1, 2 (No. 5 (1989)). This is over one hundred times the amount transmitted by check. While the number of checks continues to rise, at least one observer expects that volume to begin diminishing soon. Kantrow, Check Volume Expected to Peak in 1992, Am. Banker, Feb. 22, 1989, at 2, col. 1.


3. This is not to say that there is no governing law throughout the world. Spots of applicable legislation appear in a number of the United States and in our federal law. Some European states, particularly France and Germany, may be even more advanced in regulating electronic payments, particularly among banks. Such legislation, regulation, cases and

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to both banks and the users of the various systems; consequently, two drafting bodies have taken action to fill the vacuum and supply the needed legislation.

On the domestic front, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") has drafted a proposed Article 4A to the U.C.C. titled Funds Transfers. It was approved by the American Law Institute ("ALI") on May 19, 1989, at its annual meeting and subsequently became a Uniform Law upon adoption by the NCCUSL at its annual meeting on August 3, 1989.4

Internationally, the United Nations Commission on International Trade Law ("UNCITRAL") has taken pen in hand and produced a draft Model Law on International Credit Transfers. (The draft to which we shall refer here is dated September 18, 1989.)5 It should be immediately observed that, while the NCCUSL and ALI have completed their work, UNCITRAL has not. Meetings continue on the Model Law and one cannot anticipate when the United Nations will give the product its imprimatur6 or even what form that product will take.7

Although entitled "Model Law," the future evolution of the UNCITRAL drafts is unclear. The present intent is that the product will be designed for adoption by the participating states as the domestic law of each adopting state—albeit designed to cover only international transfers. One may, however, fairly accept this position as tentative. In one way or another, possibly even through

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4. Actually, the draft submitted to and approved by the Conference was not precisely the same as the draft previously approved by the ALI. When the ALI ratified 4A, it realized that some technical changes might still be made and provided for this in connection with its approval. When later reviewed by the ALI, the changes were deemed by it to be sufficiently insignificant so as not to require further ALI action.


ultimate adoption by the member states as a treaty, it is the aspi-
ration of UNCITRAL that its product shall ultimately govern
international EFTs.

Ostensibly, the drafters of Article 4A and of the Model Law
were designing a statute to cover the same general form of funds
transfer. In actuality, the drafters used different models to guide
their thinking and the focus of their drafts. Those responsible for
Article 4A perceived a high speed, low cost, high volume funds
transfer system as the basic standard. As they thought and wrote,
they had something like the United States Federal Reserve Com-
munications System ("FedWire") and the New York Clearing
House Interbank Payments System ("CHIPS") systems before
them. Those that gathered from around the world to write the
Model Law worked with something less specific in mind. It is not
unfair to suggest that they were unsure of what they were writing
about and that they were preparing a law for all sorts of evolved
and evolving systems that will ultimately take their places as es-
tablished forms of payment. These different conceptions had much
to do with creating the basic problem to which we shall return.

Coverage of the Two Laws

Article 4A already has been adopted by several of the United
States. The UNCITRAL Model Law will continue for some time,
possibly months—possibly years—through the drafting process. We
will assume for purposes of this Article that both drafts are
legislative successes and have become law.

How the two drafts will divide EFTs between them still re-
 mains to be seen. For present purposes, we will take each version
and further assume that they exist side by side as domestic law.
Where their coverage conflicts, our approach will be that the

8. See U.C.C. § 4A-103 comment 2 (1989) ("Transactions covered by Article 4A typi-
cally involve very large amounts of money ").

9. As of July 1990, U.C.C. Article 4A had been enacted by the following states: Califor-
nia, Colorado, Connecticut, Illinois, Kansas, Louisiana, Minnesota, New York, Oklahoma,
Virginia, and West Virginia. Telephone interview with Ms. K. Robinson, NCCUSL (Oct. 25,
1990).

10. A tentative schedule has been informally proposed: a clean, final draft by July
1990; United Nations approval at the annual meeting in June 1991. Whether this schedule is
realistic remains to be seen.
Model Law preempts. Thus, a typical EFT within the United States will be governed by Article 4A and a transfer defined as "international" by the UNCITRAL Model Law will be governed by that law. (Deviations from that pattern will be commented upon where appropriate).

We will take the two versions presently before us to analyze the differences between them, to try and predict whether their simultaneous existence will create problems for the banking system and—since such problems will be found to exist—how the collision referred to in the first paragraph of this Article may be avoided.

The Perception of Conflict

One comment can be made up front. The drafters of each of the two packages have been well aware of their opposite number and have demonstrated no particular concern for inconsistencies or conflicts. The reasons for this cavalier attitude are several. Among them:

1. The domestic draftsmen in the United States saw an immediate need for legislation. Massive sums of money were moving in the international markets. Because this was a relatively recent development, there was no statutory law and very little case law to resolve controversies that might arise. A few cases, to which we shall refer, only served to demonstrate to those involved with funds transfers the risks to which they were subject. The draftsmen were

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11. This is appropriate for two reasons. First, it is likely that if the Model Law is enacted at all it will be as federal law, either a treaty or a statute. As such, it will preempt Article 4A which will be state law. Second, since the Model Law is exclusively for international transfers and 4A is for all transfers, domestic and international, the Model Law should be considered a specialized statute which should govern in the area of its coverage.

12. In the absence of the Model Law, Article 4A purports to cover some international transfers. Its choice of law provisions make the Article apply if a designated bank which is part of the funds transfer is located in the United States. U.C.C. § 4A-507 (1989). Whether this choice of law policy will be honored by foreign jurisdictions is a difficult question and beyond the scope of this Article. See Libyan Arab Foreign Bank v. Bankers Trust Co., 1 Lloyd's Rep. 259 (Q.B. 1988); Libyan Arab Foreign Bank v. Manufacturers Hanover Trust Co. (No. 2), 1 Lloyd's Rep. 608 (Q.B. 1989) (United States law governing banks cannot establish bank-depositor relationships in England.).

13. 4A is designed to cover international as well as domestic transfers, so long as the requisite elements connecting the EFT to 4A are present. Also, the Model Law does not cover all EFTs with international ingredients, but only those that satisfy the Model Law's definition of "international." It is not impossible, therefore, to visualize an EFT with international aspects that will be governed by Article 4A and not the Model Law.
men of 4A felt that they could not negotiate or collaborate with UNCITRAL given the extended time that UNCITRAL might take to complete its drafting process.

2. UNCITRAL, on the other hand, saw the United States as only one fish in a large international pond. The fact that domestic United States law adopts one policy is no reason for the rest of the world to fall into line. (Adoption of a particular policy by the U.S. might even be a reason for proceeding differently.)

3. The individual representatives sent by the member states to the Working Group of UNCITRAL responsible for the EFT Model Law have generally not been expert in EFTs. It seems, in fact, unlikely that most of the United Nations states have people who are sufficiently conversant with this subject to draft legislation. While those states undoubtedly do have bankers from whose ranks representatives can be, and not infrequently have been, chosen, most of the UNCITRAL representation is made up of diplomats or government bureaucrats. While bankers have typically advised their countries' representatives, it is unfortunate that those with direct responsibility for the UNCITRAL product have not been generally sensitive to the issues that the legislation before them presents.

4. Something of the same can be said of the 4A draftmen. While more technical experts took part in the 4A project than participated in UNCITRAL, the representatives of the NCCUSL itself were neither bankers nor electronics experts and showed little awareness of potential international conflicts throughout the drafting process.

5. Both drafting groups have expressed confidence that whatever conflicts develop can be resolved in some manner when they arise.

The need for law covering EFTs in both the domestic and international arenas, together with the essential absence of existing law anywhere, seemed to some to create an atmosphere that would be particularly receptive to a single draft that could be applicable to both forms of EFT. Electronic payments obviously could proceed most effectively in a legal environment free of conflicts and

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uncertainty. This point was made to both drafting groups without avail.\textsuperscript{15}

Efforts have been made to reconcile the two drafts. The principal draftsmen met approximately three times without particular result. Consultative groups established by the U.S. State Department have resolved, with some success, to influence UNCITRAL to draft something closer to 4A. Indeed, that effort goes on and I would be presuming too much to predict the final form of UNCITRAL's legislation.

Part II of this Article will deal briefly with the history of the two statutory products before us. It is intended to show that greater efforts to correspond those versions might have been, but were not, made. Part III will treat some conflicts between the versions. It would unduly try the patience of the reader to identify all of those inconsistencies; I will address only some of the more fundamental differences between the drafts. Part IV will examine one significant subject dealt with by Article 4A but omitted by the Model Law Part V contains some speculations about the future.

II. Histories of the Two Drafts

\textit{Article 4A}

In 1978, a committee established by the Permanent Editorial Board ("PEB") for the U.C.C. by the ALI and the NCCUSL to monitor Articles 3, 4 and 8 of the U.C.C. was charged with drafting an outline of a New Payments Code ("NPC"), which would establish a framework of rules for all forms of payment except cash.\textsuperscript{16} The task was essentially delegated to a bright young Harvard Law School professor, Professor Hal S. Scott, who exposed a series of fundamental similarities among a number of the major payment systems (checks, credit cards, debit cards, and EFTs) and wrote a code merging them together subject to a single set of rules. The

\textsuperscript{15} It was presented most plainly to UNCITRAL because 4A had already taken shape and the benefits of using it as a model seemed self-evident. The argument was essentially ignored as was a plea to the Uniform Commissioners that they delay passage to take account of UNCITRAL action.

\textsuperscript{16} See Memorandum from Hal S. Scott, Reporter to the 3-4-8 Committee and Peter L. Murray, Assistant Reporter to the 3-4-8 Committee to members of the U.C.C. Permanent Editorial Board and members of the 3-4-8 Committee (Feb. 24, 1981) (P.E.B. Draft no. 1 preceding the New Payments Code).
NPC will not be explored in any depth, other than to say that it was perceived as revolutionary rather than evolutionary by the banking community and, indeed, by the consumer groups whose causes the NPC recognized. The NPC was rejected by general consensus in 1985.

Near the end of the NPC adventure, the banking community was shaken by the case of *Evra Corp. v. Swiss Bank Corp.* Faced with the possibility that a bank that had negligently mishandled a funds transfer might be saddled with the resulting business losses of the sender (the bank, in fact, was not), the banking community realized a need for EFT legislation. As a result, the NCCUSL established a new committee to write an umbrella EFT Uniform Law, and work began at a meeting in Arlington, Virginia in January of 1986. The Committee's work was serious and directed, resulting in a draft accepted by the ALI and the NCCUSL in 1989 which ultimately became Uniform Article 4A to the U.C.C.

*The UNCITRAL Model Law*

The development of the international effort is somewhat harder to target. It may have begun in 1972 when UNCITRAL expressed interest in international electronic funds transfers. It may also be deemed to have begun in June 1977 with an International Payments Symposium in Washington, D.C. Another potential starting date is October 1982, when the Committee on the Development of Trade of the U.N. Economic and Social Council recognized the need for rules regarding telecommunications and identified UNCITRAL as the logical central forum for this project.
UNCITRAL established a Study Group on International Payments\textsuperscript{22} composed of representatives of banking and trade institutions and issued a report in 1982.\textsuperscript{23} This report did not propose legislation, but rather was a survey of international electronic funds systems and practices. The report was developed into a Legal Guide on Electronic Funds Transfers, issued in 1987\textsuperscript{24} UNCITRAL finally set up a formal Working Group on International Payments which began consideration of a set of rules governing international electronic funds transfers at a meeting in Vienna in November 1987\textsuperscript{25} The deliberations of that Working Group, through a series of successive meetings, resulted in the UNCITRAL Model Law which we are now considering.

The Two Laws

The object of this brief history is to demonstrate that the drafting work of UNCITRAL and that of the NCCUSL proceeded over the same time period. Each was well aware of the work of the other. Indeed, certain individuals (including the author of this Article) served in both camps. Neither group had to deal with extensive legislation on the books of the United States or any other country for which an accommodation had to be made. To some, it seemed like an ideal time to craft legislation that, in a consistent manner, would regulate EFTs within the United States through domestic law and, at the same time, EFTs on the international scene. This was not to be. (At least, not yet.) Article 4A took shape before the UNCITRAL draft. By the time actual drafting began on UNCITRAL, most of the concepts in 4A had crystalized. It is clear from its structure and general approach that the UNCITRAL draft used 4A as a model. It is equally clear that the 4A draftsmen were well aware of UNCITRAL efforts before a final 4A draft was accomplished. Differences between the two drafts cannot be deemed accidents. Those differences are un-

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fortunate, could have been avoided and, unless they are somehow resolved, will probably prove costly.

III. CONFLICTS BETWEEN 4A AND THE MODEL LAW

Assumptions

We will assume for the purposes of this Article a transfer by Originator ("O") to Beneficiary ("B"), begun by an order by O to the Originator's Bank ("OB") and sent to the Beneficiary's Bank ("BB") through Intermediary Banks X and Y. Most of these terms are used and defined in the two laws.\(^{26}\) We can diagram the transaction as follows:

\[
O \rightarrow OB \rightarrow X \rightarrow Y \rightarrow BB \rightarrow B
\]

In the language of 4A, the overall transfer by which O pays B is called a "funds transfer,"\(^{27}\) and each ingredient of the funds transfer (the order from O to OB, the order from OB to X, etc.) is called a "payment order." The UNCITRAL draft calls the overall electronic payment by O to B a "credit transfer" and also calls each ingredient a "payment order."\(^{28}\) For simplicity, we will use the 4A terminology herein.

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\(^{26}\) In Article 4A, "beneficiary" and "beneficiary's bank" are defined in section 4A-103; and "originator," "originator's bank" and "intermediary bank" are defined in section 4A-104. See U.C.C. §§ 4A-103(a)(2) & (3) & 4A-104(b), (c) & (d) (1989). In the Model Law, "originator," "beneficiary" and "intermediary bank" are defined in Article 2. See Draft Model Law, supra note 5, art. 2.

\(^{27}\) U.C.C. § 4A-104 (1989). Actually the funds transfer may fairly be considered to be completed upon acceptance by the beneficiary's bank, BB, since that is the time selected by both 4A and the Model Law for the satisfaction of O's obligations to B. Both laws take the position that the obligation of the beneficiary's bank to the beneficiary is substituted for the obligation of the originator to the beneficiary. See U.C.C. § 4A-406 (1989); Draft Model Law, supra note 5, art. 14 comment 4. This ingredient is recognized by the 4A definition of funds transfer but not by the definition of credit transfer in the Model Law. See Draft Model Law, supra note 5, art. 2(a) (defining a credit transfer as a "complete movement of funds from the originator to the beneficiary").

\(^{28}\) The final step in the funds transfer is the payment from BB to B. This is not, in the structure of either 4A or the Model Law, a "payment order." See U.C.C. 4A-103(a)(1) (1989) (defining "payment order"); Draft Model Law, supra note 5, art. 2(a) (defining "credit transfer").
Scope of Application of the Codes

The transactions covered by 4A and the UNCITRAL draft vary considerably. Should the codes ultimately coexist, the relationship between them can be best described as peculiar. We may consider the division of coverage from several points of view.

Type of Transaction

Consistencies do exist between the two drafts. Both are designed to cover credit, not debit, transfers. The typical commercial electronic funds transfer today is of a credit rather than a debit type, and both drafts concentrate upon the commercial, not the consumer, transaction. To the extent that the workings of the marketplace can now recommend appropriate legal rules for a commercial funds transfer, those workings are far more evident for credit than for debit transfers; rules for the operation of debit transfers, although specifically covered with regard to consumer transactions in the United States in another context, are left for another day in the Model Law and 4A.

Another area of similarity between the two drafts, consistent with the limitation of both to credit transfers, is in their exclusion of checks, the most common form of debit transfer. Article 4A excludes checks and check-like instruments. Checks are already

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29. A credit transfer is considered to be an order by the originator/sender to its own bank to transfer funds to a third party. A debit transfer is an order by the intended recipient that funds be transferred to its bank by a third party's bank. While both credit and debit transfers embody both credits and debits to accounts, the foregoing definitions have generally been accepted by the international banking community and need not be questioned, here or elsewhere. Today, credit transfers are by far the dominant form of commercial funds transfer. Debit transfers, while still secondary to credit transfers, are more prevalent in consumer transactions where regular payments may be made through an automatic clearing house system to pay premiums to an insurance carrier or landlord or other regular creditor. Article 4A limits itself to credit and excludes debit transfers through the definition of "payment order," particularly section 4A-103(a)(1)(ii). See U.C.C. § 4A-103(a)(1)(ii) (1989). See also id. § 4A-104 comment 4. The UNCITRAL draft defines its core transaction in Article 1 as a "credit transfer" and defines that term in Article 2(a). See Draft Model Law, supra note 5, arts. 1 & 2(a).


covered by statutory law in the United States. Given that exclusion, 4A does not, however, define with any degree of precision the form of funds transfer that it is designed to cover. Possibly, in view of the current rate of technological development, this cannot be defined. Under 4A, the transfer may be slow or it may be fast. It may be accomplished electronically, by wire, by mail or even orally. Article 4A covers all techniques of funds transfer other than cash and other than payment through traditional paper documents (including, of course, a check) that might be deemed an "item" under Article 4 of the U.C.C. As we have observed, however, high speed, low cost electronic transfers were actually central to the thinking of the 4A drafters.


34. This is consistent with the essentially vague coverage of Article 4 of the U.C.C., which is by its own terms applicable to an "item." This is defined as "an instrument or a promise or order to pay money handled by a bank for collection or payment." U.C.C. § 4-104(a)(9) (1990). Cases have dealt with the question of whether an EFT can be deemed an item and generally concluded that it is not. See Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1045 (2d Cir. 1979).

35. U.C.C. art. 4A prefatory note (1989) (commenting that "in some cases the payment order is transmitted by a slow means").


37. In the sense that U.C.C. section 4A-103(a)(1) includes a written order as a payment order and that revised section 4-104(a)(9) (1990) defines an item subject to Article 4 as "an instrument or a promise or order to pay money," Articles 4 and 4A will come close to overlapping. Compare U.C.C. § 4A-103(a)(1) (1989) with U.C.C. § 4-104(a)(9) (1990). The courts may be called upon to crystalize the activities covered by each. To some degree the courts have already been doing this and excluding electronic payment systems from Article 4. See Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1045 (2d Cir. 1979). Article 4A does require that, to qualify, the payment be made through the banking system. See the definition in U.C.C. § 4A-103(1) (1989) and id. § 4A-104 comment 2. Revised Article 4 does, however, make it clear that "[t]he term [item under Article 4] does not include a payment order governed by Article 4A." U.C.C. § 4-104(a)(9) (1990).

38. See supra text accompanying note 8.
The UNCITRAL draft approaches the coverage issue differently but, subject to the reduced focus of its drafters on the high speed, low cost EFTs, seems to arrive at about the same result. Through its definition of "payment order," the traditional check is excluded from its coverage.39 By a recent elimination of the word "electronic" from its title,40 it was established that the draft was to cover paper, wire and other devices as well as purely electronic transmissions.

Conflicts of Laws

Articles 3 and 4 of the U.C.C. (and the Negotiable Instruments Law, Article 3's source), give very little instruction as to when a transaction within the definitional coverage of the Articles is, in fact, subject to its rules.41 Standard principles of conflicts of laws therefore determine the rules for most cases. This in turn depends to large measure upon the forum state and its views upon conflicts issues. Existing law, as made applicable to Articles 3 and 4 of the U.C.C., yields almost any result that may be desired; the cases give maximum discretion to the courts and minimum guidance to the parties.42

39. Draft Model Law, supra note 5, art. 2(a)-(b)(i). Through its definition of a credit transfer in Article 2(a) and its requirement that the original payment order be given by the originator to its bank, checks are excluded since a check is given by the beneficiary (payee) or other holder to the payor bank. This point is made explicitly in comment 5 to U.C.C. section 4A-104, see supra note 32, but may fairly be implied in the Model Law. Checks are not generally covered by statutory law outside the United States. The UNCITRAL Working Group Report of Jan. 27, 1989, para. 16, notes that "few countries had statutory rules governing paper-based credit transfers." See Report of the Working Group on Int'l Payments on the Work of Its Eighteenth Session, supra note 33, at para. 16.

40. See supra note 33.

41. Revised U.C.C. section 4-102 provides guidance for establishing the law for a bank's liability, but Article 4 does not go beyond this. See U.C.C. § 4-102 (1990).

42. The cases, applicable almost entirely to negotiable instruments before the U.C.C. (with the advent of the U.C.C., essentially uniform in all states with respect to Articles 3 and 4, the stream of conflicts cases virtually dried up), which became the law of all 50 states for commercial paper, reveal the following guiding principles for the choice of applicable law:

(1) The law where the instrument was written, National Bank of Am. v. Calhoun, 253 F Supp. 346 (D. Kan. 1966);

(2) the law where the instrument was delivered. Browns Valley State Bank v. Porter, 232 F 434 (8th Cir. 1916);

(3) the law of the place where the party whose obligation is at issue signed the instrument, Guernsey v. Imperial Bank of Can., 188 F 300 (8th Cir. 1911);
Both Article 4A and the Model Law fill this vacuum by supplying more extensive conflicts rules as to their applications. Unfortunately, the rules are not consistent. To begin with 4A, I will illustrate its application by a few examples from its choice of law provisions:

a. The issue of when the originator of a funds transfer makes payment to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.
b. The parties may vary their legal relationships by selecting the law of a particular jurisdiction, whether or not that jurisdiction has any relationship to the underlying transaction.
c. The rules of a funds transfer system may select the law of a particular jurisdiction and bind a bank (among others) outside that system so long as the bank had notice that (i) the system might be used and (ii) of the system's choice of law.43

The preceding examples were chosen not as a cross-section of the 4A conflicts rules, but were selected because they illustrate some inconsistencies with the conflicts rules of the Model Law. Taking them in order, the situations are handled as follows under the Model Law:

a. The relationship of originator and beneficiary is controlled by the law of the jurisdiction where the obligation is to be discharged.
b. The law selected must be of a state of the sender, the receiver or the country whose currency is used. c. There is no reference in the Model Law to funds transfer system rules.44

In the event that both 4A and the Model Law are adopted, these inconsistencies, among the others ahead, will cause obvious

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44. See Model Law art. 15.
problems for sending and receiving banks, for originators and for beneficiaries. The particular law that governs the transaction will include the rules for its own application. Transactions identical in quality will, depending upon whether they are domestic or international—that is, governed by 4A or the Model Law—fall within or without those laws based upon their inharmonious conflicts of laws principles.

Consumer Transactions

If we regard the overall coverage of the two drafts, we discern a strange status for consumer-related transfers. We begin with the assumption common to both drafts that consumer transactions are not central to their approaches. Assume, however, that Mary in New York orders her bank to take $100 from her personal account and wire it to John in San Francisco for John’s birthday. Subject to the exception soon to be noted, that transfer will probably not be covered by either law. It is in the first instance not covered by 4A because section 4A-108 provides that “[t]his Article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. § 1693 et seq.) as amended from time to time.” 46 Mary’s transfer, a garden variety consumer transfer, would typically be covered by the Electronic Fund Transfer Act (“EFTA”) 46 and would therefore be excluded from 4A. The underlying reason for this exclusion is that consumer transfers raise many issues in the perception of the legal marketplace that do not affect the typical business transaction. Article 4A was drafted with the Evra problem in mind 47 and its draftsmen decided, quite properly, to avoid consumer-related issues. 48

The EFTA excludes from its coverage, however, transfers effected through the FedWire and other similar networks, which

47. See supra note 18 and accompanying text.
48. The New Payments Code, see supra note 16 and accompanying text, attempted to cover consumer as well as commercial funds transfers. This element was not insignificant in its downfall.
undoubtedly would include CHIPS. Thus, if Mary's transfer were
effected through such a system, it would be excluded from EFTA
and thereby made subject to 4A. For the typical case, however,
Mary's transfer would not be covered by 4A. It would also not be
covered by the UNCITRAL draft, because its international prereq-
usites are not met.

Several issues are raised by this division. First, if instead of
the hypothetical $100 birthday present we assume that Mary wired
John $1 million to buy John's business and that the $1 million
came from Mary's personal account, it would still not (subject to
the FedWire, CHIPS, etc., exceptions) be covered by 4A, even
though the transfer is commercial, not consumer, in nature. The
EFTA covers transfers, regardless of the amount or purpose, made
from an account "established primarily for personal, family, or
household purposes." Mary's transfer is covered by EFTA, how-
ever, it is excluded from 4A and it is also, through lack of an
international quality, excluded by the UNCITRAL draft. One
would expect that this type of large, personal transfer does not oc-
cur very often.

In addition, assuming coverage under the EFTA (and exclu-
sion from 4A and the UNCITRAL draft), this does not mean that
the legal problems that may arise in connection with a funds trans-
fer from Mary to John are necessarily covered. The EFTA is a
statute driven by consumer concerns and its major coverages relate
to such issues as disclosure and consumer protection. Issues cov-
ered by 4A and the Model Law, such as when a transfer is
completed, when the transferor's obligation to the transferee is
paid, and the liability of a negligent bank are not part of EFTA.
Thus, given the present approach of the drafts, many aspects of a
funds transfer, "any part of which" is covered by EFTA, will not
be covered at all.

50. See infra note 204. The Model Law contains as an optional provision a statement
that it "is subject to any national legislation dealing with the rights and obligations of con-
sumers." Draft Model Law, supra note 5, art. 1.
53. If Mary's transfer to John were international in nature, as defined by the UNCI-
TRAL Model Law, I can see no reason why it would not be covered by the Model Law,
although not covered by 4A.
Considerations such as these appear to be an inherent result of the decision of the NCCUSL to separate consumer transactions from the major, commercial scope of 4A. Both laws are consistent in their recognition of consumer issues as a special problem. This approach is undoubtedly correct; consumer issues and consumer protections are different from the basic commercial concerns of the two laws. The laws differ, however, in the way they recognize these issues.

Allocation of Responsibilities

A fundamental illustration of the differences in concept between Article 4A and the Model Law is provided by the approach each takes to errant payment orders received by a bank. An order received by a bank might be unauthorized by the originator or by any sender in the chain prior to that bank. It might contain information indicating that it has been misdirected, or it might contain inconsistencies between information given in words (either the name of a beneficiary or an amount of money) and that information expressed in numbers. To the extent that an error can be gleaned from the terms of the payment order itself, the Model Law requires that a receiving bank give its sender notice thereof. In the absence of actual knowledge to the contrary, Article 4A contains no such requirement. Indeed, 4A burdens the sender with a kind of obligation to discover the error itself.

54. If the Model Law's optional provision stating that it "is subject to any national legislation dealing with the rights and obligations of consumers," Draft Model Law, supra note 5, art. 1, is adopted, one cannot be entirely sure whether Mary's funds transfer would or would not be included in the coverage of the law. Would only the aspects of the transfer that are covered by EFTA (or any applicable consumer law) be excluded from the Model Law? Or would the 4A approach be found more attractive, in which event the entire transaction would not be covered? The former would seem to be better law. The latter is more consistent with the 4A pattern.

55. Draft Model Law, supra note 5, arts. 6(3) & (6) and 8(2) & (3). Comment 3 to Model Law Article 8 notes the "substantial difficulties" involved in any solution to this problem. Strangely, the comments to Article 6, which deals with a comparable problem, do not note any particular difficulty. See id. arts. 8 comment 3 & 6 comment.

56. U.C.C. section 4A-205 does deal with inconsistencies between the name and number of a beneficiary, but does not contain a provision dealing with inconsistencies between numbers and words in describing an amount of money. See U.C.C. § 4A-205 (1989). Presumably, this is because no modern high speed system uses words at all. See also U.C.C. § 4A-208 (1989).
The Model Law imposes a burden upon both intermediary banks in the funds transfer and the beneficiary’s bank to undertake a continuing examination of the payment orders they receive to establish that they do not contain errors.\textsuperscript{57} For example, it requires each intermediary bank to establish that no payment order received “contains information which indicates that it has been misdirected.”\textsuperscript{58} Article 4A, on the other hand, permits the receiving bank to accept and retransmit the order on the basis of the information it contains and without the necessity of this kind of detective work.

Even if the payment order was not authorized by a sending customer, 4A imposes a burden of care upon it. If a receiving bank accepts an unauthorized order, any payment it receives from the purported sender must be returned.\textsuperscript{59} It must also pay interest to the sender.\textsuperscript{60} However, if the sender does not exercise due care in discovering the error, it loses its right to interest.\textsuperscript{61} Similarly, another section in 4A allocates where the burden will fall between sender and receiver for certain designated types of error.\textsuperscript{62} The section goes on to provide, however, that if the sender does not exercise “ordinary care, on the basis of information available to the sender,” the sending bank is liable to the receiving bank for any loss, up to the amount of the order, suffered by the latter.\textsuperscript{63}

Obviously, we are looking at different concepts of what an EFT should be. Article 4A views it as a highly mechanized, high speed process that does not permit careful, individual, personal scrutiny by banks performing mechanistic functions. In terms of expense, 4A clearly sees low cost as a greater goal than perfection. That is, if humans had to review each transfer, the cost structure that has become an accepted part of high speed EFTs would simply be impossible. The Model Law tends to analogize the EFT

\begin{footnotesize}
\textsuperscript{57} See Draft Model Law, supra note 5, arts. 6 & 8.
\textsuperscript{58} Draft Model Law, supra note 5, art. 6(2).
\textsuperscript{59} U.C.C. § 4A-204 (1989). On its face, this may seem to put the type of burden upon the receiving bank that is more typical of the Model Law approach. Due to the intricacies of the security system concept, however, the real burden upon a receiving bank is to comply with the technical niceties of the system. As we shall see, infra text at note 140, if the security procedures are followed, orders not actually sent by a purported sender may be “authorized” under both the Model Law and 4A.
\textsuperscript{60} U.C.C. § 4A-204 (1989).
\textsuperscript{61} Id.
\textsuperscript{63} U.C.C. § 4A-205(b)(ii) (1989).
\end{footnotesize}
system to something more archaic; examinations that slow down and increase the cost of funds transfers are not inconsistent with the overall Model Law approach. 64

**Measure of Damages**

As was demonstrated by the *Evra* case, 65 the correct measure of damages can be the most important part of an EFT controversy. Distinctions between 4A and the Model Law may create problems here.

If we return to our underlying assumptions, 66 it is obvious that many slips may occur between O’s cup and B’s lip. For example, X may negligently (as occurred in *Evra*) forget to put paper in its receiving equipment. 67 BB may pay W rather than B. What should the measure of damages for their improper behavior be? Most important, if O has lost the benefit of a bargain because of X’s or BB’s error, should X or BB recompense O for its lost profits? Such damages are generally called “consequential damages” and were at the root of the *Evra* controversy.

**Liability of a Receiving Bank** 68

Article 4A and the Model Law take somewhat different approaches to consequential damages (although in essence they both affirm that wing of the *Evra* case holding that a bank is not liable

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64. At its December 1989 meeting, UNCITRAL added another burden upon the first receiving bank, the bank receiving a payment order from the originator. The Model Law will provide that the definition of “payment order” in Article 2 will permit such an order to contain conditions imposed by the originator. This will, of course, require that first receiving bank to establish that the conditions are satisfied before it accepts the order. Article 4A requires that a payment order be unconditional. U.C.C. § 4A-103(a)(1)(i) (1989). Article 4A does permit its requirements to be varied by agreement. U.C.C. § 4A-501(a) (1989). Conditions can, through separate agreement, be imposed by any sender to any receiver, however, this would be the result of separate negotiations and not an integral part of any payment order.

65. 673 F.2d 951 (7th Cir.), cert. denied, 459 U.S. 1017 (1982).

66. See supra Part III section A.


68. This includes the originator’s bank and an intermediary bank—OB, X and Y in the foregoing assumptions—but excludes the beneficiary’s bank—BB in the assumptions. We will leave out of this discussion the responsibility of a bank which has not executed a funds transfer to return the principal amount of the funds it has received to the proper party. See, e.g., U.C.C. § 4A-303(e) (1989).
for consequential damages when it is merely negligent 69). Article 4A imposes upon a receiving bank a liability to pay interest costs when it has improperly delayed completion of a funds transfer. 70 If the error is more serious, for example when the transfer is not completed at all, interest costs are added to the expenses of the transfer and incidental expenses. 71 Consequential damages are not included in any event (unless provided for by express written contract). 72

The Model Law’s coverage is different. It does not make the distinction noted above between a mere delay and a complete failure to execute, but imposes the same liability in both situations. In the event of a receiving bank’s failure to execute properly, the Model Law holds the bank liable for the following—with consequential damages included under certain circumstances:

1. loss of interest,
2. losses caused by a change in exchange rates,
3. expenses of a new order and attorney fees,
4. consequential damages if the bank’s failure was accomplished intentionally or recklessly 73

It was the intent of the drafters of the Model Law, when conceive of circumstance (4), above, to make consequential damages available in only the most limited circumstances. It was the thought of some that, for all practical purposes, they would never be available. 74 This may be the case in some countries, but the condition of United States tort law, particularly with regard to the

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70. U.C.C. § 4A-305(a) (1989).
71. U.C.C. § 4A-305(b) (1989). Article 4A does not explain what it means by “incidental” expenses, but we may assume that they represent costs closely related to the transfer (telephone expenses, for example) and certainly not the loss of a business bargain. Whether they cover attorney fees we leave for another day. One may note, however, that since in section 4A-305, incidental expenses are mentioned in subsection (b) and attorney fees are separately mentioned in subsection (e), one can reasonably argue that such fees are not included within the concept of incidental expenses. See id. § 4A-305(b) & (e).
72. U.C.C. § 4A-305(c) & (d) (1989).
73. See *Draft Model Law*, supra note 5, art. 12.
74. *Draft Model Law*, supra note 5, art. 12(5). The Model Law is written so as to limit the possibility of consequential damages as much as seemed reasonable to the drafters. Thus, such damages may be imposed if the improper (or late) act or omission was done with the intent to cause such improper (or late) execution or failure to execute, or recklessly and with knowledge that such improper execution or failure to execute would probably result.” Id.
subject of intentional torts, makes domestic bankers uneasy as to what might constitute an intentional act. Given the magnitude of the risk involved, those bankers are convinced that they cannot afford to hope for favorable judicial rulings on this one.  

Liability of the Beneficiary’s Bank

We shall divide our review between obligations to the sender and obligations to the beneficiary. In both areas, consequential damages play a large part. There are, however, differences between the two drafts.

1 Obligation of the beneficiary’s bank to the sender — Under 4A, the liability of the beneficiary’s bank to its sender for its error is the same as the liability of any receiving bank. Neither the definition section nor the substantive law provisions make any distinction among receiving banks for this purpose. As previously noted, consequential damages are not recoverable. Under the Model Law, the beneficiary’s bank’s liability to its sender (and also to the originator) is subject to a different test from its liability to the beneficiary and may—since the bank’s liability for certain types of wrongdoings includes “any losses” incurred by the sender or originator—include consequential damages.

2. Obligation to the beneficiary — Under Article 4A, the liability of a beneficiary’s bank to the beneficiary for a failure to pay over funds due will include the beneficiary’s consequential damages “[i]f the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment.” This is the

75. The problem United States observers have with these limitations is the state of United States tort law, where, for example, there is no clear concept of intent. It has been observed on the distinction between intentional and unintentional invasions that: “‘Intent’ is also one of the most often misunderstood legal concepts. The distinction between intentional and unintentional invasions draws a bright line of separation among shadings of almost infinitely varied human experiences.” W Prosser & W Keeton, THE LAW OF TORTS § 8 (5th ed. 1984); see Champion Spark Plug Co. v. Emener, 16 F Supp. 816 (E.D. Mich. 1936); Radio Officers’ Union, A.F.L. v. NLRB, 347 U.S. 17 (1954) (holding that a person generally intends the consequences of his own acts).
77. See supra note 72 and accompanying text.
78. Draft Model Law, supra note 5 art. 12(4)(b).
sole place where 4A allows consequential damages as part of an injured party’s remedy

It appears, however, that a beneficiary bank’s liability to its beneficiary will not be governed in the United States by Article 4A, but rather by Regulation CC of the Federal Reserve System.\(^80\) Congress enacted the Expedited Funds Availability Act\(^81\) in 1987 to protect depositors against undue delays between the time money is deposited and the time it becomes available for the depositors’ use. Pursuant to its regulatory authority under the Act,\(^82\) the Federal Reserve promulgated Regulation CC. This, in part, prescribes the time that electronic funds to the credit of a party in its bank must be made available to that party.\(^83\) The Regulation also defines the civil penalty for violation of this duty as not to exceed $1,000 in an individual action or the lesser of $500,000 or one percent of the bank’s net worth in a class action.\(^84\)

Regulation CC ("CC") is the law today. Although 4A is enacted as state law, it will be preempted by CC as a federal regulation.\(^85\) Should the Model Law be enacted by the United States as federal law, we can only guess as to its relationship to Regulation CC. For convenience, however, we will assume (as we have essentially assumed as to the relationship of the Model Law with 4A)\(^86\) that the Model Law will govern EFTs that it defines as "international," and that Regulation CC will govern, for subjects within its scope, the remaining EFTs. These will probably be principally domestic transfers. The point to note here is that, although 4A allows consequential damages,\(^87\) Regulation CC does not.

Under the Model Law, one must resort to local law for the measure of damages.\(^88\) Assuming that both the Model Law and Regulation CC exist as law in the United States, a rational position is that the CC test is what is intended as the local law prescribed by the Model Law, and that the two laws have, through this adoption by reference, achieved harmony. A counter argument might be

\(^{80}\) 12 C.F.R. § 229.10-.21 (1990).
\(^{82}\) Id. § 4003.
\(^{83}\) 12 C.F.R. § 229.10(b) (1990).
\(^{84}\) 12 C.F.R. § 229.21 (1990).
\(^{85}\) See infra text accompanying note 219.
\(^{86}\) See supra Part I.
\(^{87}\) See U.C.C. § 4A-404(a) (1989); supra text accompanying note 79.
\(^{88}\) Draft Model Law, supra note 5 art. 12(4)(a).
made that CC cannot be "local law" for this transaction since, under our assumptions, it covers a different set of transactions from those governed by the Model Law. One might have resort to the common law courts for a decision in the manner of Evra\textsuperscript{89} creating legal principles for the situation. We need not resolve this issue here.

Neither law adopts Judge Posner's concept in Evra, derived by him in turn from the leading English contracts case of Hadley \textit{v. Baxendale},\textsuperscript{90} that had the defendant bank been aware of the consequences of its negligence, it would have been found responsible for consequential damages. Under the two laws, a bank's knowledge of potential damage will not determine whether consequential damages may be imposed. The 4A draftsmen justify this decision on several grounds.\textsuperscript{91} How can one know what information to give to a bank so that it understands the risk, or the individual at the bank to whom the information must be given? Even after the bank has received the information properly, how will it protect itself in terms of an appropriate charge structure? The comments to the Model Law do not refer to these problems.

Both 4A and the Model Law limit the ability to obtain consequential damages from a negligent bank to a considerably lesser extent than provided today by the U.C.C. Section 4-402, for example, plainly affords a drawer of a check that is wrongly dishonored the right to obtain consequential damages from his drawee bank. Section 1-103 provides for tort actions entirely outside the U.C.C. to the extent not displaced by the U.C.C. Section 4-103(5) on its face limits negligent banks to the amount of the item as a measure of damages in mishandling an item.\textsuperscript{92} It provides, however, for consequential damages where there is bad faith. The reach of 4-103(5) and its relationship to 1-103, 3-409 and 4-402 is, however, less than clear.\textsuperscript{93}

\textsuperscript{89} 673 F.2d 951 (7th Cir.), \textit{cert. denied}, 459 U.S. 1017 (1982).
\textsuperscript{90} 9 Ex. 341, 156 Eng. Rep. 145 (1854).
\textsuperscript{91} U.C.C. \textsection{} 4A-305 comment 2 (1989).
\textsuperscript{92} U.C.C. \textsection{} 4-103(e) (1990) (the limitation applies to ordinary negligence; the presence of bad faith raises a different issue).
The overall policy of both 4A and the Model Law is clearly to place severe limits on consequential damages, although they accomplish this result differently. The banks have sustained their case on this issue in connection with the drafting of both laws in that EFTs are typically very large, the remuneration to the banks for effecting the transfers is very small, and the need for speed and convenience is very great. As was said in Gatoil (U.S.A.), Inc. v Forest Hill State Bank, holding a bank liable for consequential damages "could cripple the banking system by exposing banks to huge claims for consequential damages where the bank is not privy to the business dealings of its clients and has no way of foreseeing or guarding against such exposure for mere lapses in ordinary care."94 The possibility that an intermediary bank might—under some circumstances and albeit of their limited scope—be held liable for consequential damages under the Model Law may be considered the most vehement single objection of the United States banks to its adoption. However narrowly that risk is circumscribed, there are enough cases in the expansive United States law of torts to give this risk a frightening element of reality

**Consequential Damages by Contract**

Some subtle inconsistencies arise between 4A and the Model Law when we look more closely at the ability of a bank to assume a liability for consequential damages by agreement with its customer.95 Since the Evra case cast such a long shadow on the NCCUSL deliberations, this was a question which had to be resolved clearly in the draft.

Having resolved that, contrary to the Hadley v. Baxendale96 idea, mere knowledge by a bank would not subject it to consequential damages, the draftsmen felt that a way had to be found to

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95. There are, of course, various reasons that a bank would be willing to assume this greater responsibility: it might be well paid for it; it might have special relationships with its customer; it might do it as a competitive edge; it might be bullied into it by a powerful customer; exchange rules might provide for the higher level.
96. 9 Ex. 341, 156 Eng. Rep. 145 (1854).
enable a bank to assume the greater liability, should it consciously make that decision. Thus, section 4A-306(c) provides that "damages, including consequential damages, are recoverable to the extent provided in an express written contract of the receiving bank." By use of the words "express written contract," it was assumed that the act of the bank would be deliberate, accomplished with an understanding of the consequences and by an officer with authority sufficient to bind the bank.98

The Model Law allows consequential damages to be added to the extent that they are not provided for "by agreement."99

This kind of difference, perhaps inconsequential, perhaps not, makes the absence of cooperation between the NCCUSL and UNCITRAL as regrettable as the differences in underlying substance. Will a different, lesser agreement satisfy UNCITRAL than that required to satisfy 4A? "An express written contract" does seem to mean something more than an "agreement." Will the sender's chat with a bank officer with questionable authority to bind the bank to massive expenses rise to a higher order under the Model Law than under 4A? One hopes that the resolutions will be the same so that a bank will be subject to the same set of standards whether it is sending to San Francisco or to Zurich. The language is, however, different and that can be used to justify different results.100

Responsibility of Originator's and Intermediary Banks for the Completion of Funds Transfers

Both versions place a responsibility upon the originator's bank and upon subsequent intermediary banks to ensure that the funds

98. Hypotheticals were put to the draftsmen: suppose the message sender asked the clerk receiving the message whether the bank would stand behind the send and the clerk responded in the affirmative. This might be less than express; it certainly is not written. Before the express, written document passed, one would think that it would find its way to one in authority. There is no requirement, however, that the document be signed. A weary group of draftsmen had had enough.
99. Draft Model Law, supra note 5, art. 12(7).
100. "Where the legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect was intended." F.J. McCaffrey, STATUTORY CONSTRUCTION § 13, at 40 (1953) (citing Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637 (N.Y. Sup. Ct. 1941), aff'd, 264 A.D. 723, 34 N.Y.S.2d 37, appeal denied, 264 A.D. 779, 35 N.Y.S.2d 726 (1942)).
transfer arrives at the beneficiary's bank. In some consequential
details, however, they proceed under different rules.

The nature of the funds transfer that we have established as
our basic assumption\textsuperscript{101} follows closely the intended path of the
funds transfer in the \textit{Evra} case.\textsuperscript{102} In \textit{Evra}, the intermediary bank
(Bank Y in our basic assumption) lost the order through its negli-
gence and the Seventh Circuit held that it was not liable for the
consequential damages that resulted.\textsuperscript{103} The \textit{Evra} plaintiff had also
sued its own bank (OB in the above schematic) for breach of con-
tract and in negligence; it was found not liable on either count.\textsuperscript{104}

We will now examine the status such a bank would hold under
the Model Law or 4A. Swiss Bank, an intermediary bank—Bank Y
in the model—was found guilty of negligence. We shall also ex-
amine its status under the two new draft laws if it had not been
found negligent, and the transfer still did not reach the benefi-
ciary's bank. The two draft laws handle these problems similarly
but not identically.

Article 4A places what it calls a "money-back guarantee" re-
sponsibility upon all receiving banks except the beneficiary's
bank.\textsuperscript{105} Each receiving bank first has a duty to comply with the
terms of the order that it accepts.\textsuperscript{106} Under the statute, however,
that only causes the funds to be moved to the next bank in line.\textsuperscript{107}
The draft goes on to provide that "if the funds transfer is not com-
pleted by acceptance by the beneficiary's bank," no sender,
including the originator (O in the basic assumption) has to pay the
amount of the transfer and, if it does pay, it is entitled to a refund
with interest from the bank receiving payment.\textsuperscript{108} As previously

\begin{itemize}
\item \textsuperscript{101} See supra Part III section A.
\item \textsuperscript{102} 673 F.2d 951 (7th Cir.), cert. denied, 459 U.S. 1017 (1982).
\item \textsuperscript{103} \textit{Evra}, 673 F.2d at 959.
\item \textsuperscript{104} Id. The plaintiff Hyman-Michaels sued the Swiss Bank; that bank impleaded Hy-
man-Michaels' bank, the Continental Bank; Continental cross-claimed against Hyman-
Michaels' who counterclaimed against Continental. Hyman-Michaels's claims against the
Continental Bank were for breach of contract and negligence. Continental was found not
guilty of either. Id. at 960.
\item \textsuperscript{105} See U.C.C. § 4A-402 comment 2 (1989) (explaining the idea of the money-back
    guarantee).
\item \textsuperscript{106} U.C.C. § 4A-302(a)(1) (1989).
\item \textsuperscript{107} Id.
\item \textsuperscript{108} U.C.C. § 4A-402(d) (1989). Cf. id. § 4A-402(e) (if the bank whose act caused the
    failure is unable to repay, the loss is borne by the first bank in the funds transfer that
    ordered the use of that bank).
\end{itemize}
noted, it is receipt by the beneficiary’s bank that discharges the obligation as to which the funds transfer is made. Through the money-back guarantee, the banking system gives the originator its assurance that, once the transfer has been properly begun, the originator’s expectation of ultimate payment will be honored.

The UNCITRAL Model Law has a similar rule. It provides:

The originator’s bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator’s payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary’s bank within the time required by article 9.

The “money-back guarantee” responsibility of a bank under 4A is consonant with the general idea of a guaranty; if the transfer is not completed, any funds received must be returned with interest. If payment has not been made, there is no duty upon the sender to pay. The concept is different under the Model Law. The receiving bank is subject to something deemed a “liability” and the “paragraph (5)” referred to in the above quotation from the Model Law subjects banks to the same potential for consequential damages as was described, above, in section C. It was the sense of the Working Group of UNCITRAL that the banks were generally in a better situation than the originator to discover what went wrong; this loss burden should, therefore, be put upon them.

The decision inherent in both draft laws to put this responsibility upon the intermediary banks reminds one of the historic New York Rule/Massachusetts Rule controversy which concerned

109. See supra note 27.
110. Model Law Article 12(5) specifies the measure of damages and will be dealt with later in this discussion. See Draft Model Law, supra note 5, art. 12(5).
111. Id. art. 12(2).
112. The entire concept of Model Law Article 12, within which the quoted paragraph resides, is one of liability. See id. art. 12.
113. Once the responsibility is termed a liability, it has been pointed out in UNCITRAL sessions that the possibility exists for other, separate damages under the local legal systems of various countries. That avenue will not be explored in this Article.
check payment. Under the New York rule, a bank in which a check was deposited was deemed to appoint subsequent banks handling the check as its agent; it was, therefore, responsible to the depositor for their negligence.\(^{115}\) Under the Massachusetts rule, the depositary bank discharged its duty when it properly forwarded the check on its path to the drawee/payor bank and had no responsibility for the negligence of banks later handling the check.\(^{116}\) To the extent that banks had control of the check collection process, they naturally did what they could, usually through clauses in deposit agreements,\(^{117}\) to incorporate the Massachusetts rule into their relationships with their depositors. Ultimately, Article 4 of the U.C.C. adopted the Massachusetts rule.\(^{118}\) The two new laws, of course, go the other way for EFTs and permit direct actions by the originator ("O") against its bank ("OB") for sums which OB can recoup by collecting down the line.

Article 4 of the U.C.C. has been criticized for representing a banker's rather than a bank customer's view of the world.\(^{119}\) Adoption of the Massachusetts rule is one example of this representation. Without necessarily branding Article 4 a "banker's code," it clearly resolves most difficult issues in favor of the banks.\(^{120}\)

While bank representatives were a major part of the Article 4A drafting process, all issues were not resolved the banks' way. The decision to adopt the "money-back guarantee" and its application through a New York-type rule clearly was not to the banks' liking. Its ultimate adoption was part of the process of compromise whereby the corporate "users" of the electronic payment system agreed to the virtually complete elimination of their remedy of

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119. See Beutel, The Proposed Uniform (?) Commercial Code Should Not Be Adopted, 61 Yale L.J. 334, 335 (1952) ("Article 4 on Bank Deposits and Collections is an unfair piece of class legislation maneuvered through the American Law Institute and the Commission on Uniform Laws by pressure groups favoring the bankers over their customers.").
consequential damages against the banks. In exchange, the banks agreed to this version of the Massachusetts Rule in 4A.

Operation of the money-back guarantee is another illustration of the basic difference in approach of the 4A draftsmen as contrasted with UNCITRAL. The latter, rooted more in the traditions of the past, instinctively put a greater burden upon the banking system. The former, dedicated to speed and economy, reduced that burden.

In the 4A deliberations, it was pointed out that a bank might be forced to effect a payment order in favor of a particular receiving bank because it was instructed to do so.\textsuperscript{121} If that receiving bank becomes insolvent and cannot complete the funds transfer, why should the obedient bank be required to return money (with interest) to one who might even have given the ill-starred instruction? This reasonable position resulted in a variance from the guarantee in favor of a bank following orders when the bank, receiving a payment as a result of those orders, does not complete the transfer and cannot return that payment because of its own insolvency or the effect of law\textsuperscript{122}

Both 4A and the Model Law have a money-back guarantee, but they deal with it in different ways. The problem that this difference and the liability difference creates for a sending bank is obvious. If a New York bank accepts an EFT intended for a San Francisco recipient, it has one type of risk; if the recipient is in Basel, the game changes, and the New York bank is subject to potentially greater damages. In pricing its services, a reasonable bank takes account of its potential liabilities. Possibly, the New York bank would be forced to adopt two price structures reflecting the different risks under the two laws.

**Failure To Give Notice of Rejection**

Both 4A and the Model Law deem a payment order to be a request to the receiving bank that it accept and execute that order.\textsuperscript{123} (Special rules apply to a receiving bank that is also the beneficiary’s bank, but we will not be concerned with them at this

\textsuperscript{121} See the duty of a receiving bank as prescribed by U.C.C. § 4A-302 (a)(1) (1989).
\textsuperscript{122} Id. § 4A-402(e).
\textsuperscript{123} Id. § 4A-103(1); Draft Model Law, supra note 5, art. 2(i).
point.) Both proposed laws give the receiving bank the opportunity to reject the order if the bank acts within an appropriate time frame.124 Here, the two proposals diverge and create two separate and tortuous paths.

Under 4A, unless there is some form of contractual obligation between a sending and receiving bank, the receiving bank accepts the order when it executes the order.125 If the bank decides to reject the order, it must notify the sender, assuming that the sender has enough funds on deposit with the receiver to honor the order.126 If the receiving bank decides that it will reject the order but does not give notice of rejection, it is not, however, deemed to have accepted.127 The receiving bank incurs no liability to the sending bank other than to pay interest to the sending bank on any withdrawable credit balance that the sender has established with the receiver.128 This interest can run for a maximum period of five days; the order is then deemed automatically canceled by operation of law.129 Article 4A, consistent with the manner in which it generally allocates responsibility to the sender rather than the receiver, causes the interest to stop before the end of the five day period if the sender learns that the order was not executed.130

Under the Model Law, again in the absence of an agreement to the contrary, a receiving bank that decides not to accept also must give the sending bank notice of its decision, unless "one of the reasons is insufficient funds."131 This is like the 4A pattern. Under the Model Law, however, if the receiver does not give the notice, it accepts.132 In this respect, the exception relating to insufficient funds on deposit was deemed significant by the UNCITRAL Working Group. While the Model Law duty to reject, with the consequence of acceptance if the notice is not given, was

124. U.C.C. § 4A-208 (1989); Draft Model Law, supra note 5, art. 5.
126. Id. § 4-210(a).
127. See id. § 4A-210 comment 1 ("Acceptance can occur only if the receiving bank executes the order.").
128. Id. § 4A-210(b).
129. Id. §§ 4A-210(c) & 4A-211(d).
132. Draft Model Law, supra note 5, art. 5(2)(a) (considers the failure to give a rejection notice as the equivalent of acceptance).
acknowledged to place a heavy burden on the receiving bank, it was also noted that the duty exists only for a bank that has received funds and, therefore, probably has a continuing relationship with the sending bank. The duty was widely believed to be reasonable and within the scope of accepted bank procedures. Acceptance in turn brings to life the duties of the acceptor to issue its own payment order within the allotted time frame that is consistent with the order received and accepted by it.

The consequences of failure under the Model Law to give the notice of rejection are serious. Under 4A, as noted, there is only the interest penalty. However, the Model Law imposes a duty upon the bank to comply with the order. If a receiving bank does not honor its obligation to comply, it faces the following liabilities:

a. Loss of interest;
b. loss caused by a change in exchange rates;
c. expenses incurred for a new payment order and for reasonable costs of legal representation; and
d. any other loss that may have resulted if non-execution resulted from an intent to have caused it, or reckless or knowledgeable behavior.

Thus, there are two theories of rejection that result in two sets of consequences. Article 4A states that notice must be given, but imposes no duty to act in the absence of notice; failure to give notice under 4A results in relatively minor statutory consequences. Under the Model Law, failure to give notice of rejection constitutes an acceptance and triggers quite a significant set of penalties.

This difference presents yet another illustration of the difference in approach between 4A and the Model Law. Article 4A is designed for the modern, high speed, low cost systems. It is fundamentally the duty of the originator to ensure that his order is followed and received by the beneficiary. If an order is not received when due, the originator must protect himself. He cannot relax, accept the consequences, and then sue an erring bank as the plain-

134. See Draft Model Law, supra note 5, art. 5(2).
135. Id. art. 12(1), (2) & (5).
136. The absence of a duty is consistent with the overall approach of 4A, since it is the act of executing the payment order that constitutes the acceptance. U.C.C. § 4A-209(a) (1989).
tiff attempted in *Eura*. This scenario is more suitable for yesterday's payment systems, including of course the checking system. The UNCITRAL Model Law favors the originator, permitting suits against the lender, including actions for consequential damages. The differing outlooks of the drafters of the two laws have resulted in substantive differences like this one.

The result is that a bank will need to know which law governs when it decides how to react to a payment order. The disparity between the two versions is unfortunate when they govern essentially identical transfers.

*Security (Authentication) Procedures*

Both proposals include a mechanism for protecting the integrity of the funds transfer system, called a security procedure in 4A\textsuperscript{137} and an authentication procedure in the Model Law.\textsuperscript{138} (We will use the 4A terminology.) This is a procedure adopted by the banks to limit the chance that the order they are receiving was sent by someone other than the named sender and also to increase the likelihood that the order is correct.\textsuperscript{139} Obviously, security devices may, and are expected to, differ widely among banks and even within the same bank.

The two versions have similar approaches to security procedures. The differences are, however, sufficient between them to create risks in the event that a bank has not adapted to the particular law that will apply.

The fundamental approach of 4A is that if an interloper gives a bank a payment order in the name of a designated sender, that order will bind the sender if the bank follows a security procedure that is "commercially reasonable."\textsuperscript{140} The sender can avoid the responsibilities of the order (that is, have the order deemed to be unauthorized and shift the loss to the bank) by proving that it did not provide the interloper with access ability through the cus-

\textsuperscript{137} Id. § 4A-201; see also id. § 4A-202(b) & (c).

\textsuperscript{138} Draft Model Law, supra note 5, art. 2(j).

\textsuperscript{139} A discussion of security procedures appears in D. Baker & R. Brandel, "The Law of Electronic Fund Transfer Systems" \textsuperscript{18.05} (2d ed. 1988).

\textsuperscript{140} U.C.C. § 4A-202(b) (1989). The draft does not attempt to define what is commercially reasonable. Rather, it prescribes that this is a question of law to be decided by the circumstances of each particular case. Id. § 4A-202(c).
The UNCITRAL Model Law has the same general approach, but the customer will be bound only if it has sufficient funds or credit in the bank to cover the order. The reason for this limitation is given in the comments to the Model Law as follows:

[This limitation] affords a protection for originators in some countries. By limiting the amount that can be debited to an account, a customer can limit the amount of potential loss. Such a limitation also furnishes to a limited degree an indication that an excessively large payment order may be in error or fraudulent.

It is apparent that the foregoing rationale applies equally to American as well as foreign funds transfers. However, a sender’s potential liability in the United States is unlimited in favor of an intermediary bank receiving and, in turn, sending an unauthorized order pursuant to a valid security procedure; under the Model Law, this liability is limited to the amount on deposit. We see here once again the tendency of 4A to favor the receiving bank in a high speed system. The drafters believed that the receiver should be entitled to rely upon an order assuming that the required information is sent. The receiving bank is obligated only to certain prescribed duties; losses due to legal violations tend to fall upon senders. The Model Law, rooted more deeply in the past, forces more upon the receiving bank—here, how much cover is in place as a measure of the sender’s responsibility Speed is sacrificed for the increased security of the sender.

Once again, it is unfortunate that the two drafting groups could not have pooled their concepts as to how a security device should work in order to arrive at a harmonious result.

142. Draft Model Law, supra note 5, art. 4(2)(b). Article 4A does require the receiving bank to abide by any agreement between sender and receiver. U.C.C. § 4-302(a)(1) (1989). Thus, the sender may by agreement restrict the overdrafts or credits that the receiver may grant the sender; it may even limit the amount of the payment orders that the receiver is authorized to execute. Absent such a restrictive agreement, however, there does not have to be a credit or an agreement to give credit in favor of the sender as is required by the Model Law.
143. Draft Model Law, supra note 5, art. 4(2) comment 7.
144. Both drafts, through their incorporation of the security procedure approach, have the effect of reducing the potential liabilities of a bank below what they would be had a check drawer’s signature been forged and the drawee bank paid. In the United States, under the classic rule of Price v. Neal, 97 Eng. Rep. 871 (1762), incorporated in the Uniform Commercial Code in § 4-207(1)(b), a bank will typically be responsible for the unauthorized
Duty To Follow Instructions

The Originator, O, knowing of a good and continuing relationship between Intermediary Bank Y and the Beneficiary's Bank, BB, orders the Originator's Bank, OB to route the funds transfer to BB through Y OB issues this instruction to Intermediary Bank X. It happens, however, that X has a comfortable relationship with Bank O, believes that Bank O is both faster and cheaper than Y, and, incidentally, just learned that Y is on its regulator’s problem bank list. Acting in the best of faith, Bank X decides to route the transfer to BB through Bank O. May X do this? The answer is yes under the UNCITRAL Model Law and no under draft 4A.

The basic requirement of 4A is that, when a sending bank prescribes that a particular intermediary bank or funds transfer system be used to move an order along, the receiving bank must comply with the instruction received. It then permits the receiving bank to vary the designated funds transfer system—but not the designated intermediary bank—if it acts in good faith. The Model Law permits a receiving bank to ignore the sender's order concerning use of both an intermediary bank and a funds transfer system when “the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive costs or delay in completion of the credit transfer.”

Both drafts justify the positions taken in the comments to the relevant sections. Article 4A stresses the relationship between Banks Y and BB that the sender wants to utilize and acknowledges that more leeway appears permissible in the particular funds transfer system used. The Model Law contemplates problems along the route of the message that should be picked up by an intermediary sending bank.

Another way of dealing with problems anticipated by the receiving bank, incorporated into the Model Law but not 4A, enables (but does not require) the receiving bank to contact the sender

withdrawal. U.C.C. § 4-207(1)(b) (1989). More simply, the U.C.C. also makes a drawee bank liable for honoring any unauthorized order, which includes a forged check. Id. § 4-401.

145. U.C.C. § 4A-302(a)(1) (1989). If the receiving bank fails to comply with the terms of the sender's order, the receiver is then subject to the liabilities prescribed by U.C.C. section 4A-305.


147. Draft Model Law, supra note 5, art. 6(5).
within the time allotted for acceptance and get instructions for the perceived problem.\textsuperscript{148} (Presumably such action could be taken even without this statutory authorization and could also be taken under the pattern of 4A.)

Unless a difference between a domestic funds transfer and an international funds transfer can be demonstrated, the conflicting approaches of the respective drafts cannot be justified. In the absence of ultimate accommodation, it will be necessary for a receiving bank to know to which law a particular transfer is subject when it perceives trouble along the path planned by the sender.

**Obligation of Beneficiary's Bank**

Article 4A spells out with some particularity the obligations of a beneficiary's bank to the beneficiary upon that bank's receipt of a payment order. The Model Law does not attempt 4A's meticulous approach; when it is specific, however, the Model Law's approach is different.

Article 4A has several provisions dealing with the relationship between the beneficiary and his bank. It prescribes when the beneficiary's bank has accepted a payment order.\textsuperscript{149} It then devotes a full section to the obligations that the beneficiary's bank has towards the beneficiary upon acceptance of the payment order.\textsuperscript{150} It states when payment is due, the results of failure to pay (including the possibility of consequential damages—the only place that such damages appear in the Article), the beneficiary's bank's duty to give notice to the beneficiary, the form of notice, penalties for failure to give notice and opportunities to waive the requirements.\textsuperscript{156}

\textsuperscript{148} See id. (last sentence).
\textsuperscript{149} U.C.C. § 4A-209(b) (1989). This event is also identified in Model Law Article 6(2), but with considerably less particularity.
\textsuperscript{150} U.C.C. § 4A-404 (1989).
\textsuperscript{151} Id. § 4A-404(a).
\textsuperscript{152} Id.
\textsuperscript{153} Id. § 4A-404(b).
\textsuperscript{154} Id.
\textsuperscript{155} U.C.C. § 4A-404(b) (1989).
\textsuperscript{156} Id. § 4A-404(c).
The Model Law also prescribes when the beneficiary's bank accepts a payment order. The events causing acceptance are not, however, consistent with 4A. The Model Law does provide that, upon acceptance, the beneficiary's bank is liable to the beneficiary. The liability is designed to be discharged in a particular manner. As of this writing, two possible variants are given. Whichever variant is ultimately selected, however, the manner of settling the obligation of the beneficiary's bank to the beneficiary will be handled differently from the provisions of Article 4A. Since the total presentation of this matter is handled one way in Article 4A and another way in the Model Law, it is hard to be precise about how many differences there are and how significant they will be in practice.

The Model Law also provides for a bank's liabilities for failure to execute properly in favor of the beneficiary. These liabilities may include consequential damages. The beneficiary bank's liability may also include consequential damages under 4A, but the prerequisites differ. Liability under the Model Law, depending upon the nature of the beneficiary's bank's dereliction, may be in favor of the original sender or the beneficiary. Article 4A provides for liabilities in favor of the beneficiary only.

The analysis is, once again, muddied by the effects of Federal Reserve Board Regulation CC that preempts state law (including

157. Draft Model Law, supra note 5, art. 6(2).
158. The tests are lengthy, worded differently and filled with differences. For example, Model Law Article 7(2) requires a rejection notice to be given by the execution date, while 4A requires it by the next day. See Draft Model Law, supra note 5, art. 7(2); U.C.C. §§ 4A-209, 4A-210 (1989). Under Model Law Article 7(1)(d), acceptance occurs upon notice to the beneficiary that he has the right to withdraw funds. Under U.C.C. Article 4A, notice that the order has been received suffices for acceptance. U.C.C. § 4A-209(b)(3) (1989).
159. Draft Model Law, supra note 5, art. 8(4).
160. See id.
161. For example, one of the possible variants of Model Law Article 8(4) divides those obligations between cases where the beneficiary has and cases where it does not have an account with its bank. Article 4A deals with this particular approach but is not based on it.
162. Is putting funds at disposal (Draft Model Law, supra note 5, art. 8) the same as paying (U.C.C. § 4A-404(a) (1989))? Is a requirement to notify on the day of receipt (Draft Model Law, supra note 5, arts. 8 & 9) significantly different from a requirement to notify by midnight of the next day (U.C.C. § 4A-404 (1989))? 
163. Draft Model Law, supra note 5, art. 12(4).
165. Draft Model Law, supra note 5, art. 12(4).
Article 4A, assuming, as we do, its adoption as state law). Regulation D generally describes the relationship in an EFT of the beneficiary's bank and the beneficiary. It is sufficient to observe that the Model Law's structure is even more out of sync with Regulation CC than with Article 4A. For example, Regulation CC does not allow consequential damages while both 4A (in limited circumstances) and the Model Law do.

This may well be an area where a United States lawyer should tread lightly. The relationship between a bank and its depositary customer is likely to be subject more to the niceties of local law than are some other aspects of the funds transfer system. Some portions of the Model Law are likely to be the result of an appreciation of these niceties. On the other hand, one has difficulty in appreciating that such issues as notice to the beneficiary or times of transfer cannot be overridden by a universal Model Law. The observation must be repeated, however, that a beneficiary's bank will have particular difficulty in untangling the two legal skeins of the different laws.

Cancellation and Amendment

1. Banks other than the beneficiary's bank.—The times within which payment orders may be cancelled or amended after they are received by banks other than the beneficiary's bank differ between the two drafts. They start in the same place; cancellation and amendment are effective as to banks that are not the beneficiary's bank if received within a reasonable time before the receiving bank has retransmitted the order. Under 4A, the re-

167. See infra text accompanying notes 205-06.
169. Actually, U.C.C. section 4A-211 speaks in terms of "Cancellation and Amendment": the Model Law, in Article 10, deals only with "Revocation." For present purposes, we will assume that this difference is without substantive significance. The previous draft of the Model Law, U.N. GAOR, U.N. Doc. A/CN.9/WG.IV/WP.41 (1989), phrased the relevant section (Article 8(1)) in terms of "revocation and amendment." The current draft phrases it merely as "revocation." We will assume that the ability to revoke includes the ability to amend and that no substantive change was intended.
170. It is not clear whether the rule espoused by both laws is consistent with the results of Middle East Banking v. State St. Bank Int'l, 821 F.2d 897 (2d Cir. 1987), where a stop order was received by a bank in time to stop the transfer, but the transfer was in fact effected through employee error. See Middle East Banking, 821 F.2d at 900, 903 (Funds
qurement is phrased in terms of acceptance and in the Model Law in terms of execution, but the effect is much the same since under 4A acceptance occurs only through execution.

The differences occur after the statement of the underlying rule. Under 4A, a receiving bank may be forced to accept a cancellation or amendment after having accepted an order only if the receiving bank agrees or if there is a funds transfer rule to that effect. (The receiving bank must also be able to cancel or amend the order it has in turn given.)

Under the Model Law, a different pattern is prescribed. The receiving bank is obligated by the statute to notify the next bank in line of the revocation "as promptly as possible under the circumstances." If it fails to get to the next bank in line in time to stop the transfer, it appears that the revocation is simply ineffective and the original order remains effective. If, however, it fails to act "as promptly as possible under the circumstances" and the transfer is for that reason not cancelled, the sending bank is relieved of its responsibility to pay the receiving bank the amount of the transfer (or, if it has already paid, it may get its money back); and the receiving bank retains its liability to the next bank in line. Under 4A, this burden on the receiving bank simply does not exist.

2. The beneficiary's bank.—If the receiving bank is the beneficiary's bank, the rules of the two drafts again diverge. Cancellation or amendment is again valid if made reasonably in advance of acceptance. After acceptance by the beneficiary's bank, there are different rules. The Model Law does not permit

were voluntarily returned to the sender, but the receiver was nevertheless found responsible for what it did with the stop order it had received.

171. U.C.C. § 4A-211(b) (1989). The concept of acceptance rather than execution is undoubtedly used because 4A groups together cancellations given to intermediary and beneficiary banks; the latter banks have no concept of re-execution.

172. Draft Model Law, supra note 5, art. 10(1).


174. Id. § 4A-211(c).

175. Id. § 4A-211(c)(1).

176. Draft Model Law, supra note 5, art. 10(4).

177. We continue to assume that the Model Law applies to amendment as well as to revocation.

178. U.C.C. § 4A-211((b) (1989); Draft Model Law, supra note 5, art. 10(2).
revocation by the beneficiary's bank after its acceptance.\textsuperscript{179} Article 4A requires either an agreement by the beneficiary's bank to that effect or a funds transfer rule authorizing cancellation after acceptance.\textsuperscript{180} 4A has additional requirements for cancellation or amendment after acceptance with respect to a payment order accepted by the beneficiary's bank.\textsuperscript{181}

The question dealt with here is at what point in the transfer process is an act sufficiently accomplished that it may not be undone through a stop payment order or some other procedure provided in the Code. The general approach is that recipients of electronic funds transfers tend to treat them as the rough equivalent of cash. Therefore, they should be irreversible as early as possible.\textsuperscript{182} Both drafts honor this principle, although in somewhat different ways.

Some of the foregoing details are significant, and some are not. They all, however, subject a receiving bank to tests as to how to respond to requests to cancel or amend. Consistent with its general approach, the Model Law subjects receiving banks to a greater responsibility for surveillance. To the extent that the tests differ when applied to funds transfers in the domestic as contrasted with the international market, they place burdens upon the banking system that may be arduous and probably could have been avoided.

\textsuperscript{179} For this purpose, the basic principle of Model Law Article 10(1) requiring revocation before acceptance is not modified. That this result is intended is confirmed by comment 10. See Draft Model Law, supra note 5, art. 10 comment 10.

\textsuperscript{180} U.C.C. § 4A-211(c) (1989).

\textsuperscript{181} Id. § 4A-211(c)(2). Section 4A-211(c)(2) provides as follows: [C]ancellation or amendment is not effective [in this situation] unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to recover from the originator.

\textsuperscript{182} In Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047 (2d Cir. 1979), payments were considered irrevocable when made. The rules of the CHIPS system were supportive of this result. Notice to stop a transfer that might have been received by a bank minutes before it executed that transfer was deemed ineffective. Note that under Article 4A, funds transfer system rules will continue to govern and so Delbrueck would probably come out the same way and for the same reason. As we shall see in Part IV the Model Law does not deal with funds transfer system rules. Under the principles of the Model Law, however, Delbrueck would probably be decided to achieve the same result.
Par Payment

Article 4A and the UNCITRAL Model Law contain different provisions as to whether the parties to a funds transfer can expect what has traditionally been called “par payment.” That is, can the recipient of a funds transfer, assuming that all goes well, expect to receive the same amount that was sent by the originator, or can parties along the way skim off sums for their services, thereby reducing the amount that will ultimately be received at the other end?

Today, one can generally assume that his check will be paid in the amount for which it was written. This was not always so. Banks in the collection process had for years charged for their services so that check payees regularly received something less than the face amount of the check. The goal of what we now call “par payment” was achieved only after considerable pressure by the Federal Reserve System that was generally supported by federal legislation. The legislation eliminated exchange charges in national banks and in state banks that were voluntary members of the federal reserve system. In the face of this pressure, exchange charges by nonmember state banks “gradually withered away.”

The absence of such charges has become consistent with banking practice since checks are generally handled by banks that have some form of correspondent relationship with each other. Thus, the charges that must necessarily attend the functions of handling and paying checks can be satisfied through the ebb and flow of interbank balances and other relationships.

This may be less true when electronic payments are the medium of funds transfer. The system of payment through electronic means has not achieved the level of maturity of the check system. Banks may receive payment orders from banks with whom they

183. The story of the evolution from non-par payments to today's scheme, the support of the Federal Reserve System and the place of state legislation, including the Bank Collection Code, is told in Scott, The Risk Fixers, 91 Harv. L. Rev. 737 (1978) and Wyatt, The Par Clearance Controversy, 30 Va. L. Rev. 361 (1944).


have no continuing relationship; they may also handle electronic funds transfers where an existing correspondent relationship is not, or not yet, in tune with the needs of electronic payments. For these reasons, the draftsmen of 4A had originally engineered a system within which correspondent banks might have creamed off their various charges from transferred funds as they passed through, as in the manner of non-par payments as they existed in the early part of this century Section 4A-302(d), however, now provides that this may not be done unless the sender specifically gives an instruction allowing this. Since the original sender is the originator of the funds transfer, this means that par payment will be achieved in all cases in the manner of the checking system, unless the originator provides for something different when he starts the process.

The ability of the originator to give an order that will result in payment to the beneficiary of a lesser amount raises the question of whether the underlying obligation will be satisfied. That is, if originator ("O") owes beneficiary ("B") $1,000,000 and authorizes that transfer charges may be deducted, will payment to B of, say, $999,990 ($10 having been deducted along the way by an intermediary bank pursuant to O's instructions) satisfy the debt?

4A solves the problem by saying, first, that the debt is satisfied by the lower payment. It then, however, adds that the debt will not be satisfied if B demands the $10 from O and O refuses to pay it.186

The UNCITRAL Model Law takes a different approach. It provides for non-par payment without the authority of the originator.187 It also requires O to pay B the amount of the charges to satisfy the underlying obligation. Apparently, if O does not pay B, the obligation is still discharged but B has a claim, perhaps in contract, against O.188

187. The text is not specific on this allowance although a fair reading of Model Law Article 14 would seem to authorize it. Any ambiguity on this point is clarified, however, by comment 9. See Draft Model Law, supra note 5, art. 14 comment 9.
188. The Model Law provides:
If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.
Draft Model Law, supra note 5, art. 14(3).
The approach of the two proposed laws may probably be varied by an agreement of the parties that a specific sum—and nothing less—must be received by the beneficiary for the underlying obligation to be satisfied. Section 4A-501 provides a general authority to vary rights and obligations by agreement.\textsuperscript{189}

The attitude of the Model Law to variations by agreement is not yet clearly articulated. Again, the two drafts differ.

IV System Rules: An Article 4A Coverage Not Addressed by the Model Law

Article 4A is the product of some three and one-half years of work. Its concepts, construction and drafting were conceived and reviewed by some of the leading specialists available in electronic funds transfers. Its resolution is a carefully honed set of compromises among implementers of funds transfers—principally banks—and the users of those transfers—principally commercial enterprises (and, incidentally, also banks).

A critic who now comes to the scene arrives too late to appreciate the process of creation. Depending upon one's particular orientation, one will probably disagree with various of the policy positions taken. Since many of those positions represent compromises rather than anyone's ideal resolution, some disagreement with the final result is not only appropriate but almost inevitable. It would, however, be difficult to assert that legal areas of consequence to those involved in electronic funds transfers were ignored.\textsuperscript{190} The experts who guided the drafting knew where the problems lay and attempted to deal with them.

This cannot be said for the UNCITRAL Model Law. Experts rubbed shoulders with neophytes during the drafting process, and the results of this mix of knowledge permeates the current draft. It is not insignificant that Article 4A contains 38 sections, the Model

\textsuperscript{189} As 4A is part of the U.C.C., the general authority provided in U.C.C. section 1-102(3) to vary the provisions of the U.C.C. by agreement apply. U.C.C. § 1-102(3) (1989). It is unclear what subsection 4A-501(a) adds. However, the latter subsection does repeat the statutory pattern already established for variation by agreement found in subsection 4-103(1). See id. §§ 4-103(1) & 4A-501(a).

\textsuperscript{190} The draftsmen were sufficiently modest to acknowledge the existence of "gaps that may be present in Article 4A." Id. § 4A-501 comment 1.
Law only 12. (And the Model Law does not attempt to squeeze more into each section.)

In this portion of the Article I will examine one significant area, namely the relationship of payment system rules with statutory law, that was dealt with in 4A but not in the Model Law.

Payments through electronic means are frequently conducted by groups or associations of banks, frequently called nets or, somewhat more formally, funds transfer systems.191 These systems operate through sets of rules.192 So long as there is no controlling statutory law in force, these rules operate as contracts among the participating banks. The effect of these contracts upon third parties not part of the system is less clear.193 The relationship of these rules with statutory law became an obvious issue as 4A and the Model Law came into focus.

Article 4A deals with this issue. It specifies a general rule for its relationship with a standard funds transfer system, the most significant of these systems being the Clearing House Interbank Payment System ("CHIPS"). It also deals with its relationship with the Automatic Clearing House System, whether operated by the Federal Reserve System194 or by an association of banks.195 Article 4A also makes clear that, however standard rules of federal preemption may handle the problem, not only Federal Reserve System regulations but also operating circulars of the separate Federal Reserve Banks supersedes any inconsistency in 4A. Thus, funds transfers through FedWire will, from the viewpoint of Article 4A, be handled consistently with transfers through privately operated systems.196

This approach demonstrates the modernity and reality of 4A. Given the dominance of electronic payment systems in today's financial structure, an appropriate relationship between the rules of

191. The use of such systems was essentially impelled as a result of Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976), which held that an electronic terminal was not a branch of a bank if it was not owned or rented by that bank. Thus, the practice grew of one bank utilizing terminals owned by other banks or by entities separate from the bank.


193. Id. ¶ 19.06(1).


196. Id. § 4A-107. This form of transfer is known as Fedwire and is governed by Regulation J of the Federal Reserve System, 12 C.F.R. § 210 (1990).
those systems and an umbrella statute is essential. The recognition of those rules as overwhelming the statutory language is actually not a new idea in the Uniform Commercial Code. It reflects the approach of the U.C.C. where usages of trade can be found to embody an agreement and stand alongside the traditional rules of offer, acceptance and consideration.\footnote{197} Article 4A looks to the future and is a fresh and original approach to statutory drafting.

The Model Law does not deal with such issues. It is not that funds transfer systems are unknown outside the United States. Great Britain has the CHAPS system, France utilizes the Sagitaire system, Japan has the ZENGIN system, Singapore has the SHIFT system, and Hong Kong has the CHATS system.\footnote{198} In this sense, the Model Law is old-fashioned, even more traditional, than 4A. It is written more in the manner of the standard law governing payment by check. Obviously the funds transfer systems are known to the drafters of the Model Law. Also known is the fact that those systems have their own rules which play a part in funds transfers and will affect such transfers after the Model Law becomes effective.\footnote{199} At this time, however, the relationship between the Model Law and those rules does not form part of the Law's structure.

V Speculating About the Future

Form of Passage

We have assumed throughout this Article the passage in the United States of both Article 4A and the Model Law. That is, they will coexist and the conflicts between them must be resolved. Here, we will both refine and question that assumption.


First, Article 4A has been and is being enacted as state law and as part of the Uniform Commercial Code. The Model Law (again assuming that it is adopted by any legislature) may become the law of one or more states in the United States; it may be enacted—more probably will be enacted—as federal law. There is, of course, no indication that Congress has any concern with the Model Law. In either case, however, its relationship with enacted 4A will have to be established.

Should it also become state law, the Model Law contains its own area of coverage, and whether a particular transaction falls under 4A or the Model Law will be a continuing issue. Article 4A is not, by its own terms, restricted to domestic transactions. It requires only that a key ingredient of the funds transfer be located in the state which has passed the law. (To the extent that the parties have agreed that 4A shall govern, even that degree of connection is not required.)

The most rational correspondence of 4A and the Model Law would be for the Model Law to control in the specific areas for which it is designed. That is, it would govern a funds transfer where "the originator's bank and the beneficiary's bank are in different countries." Even if, for such a transaction, the connection with a state of the United States were sufficient to put 4A into play, controlling law would be the Model Law. Article 4A would, however, govern the remainder of EFTs to which, by its own terms, it is applicable and to which the Model Law is inapplicable. (This

200. There is an occasional suggestion that 4A should be enacted as federal law in order to bring its effects at one time and in a uniform manner to the entire country. Whatever the beneficial effects of such enactment might be, we will assume that there is no particular political force seeking this result and that 4A will follow the remainder of the Uniform Commercial Code as state law.

201. The mandate given by the United Nations to UNCITRAL in connection with its funds transfer endeavors is broad enough to enable UNCITRAL to write a domestic as well as an international law.


203. Id. § 4A-507(b).

204. Draft Model Law, supra note 5, art. 1(1).

205. Such a reading would be in conformity with general principles of statutory construction. "Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the latter will prevail." 2A N. Singer, Statutes and Statutory Construction § 51.00 (4th ed. 1984) (1984 rev. of Sutherland Statutory Construction).
conforms to the standard reading of statutes: the more specific controls the more general.)

To the extent that banks or users must analyze the applicable statute for each transaction, inconsistencies between the two will be particularly troubling. Issues of differing responsibility and liability will be raised and related matters of pricing must be addressed. In grey areas, issues of coverage may have to be addressed by the courts.

If the Model Law is enacted as federal law, the issues will be similar but shaded differently. Federal law preempts state law and thus the areas that the Model Law covers will preempt conflicting state law. This, however, would not seem to create a different result from that which would occur even if both were state law and the approach recommended above were adopted.\textsuperscript{206}

If the Model Law is ultimately adopted by the Senate as a treaty of the United States, the result is once again essentially the same. Treaties are federal law and, as such, preempt state law. The areas governed by 4A (state law) and the Model Law (federal law) would have to be worked out; areas of inconsistency would be ruled by the Model Law, and the problems we have outlined would persist.

The foregoing paragraphs are, of course, all speculation. If one were to select today the most likely pattern of passage, it would be 4A as state law and the Model Law not at all. To the extent that United States bankers have any awareness of the Model Law, their reaction is one of almost unallayed dismay. They deem it without recognition of the true nature of EFTs;\textsuperscript{207} they consider that, where tough issues exist, the Model Law selects the wrong answers; they consider the Model Law to be a surface approach to what 4A addresses in depth.\textsuperscript{208} Thus, we may fairly assume that in anything similar to its present form, the Model Law will not become United States law at all. But does this mean that the problem we have been examining, of the relationship between the two laws, will not exist?

\begin{footnotesize}
\begin{enumerate}
\item[206.] This would be the case even if the Model Law were ultimately promulgated by the Federal Reserve System in the form of a regulation. Again, I am not suggesting that such an event is being considered.
\item[207.] See supra note 8. I have previously noted the different focus of the drafters of 4A from that of the Model Law drafters.
\item[208.] One banker has called the Model Law a "poor man's 4A."
\end{enumerate}
\end{footnotesize}
Unfortunately, the problem will not go away so simply. The Model Law may well (and on this subject we will not attempt any prediction) be adopted as the law of foreign states. Funds transfers emanating from, or even merely passing through, the United States could then easily become subject to its terms as they touch adopting foreign states. The problem then becomes one of conflicts of laws—whose law governs—and that turns largely on the law of the country where the lawsuit is brought.\(^\text{209}\) Inconsistencies between the two laws can still be troubling, creating at the international level the issues of underlying responsibilities and resulting liabilities with which this Article has been concerned. Anything less than consistency between the two draft laws should be avoided.

\textit{One Person's Opinion}

The author here suggests that, given the constant and continuing mix of domestic and foreign funds transfers handled by the major (and even the minor) United States banks, while it is not inconceivable that 4A and the Model Law could coexist as guiding law—one for some transfers, the other for the remainder--this possibility is undesirable at best and, at worst, is an expensive travesty of financial regulation.\(^\text{210}\)

\textit{Possible Solutions}

We cannot be certain that this potential legislative collision will occur. The problem does clearly exist on the horizon and those in the trenches must try and avert any unfortunate confrontation.

As we noted at the start of this Article, 4A is essentially completed.\(^\text{211}\) The most effective effort, therefore, is clearly to try and fashion the Model Law as closely as possible to the image of 4A. One has no reason to be optimistic that this will occur (subject perhaps to the idea in the last paragraph of this section). The rest


\(^{211}\) I say essentially because revisions can always be made. In addition, states may adopt 4A in a nonuniform manner. While this is discouraged by the Commissioners, it does happen, both upon initial enactment and through modifications from time to time.
of the world has no dedication to the United States' 4A or to the concepts of the American bankers, users and related institutions such as clearing houses and the funds transfer systems who are largely responsible for it.

One possible method of avoiding conflict is to attempt to slow 4A down in the state legislatures in order to await the Model Law as the appropriate statute. Assuming that the Model Law does ultimately become federal United States law, this would achieve uniformity among the United States and the rest of the world. It does create problems: principally, how would we approach EFTs that are entirely domestic in nature and therefore not within the coverage of the Model Law? The United States banking interests are convinced that the present absence of statutory law and the suspense created by cases like Evra and others that are sub judice are dangerous and intolerable. We undoubtedly need law in the short term and cannot wait for the U.N. to complete its elephantine process of legislative gestation.

If the foregoing course were taken, might we amend the Model Law so that it covers domestic EFTs within the United States in addition to its present international coverage? This possibility would first require a new study to see whether it is appropriate for that purpose. We would undoubtedly encounter its general inferiority to 4A and start to extract from 4A to remedy the deficiencies. This could lead anywhere.

An alternative course of action is to try and discourage both the completion of the Model Law by UNCITRAL and its approval by the U.N. Aside from some minor embarrassments for those who toiled from this country to produce the Model Law, there are problems in this approach. Primarily, we would be left without firm legal guideposts in the international arena to govern EFTs. The application of local law would remain uncertain under conflicts of law principles and we might find ourselves back in the clouds of Evra.

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212. In light of the fast pace with which states have been adopting Article 4A, this is not likely a viable alternative.

213. See supra text accompanying notes 7-8 for the Model Law's underlying concept of internationality.

214. Anticipating trouble down the road, the United States delegation to UNCITRAL has already informed the group in no uncertain terms that the draft it was producing would almost certainly be unacceptable in the United States.
One possible solution would be a Federal Reserve Board regulation adopting the Model Law or portions of it as applicable to United States EFTs. The Federal Reserve has broad powers to regulate the money transfer system. It has used these powers to promulgate its Regulation J which covers the checking system as it is affected by the Federal Reserve clearing operation and the EFT operation known as FedWire. It is clear that this Regulation preempts state law, including the law of the Uniform Commercial Code. More recently, based upon authority contained in the Expedited Funds Availability Act the Federal Reserve has made massive changes in the check collection process generally and to that extent again preempted the U.C.C.

The process of what has been termed "federalization"—that is the drawing of state law into federal enactment—seems to be becoming more acceptable. It would seem only a further step in that process for the Federal Reserve to take two new and incompatible statutory approaches and rewrite them into a federal regulation that would become the governing law of the area. Such a regulation, to achieve the consistency that we perceive as welcome, would at the very least have to be consistent with the Model Law. We suspect that a move of this nature would be as distasteful to the Federal Reserve as it would be to the NCCUSL, which is committed by philosophy to the vitality of state law. Furthermore, as we have previously indicated, the Model Law is generally deemed inferior as a legal guide to 4A and its adoption as the model should probably be avoided. It is, however, a solution.

At this time, before the Model Law is accorded the UN imprimatur, the intelligent approach would still seem to be a continuing effort to amend it in the direction of 4A. The approach has, of course, been repeatedly pursued to no avail. One possible alterna-

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220. See Rubin, supra note 184, at 1256.
221. See supra text accompanying note 208.
tive has, in a sense, actually grown out of the different foci we have already mentioned between the drafters of 4A and those of the Model Law.\textsuperscript{222} If, indeed, the major attention of the 4A group has been on high speed, low cost, high volume EFTs and the attention of the Model Law group has been on a "broader" set of EFTs,\textsuperscript{223} why not divide the Model Law into two parts; one would be consistent with 4A, the other not. The consistent part would cover the high speed transfers that are in fact the main concern of the United States interested parties. Transfers over such systems as CHIPS, CHAPS and other similar systems would be governed by a harmonious body of law and everything else (whatever that may turn out to be) will live under legal systems that may present problems for the banks, the parties and the courts, but would probably not be destructive in their impact. This approach presents difficult drafting problems and may ultimately achieve the approval of no one. At this time, it does, however, suggest another way out.

VI. Conclusion

It is simplistic and trite to agree that the world is growing smaller. We do, however, still frequently find ourselves working with the ideas of the larger world of yesterday when dealing with the problems of the smaller world of tomorrow. The two drafting processes that concern us here are illustrative. As we have previously indicated, it makes little difference to a New York bank whether it sends an EFT to San Francisco or to London. Yet, two law-authoring bodies have been at work on separate laws that are designed to govern the two transactions separately. We know that, should they both be enacted, there will be trouble. Yet, each proceeds in essential independence of the other.

Insofar as the insular attitude of the United Nations is concerned, it has been suggested that with the United States century-old movement to unify commercial law behind us,\textsuperscript{224} we are both

\textsuperscript{222} See supra text accompanying note 8.
\textsuperscript{223} I will not attempt to identify what that broader group encompasses.
\textsuperscript{224} The first Uniform Law written by the National Conference of Commissioners on Uniform State Laws was the Negotiable Instruments Law which became a Uniform Law in 1896 and was adopted by all states. The major unification of commercial law was accomplished by the Uniform Commercial Code which became a Uniform Law in 1951. This may
more sensitive to the problems engendered by separate legal systems and more attuned to the possibilities of unification.\textsuperscript{225} One is harder put to justify the disjointure of the United States Commissioners.

However, we face the future with optimism.