Funds Transfers, Payments, and Payments Systems - International Initiatives towards Legal Harmonization

Gregor C. Heinrich

Recommended Citation
https://scholar.smu.edu/til/vol28/iss3/11

This Perspective is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
Funds Transfers, Payments, and Payments Systems—International Initiatives Towards Legal Harmonization

Recent years have seen substantial growth in cross-border banking activities. On the one hand, banks are increasingly seeking to establish subsidiaries, or at least offices, in countries other than their own. On the other hand, the commercial activities of banks, above all funds transfers, have expanded tremendously. This growth has occurred in terms of both the amount of individual payments and the total amounts "moved" from one entity to another.

For instance, in 1978 S.W.I.F.T. was considered very successful because it linked about 500 banks in sixteen countries and had achieved an annual traffic volume of almost 25 million messages. Today S.W.I.F.T. handles the same number of messages in a few weeks. Within the European Union (EU) the volume...
of cross-border payments is bound to increase as the internal market establishes itself and possibly develops towards full economic and monetary union.¹

An increase in the volume of payments brings with it an increase in risk. This applies not only at the consumer level, where, *inter alia*, the lack of transparency in conditions and techniques, the quality of performance of funds transfers, and "double-charging" by intermediary and beneficiary banks are a permanent issue—at least in the EU member countries.

Of course, self-regulation would in theory be an ideal solution for eradicating problems encountered in funds transfers. However, whenever a transaction has a connection with more than one jurisdiction, additional uncertainties may exist as to what specific rules may be applicable in the context. One way of solving such potential conflicts of laws is to harmonize applicable rules. Harmonization greatly reduces the necessity to resort to domestic rules of private international law. At the same time, harmonization of rules reduces the risk that a problem will be treated and solved differently in other countries, thus also curtailing a tendency towards "forum shopping."

In the field of payments, two major legal initiatives received a fair amount of international attention since they focused on harmonizing the rules that govern credit transfers, especially cross-border credit transfers:

- a U.S. initiative to harmonize domestic rules governing wholesale wire credit transfers. This initiative resulted in the drafting of a new instrument, Article 4-A "Funds Transfers," to be incorporated into the Uniform Commercial Code (UCC). The new rules contained therein were subsequently adopted by a large number of U.S. states, most importantly New York,² and
- an initiative by the United Nations Commission on International Trade Law (UNCITRAL) that resulted in the adoption and publication of Model Rules on International Credit Transfers in May 1992.³

UNCITRAL's Model Law and Article 4A UCC are not the first and only instruments that aim to standardize certain issues arising in the context of interna-

---

¹ In March 1992 the volume of retail payments below ECU 2,500 was estimated at 200 million transactions: "Payment systems in Europe," opening address by Commissioner d'Achirafi at the European Finance Convention, 3rd December 1993. In the EU the Commission typically focuses on retail payments, whereas work on large-value payment systems has been undertaken by central banks; see infra parts III and IV.

² The draft was finalized in August 1989. Article 4A was designed to be state, not federal, law. As of 1st January 1993, 42 U.S. states had made Article 4A part of their UCC (Alabama, Alaska, New Jersey, South Carolina, and Puerto Rico are considering enactment). The text also constitutes an Appendix to the Federal Reserve System's "Regulation J" applicable to funds transfers through "Fedwire," as amended with effect from 1st January 1991: 12 C.F.R. § 210, Subpart B. Article 4A is explicitly designated as the law governing Fedwire. In the United States, Fedwire, CHIPS, S.W.I.F.T., telex, and book transfers are covered by Article 4A.

³ See infra part III.10.
tional payments. Particularly in the light of rapid technological changes in the banking world and the increasing automation of payment transactions, there is an ever greater need for information and harmonization at an international level.

At the international level, the discussions on cross-border credit transfers will not end with the publication of the UNCITRAL Model Law. At present, for instance, the Commission of the EU uses the Model Law as one of the bases for its own ideas on how to regulate international credit transfers and has set up a "Working Group on the Legal Framework for Cross-border Payments in the Community" to assess future work in this field. It does not seem to be the intention of the Commission, however, to propose that the UNCITRAL Model Law, as such, be enacted in the member states. The EU Working Group is composed of government representatives (usually from the Ministries of Finance and/or Ministries of Justice); the national delegations are supplemented by representatives from central banks. The Group is studying where in the EU there is a need for harmonization of rules regarding finality and revocability of payments, bankruptcies, the time required for processing a payment order, etc.

At any rate, the Model Law is useful since it might promote further discussion on payment issues. For instance, each country wishing to adopt all or part of the Model Law, will start looking into the compatibility of new concepts with old conventions and regulations. Also, issues originally discussed within the UNCITRAL Working Group but not incorporated in the final version of the Model Law—such as conflict-of-law rules or the discharge of underlying obligations—might be reexamined in the future. In addition, new issues might be raised during future discussion and may result in a desire to supplement or amend the Model Law.

In this context, it appears useful to point to a number of further initiatives that


8. For instance, at the UNCITRAL Congress held in New York in May 1993 it was suggested to supplement the UNCITRAL, *Legal Guide on Electronic Funds Transfers, supra* note 5, to deal with cases of flight capital and tax evasion, UN Doc. A/CN.9/378, 23rd June 1993, p.4.
exist in this field. Some initiatives were conceived with a view to harmonizing rules that directly address such issues as payments or funds transfers: others, such as those regarding bankruptcy or consumer protection, have a more indirect effect on payment issues. Some have culminated in intergovernmental conventions, others in the form of standard contractual clauses, recommendations, or guidelines suggested by trade groups. Some of the initiatives have not been as successful as others and have not been adopted as national laws. However, some of the draft conventions have had an important indirect impact insofar as they have served as models for some of the rules laid down in other conventions or national statutes.

The following list, which does not claim to be exhaustive, is meant to serve as a quick reference for such—mostly statutory—initiatives. Debt instruments are, however, not included. The initiatives are categorized into eight parts: I: Place of Payment / Time of Payment / Time Limits; II: Foreign Money Liabilities; III: Funds Transfer / Payments—General Issues; IV: Payment Systems / Clearing / Netting; V: Electronic Data Interchange—EDI; VI: Collections; VII: Bankruptcy; VIII: Private International Law. Within these categories the presentation is systematic, providing information—where available—on (a) the name or title of the initiative, (b) where and when the resulting instrument was adopted or published, (c/d/e) the entry into force of a convention, ratifications, or accessions, (f) the initiative’s contents, (g) the bibliography for the source of the initiative, and (h) a selection of essential secondary bibliographical references for each initiative. Bibliographical references of general interest with regard to the issues addressed by the initiatives, which are grouped into relevant parts, are to be found at the outset of each part.

I: Place of Payment / Time of Payment / Time Limits

INTERNATIONAL FUNDS TRANSFERS


1. COUNCIL OF EUROPE

(a) European Convention on the Place of Payment of Money Liabilities / Convention Européenne relative au lieu de paiement des obligations monétaires.
(b) Basle, 16th May 1972.
(c) Not in force; requirement: 5 ratifications. However, the clauses were incorporated into other Conventions, such as the UNCITRAL and Hague Conventions on sale of goods.
(e) A, D, NL.
(f) The Convention consists of five articles. Payment shall be made at the creditor's habitual residence at the time of payment (art. 2.1); where payment is to be made at a different place, any increase in the expenses or any financial loss resulting from the change in the place of payment shall be borne by the creditor (art. 4).
(g) European treaty series, no. 75, Strasbourg 1972.

2. COUNCIL OF EUROPE

(a) European Convention on the Calculation of Time Limits / Convention européenne sur la computation des délais.
(b) Basle, 16th May 1972.
(c) In force: 28.4.1983 (requirement: 3 ratifications).
(e) B, F, D, I, P, S.
(f) The Convention consists of seven articles. Time limits expressed in days, weeks, months, or years shall run from the dies a quo at midnight to the dies ad quem at midnight (art. 3.1).
(g) European Treaty Series, No. 76, Strasbourg 1972.

3. HAGUE DIPLOMATIC CONFERENCE

(b) The Hague, 1st July 1964.

FALL 1994
(c) In force 18.08.1972, following ratification, by five States:
(d) B, GB, Israel, NL, San Marino.
(e) Further signatures, ratifications, or adhesions: D, Gambia, I (Italy notified
the denunciation on 11.12.1986 but declared that the Convention was to
remain valid until 31.12.1987; also in Germany, the Act by which it
accessed to the UN Sales Convention repealed the Hague Conventions of
1964 as from 1.1.1990; see infra part 1.5(c)).
(f) The purpose of the Uniform Law (104 articles)—that was elaborated to-
gether with a Convention and uniform law on the formation of contracts
for the international sale of goods—was to eliminate as far as possible
the application of rules of private international law (art. 2). The law applies
to contracts of sale of goods entered into by parties whose places of
business are in the territories of different States, independent of the nation-
ality of the parties (art. 1). The application of the law may, however, be
excluded by express or implied agreement (art. 3). With regard to the
place of payment, the buyer shall in principle pay at the seller’s place of
business or habitual residence, “or, where payment is to be made against
the handing over of the goods or of documents, at the place where such
handing over takes place” (art. 59.1). “Where, in consequence of a
change in the place of business or habitual residence of the seller subse-
quent to the conclusion of the contract, the expenses incidental to payment
are increased, such increase shall be borne by the seller” (art. 59.2).
Where the parties have agreed upon a date for the payment or where such
date is fixed by usage, the buyer shall, without need for any other formal-
ity, pay at that date (art. 60).
(g) UNTS, Vol. 834, p. 169.
(h) Dölle, Kommentar zum Einheitlichen Kaufrecht, München 1976 (with a
reprint of the Convention and Uniform Law in English, French, and Ger-
man on pp. 771-803); Graveson/Cohn/Graveson, The Uniform Laws on
Conventions and Uniform Laws on the International Sale of Goods,”
Am.J.Comp.L. 13(1964)326ff.; Ndulo, “The Vienna Sales Convention
internazionale dalle convenzioni dell’Aja alla convenzione di Vienna,”

4. INTERNATIONAL LAW ASSOCIATION (COMMITTEE ON INTERNATIONAL
MONETARY LAW—MOCOMILA)

(a) Model rules on the time of payment of monetary obligations.
(b) Seoul, August 1986/Warsaw, August 1988.
Four rules were laid down:

*Rule 1*: Payment is deemed to be made at the moment when the amount due is effectively put at the disposal of the creditor.

*Rule 2*: Payment by bank or giro transfer, including electronic funds transfer, is deemed to be made at the moment when the amount due has been unconditionally credited to the creditor's account.

*Rule 3*: Concerns payment by check, *Rule 4* payment by unconditionally guaranteed instrument of payment.


5. United Nations—UNCITRAL


(b) Vienna, 11th April 1980.

(c) In force 1.01.1988, following ratification by ten States: Argentina, China, Egypt, F, H, I, Lesotho, Syria, USA, YU and Zambia. For details on the state of signatures, ratifications, accessions and approvals [as of 12th July 1993], see United Nations, "Status of Conventions," *Document A/ CN.9/381* (14th July 1993). Updated versions are published at regular intervals.

(d) Further ratifications, accessions or approvals (as of 12th July 1993) by: Australia, Austria, Belarus, BG, CDN, CH, Chile, (former) CSFR [The federal State ceased to exist on 1st January 1993], D, DK, E, Ecuador, Finland, Guinea, Iraq, MEX, N, NL, ROM, Russian Federation, S, Slovakia, Uganda, Ukraine.


(f) The Convention (101 articles) applies to contracts of sale of goods between parties whose places of business are in different States and either both of these States are Contracting States or the rules of private international law lead to the law of a Contracting State. The rules do not override
domestic law that outlaws certain transactions and invalidates proscribed contracts. It deals with two basic aspects of the sales transaction: formation of the contract and obligations of the parties under the contract.

The place for payment is in principle at the "seller's place of business; or if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place" (art. 57.1). "The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract" (art. 57.2).

With regard to the time of payment, article 58(1) specifies: "If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the Contract and this Convention . . ."


II: Foreign Money Liabilities

1. Council of Europe

(a) European Convention on Foreign Money Liabilities / Convention européenne relative aux obligations en monnaie étrangère.

(b) Paris, 11th December 1967.

(c) Not in force; requirement: 3 ratifications.

(d) LUX-9.2.1981.

(e) A, F, D.

(f) The rules, laid down in nine articles, confer upon the debtor the right to pay in local money a sum due in a currency other than that of the place of payment, unless a different intention of the parties appears, or a different usage is applicable (art. 1). They allow the creditor to recover damages in case of delay of payment if, during the period of such delay, the currency to which the creditor is entitled depreciates in relation to the currency of the place of payment. They enable the creditor to claim in proceedings the money to which he is entitled so as to avoid the risk of a loss that may result from conversion into the currency of the country of the forum.

(g) European Treaty Series, No. 60, Strasbourg 1967.


III: Funds Transfer / Payments—General Issues

General bibliography:


See also, for further references on general issues, Kokkola, "An international bibliography of payment instruments and systems literature for the years 1985-1991," Bank of Finland Discussion Papers 14/92 (April 1992).

1. COUNCIL ON INTERNATIONAL BANKING (C.I.B.)

(a) Interbank Compensation Rules.

(b) New York, first effective 1st November 1977; latest version, incorporating all amendments and effective interpretations, effective 1st January 1983.

(c) (To be incorporated by contract, e.g. reference in CHIPS rules.)

(f) The purpose is to establish rules for settling claims for compensation between C.I.B. member banks when such claims are the result of interbank payment errors. Three types of errors are covered: erroneous or duplicate payment, late payment, and payment to the correct bank but incorrect beneficiary. The rules govern compensation for lost availability of funds and do not apply to recovery of lost principal. The rules apply to all payments to and from foreign customers in U.S. dollars, whether made by check, CHIPS, book transfer, or Federal Funds Transfer. The C.I.B. is an American trade association—consisting of three regional C.I.B.—with (in 1993) more than 365 member institutions.


2. European Community


(b) Brussels, 8th December 1987.

(f) The Recommendation (4 sections) addresses "all economic partners concerned" in the relations between financial institutions, traders and service establishments, and consumers. They are limited, however, to card payment systems or POS terminals and cover: contracts, interoperability, equipment, data protection and security, fair access, and relations between issuers/traders/consumers.


3. European Community

(a) Commission Recommendation concerning payment systems, and in particular the relationship between card holder and card issuer / Recommandation de la Commission concernant les systèmes de paiement et en particulier les relations entre titulaires et émetteurs de cartes.

(b) Brussels, 17th November 1988.

(f) The Recommendation contains an Annex (8 paragraphs) that regards financial consumer protection and is, inter alia, aimed at harmonizing terms of contract and achieving the irrevocability of payment instructions communicated electronically. Issuers of payment cards and similar devices as well as system providers should conduct their activities in accordance with the provisions of the Recommendation.


4. EUROPEAN COMMUNITY

(a) Commission Recommendation on the transparency of banking conditions applicable to cross-border financial transactions / Recommandation de la Commission concernant la transparence des conditions de banque applicables aux transactions financières transfrontalières.

(b) Brussels, 14th February 1990.

(f) The objective of the recommendations (laid down in 6 "principles") is to increase the transparency of the information and invoicing regulations which the institutions (credit institutions and postal services) shall observe.

(g) Official Journal of the EC, No. L 67/1 (15.03.1990) (Recommendation 90/109).

(h) Commission EC, infra part III.5.

5. EUROPEAN COMMUNITY-RELATED WORKING GROUPS AND DISCUSSION PAPERS


(ii) European Parliament, Report of the Committee on Economic and Monetary Affairs on the system of payments in the context of Economic and Monetary Union (Rapporteur: Mr. Bofill Beilhe), 28.01.1993 (Doc.:A3-0029/93); Idem, Report of the Committee on Legal Affairs and Citizens' Rights on easier cross-border payments in the Internal Market (Rapporteur: Mr. Simpson), 28.01.1993 (Doc.: A3-0028/93);


6. FÉDÉRATION BANCAIRE DE LE COMMUNAUTÉ EUROPÉENNE / EUROPEAN SAVINGS BANK GROUP, AND ASSOCIATION OF COOPERATIVE BANKS OF THE EC

(a) European Banking Industry Guidelines on customer information on cross-border remote payment.

6. The guidelines were prepared by the three European Credit Sector Associations in the light of work carried out by the EC Commission in relation to examining payment systems in the internal market (see supra part III.5). Their purpose is to provide guidance to member organizations in issuing recommendations to member banks in relation to the production of literature of information brochures for their customers.


8. Internationa Chamber of Commerce

(a) Guidelines on International Interbank Funds Transfer and Compensation / Principes directeurs pour le transfert international interbancaire de fonds et pour l'indemnisation.
(b) Paris, February 1990.
(c) The aim of the Guidelines (18 articles) is not to provide a sophisticated set of rules, but rather a framework in which the largest number of banks can operate, particularly if they have no existing system. The Guidelines apply only to funds transfer messages between banks (in different countries); they do not contain rules on discharge of underlying obligation or time of payment. Subdivisions of the Guidelines: definitions, applicability, process, liabilities and responsibilities, compensation procedures for incorrect execution of funds transfer messages.


8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).

8. International Organisation for Standardisation

(a) Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.
(c) Part 1: International Standard; Part 2: Draft (see infra part III.8(f)).
for electronic funds transfer messages. This is still a draft (DIS—Draft International Standard); publication is foreseen for 1994. It has recently undergone a revision "Bank telecommunication—Part 2: Documentary credit messages—Universal set of data segments and data elements for electronic documentary credit messages." In addition, Part 3 (collection messages) and Part 4 (Balance reporting messages) should be published in 1994.]

Part 1 identifies and defines terms and data elements used in describing, processing, and formatting funds transfer payment orders. The terms are, generally, defined from the perspective of the receiver of a funds transfer message since it would be incumbent on him to interpret and understand the full intent and meaning of such messages.

(g) International Organisation for Standardisation, ISO 7982-1:1987 [ISO Central Secretariat, CH-1211 Genève].

(h) Other ISO-Standards within the Standards group 015 (Banking and financial services) concern banking documents (sub-group 140) and identification and credit cards (sub-group 150), inter alia: ISO 4217:1990—codes for the representation of currencies and funds; ISO 6260—mail payment orders; ISO 7746:1988—banking, telex formats for inter-bank messages; ISO 61611:1987—international securities identification numbering system (ISIN); ISO 7775:1991—securities, scheme for message types; ISO 8730:1990—banking, requirements for message authentication (wholesale); ISO 10126-1 and 10126-2: banking, procedures for message encryption (wholesale); ISO 11131:1992—banking and related services, sign-on authentication; ISO 6680:1987—international check remittance.

9. NATIONAL COUNCIL FOR UNIFORM INTEREST COMPENSATION, INC.
(N.C.U.I.C.)

(a) Rules on interbank compensation.
(b) Washington, D.C., 1st March 1993
(c) The rules govern the settlement of claims for compensation between banks of various [U.S.] Clearing Houses or Regional Associations that have agreed to be bound by the rules—including their overseas branches—arising from interbank funds payments (other than ACH payments) or the transfer of securities in U.S. dollars (art. 1.1). The claims may exist regardless of the source or ultimate beneficiary of any payment, whether foreign or domestic, or the nature of the underlying obligation (e.g. securities transaction, foreign exchange).

The rules do not replace the compensation rules or guidelines that may govern the settlement of claims between members of a single clearing house, regional association, or national association (e.g. C.I.B. Rules, supra part III.1). They are intended to serve as a basis for the development
of local or regional rules where none exist, and are intended to create (i) an incentive for the prompt return of missent funds; (ii) the timely submission of claims; (iii) the orderly solution of claims; (iv) a general mechanism for settling of disputes (art. 1.1).

The N.C.U.I.C. arose initially from a task force initiated by the American Bankers Association (1980-1985) and an ad hoc committee (1985) that, in 1986, approved the first nationally harmonized "Funds Transfer Rules." The N.C.U.I.C. was incorporated as a formal industry group in 1989.


10. UNITED NATIONS—UNCITRAL

(a) _Model Law on International Credit Transfers / Loi type sur les virements internationaux._
(f) This Model Law, drafted by the UNCITRAL Working Group on International Payments, finalizes the most thorough law reform initiative regarding payments that had been discussed in an international framework. The Model Law is designed to produce a comprehensive body of rules to govern relations between parties to funds transfer transactions. These rules are not intended to be part of an international convention, but are designed for use by legislators. The Model Law has thus been addressed to legislative bodies (via the national governments) for adoption as statutory law. As discussed in the Working Group, a Model Law would be more flexible than a convention because countries would be able to take those parts of it that they find useful and adapt them to their needs [UNCITRAL, Report of the Working Group on International Payments, 18th Session, UN Doc. A/CN.9/318; 27th January 1989, p. 3.]

UNCITRAL’s international undertaking paralleled the United States’ domestic project to harmonize its rules on credit transfers. Article 4-A UCC has, to a certain degree, had an impact on UNCITRAL’s Model Law. On the one hand, the U.S. legislative initiative had begun earlier and was always "ahead" of the discussions at UNCITRAL; on the other hand, both sets of rules address similar problems and have resulted from the desire to eliminate the uncertainties that exist with regard to the judicial nature of a funds transfer, and consequently the rights and obligations that are created as soon as more than one national jurisdiction is involved.

In 1986 UNCITRAL decided to begin preparing model rules, which were at first limited to electronic funds transfers. Later, the draft Model
Law was expanded to cover any form of credit transfer as long as such a transfer was "international," which, under Article 1 of the Model Law, applies to "credit transfers where any sending bank and its receiving bank are in different States." A "credit transfer" (as distinguished from a "debit transfer") is understood to be made up of a series of operations that are initiated by a "payment order" which is in turn defined as an "unconditional instruction, in any form, by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money . . . ."

The 19 articles cover:
(1) General Provisions: sphere of application, definitions, conditional instructions, variation by agreement;
(2) Obligations of the Parties: obligations of sender, payment to receiving bank, acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank, obligations of receiving bank other than the beneficiary's bank, acceptance or rejection of a payment order by beneficiary's bank, obligations of beneficiary's bank, time for receiving bank to execute payment order and give notices, revocation;
(3) Consequences of Failed, Erroneous, or Delayed Credit Transfers: assistance, refund, correction of underpayment, restitution of overpayment, liability for interest, exclusivity of remedies;
(4) Completion of Credit Transfer.


11. Universal Postal Union / Union Postale Universelle

(a) **Arrangement concernant les mandats de poste et les bons postaux de voyage.**

(b) Hamburg, 27th July 1984.

(c) In force, 1.1.1986.

(f) The rules (52 articles) concern postal payment orders ("mandats") and postal traveller cheques ("bons postaux de voyage"). *Inter alia*, there are articles dealing with the money of payment and conversion (art. 3), and with interpostal administration compensation and netting (arts. 28-30).

(g) **Acts of the Universal Postal Union, Vol. IV (Berne) [Available inter
alia in French and Spanish. The Arrangement is published as a law in Switzerland: RO, 1985, pp. 2175-2190.]

12. **UNIVERSAL POSTAL UNION / UNION POSTALE UNIVERSELLE**

(a) **Money Orders Agreement / Arrangement concernant les mandats de poste.**
(b) Washington, 14th December 1989.
(c) In force, 1.1.1991.
(f) The rules (13 articles) govern the exchange of postal money orders ("mandats") which contracting countries agree to set up in their reciprocal relations; the rules on postal travellers’ cheques that were contained in the previous Money Orders Agreement (1984 Hamburg Congress) were abolished at the 1989 Washington Congress. *Inter alia*, there are articles dealing with the currency of payment and conversion (art. 3), and with preparation and settlement of accounts (articles 12 and 13).


13. **UNIVERSAL POSTAL UNION / UNION POSTALE UNIVERSELLE**

(a) **Giro Agreement / Arrangement concernant le service des chèques postaux.**
(b) Washington, 14th December 1989.
(c) In force, 1.1.1991.
(f) The rules (17 articles) govern all the services which the giro service is able to provide for users of giro accounts and which contracting countries agree to set up in their reciprocal relations; nonpostal organizations may also participate (art. 1). The rules contain provisions on transfer, inpayment into a giro account, payment by money order or by outpayment check, and postcheck.


IV: Payment Systems / Clearing / Netting


1. Basle Committee on Banking Supervision

(a) The supervisory recognition of netting for capital adequacy purposes / Reconnaissance prudentielle de la compensation aux fins de la mesure des fonds propres.

(b) Basle, April 1993.

(c) Proposal.

(f) The text is a consultative proposal issued for public comment by the Basle Committee with the agreement of the central bank Governors. The text forms part of a three-part package of supervisory proposals for internationally active banks, containing consultative papers on netting, market risk and interest rate risk. If enacted, the proposal encompassing netting would—under carefully defined conditions and recognition by national supervisors—liberalize the terms of the 1988 Basle Capital Accord as they apply to the use of bilateral netting in the measurement of credit risk associated with certain classes of financial instruments. The issues raised regarding multilateral netting are of a general nature and, pending further study, will not entail modifications of the Capital Accord.
2. **European Community: Committee of Governors of the Central Banks of the Member States of the EEC**

(a) Payment Systems in EC Member States.
(b) September 1992.
(c) The report (a.k.a. *Blue Book*) was prepared by an ad hoc group on EC payment systems that was created in January 1991 by the Committee of Governors. The *Blue Book* is a descriptive guide to the payment systems in Community countries with a view to current and future issues of direct concern for central banks, especially taking into account new developments that had occurred in the three years since the publication of the G-10 study on "payment systems in 11 developed countries" (*infra* part IV.6(h)); in addition, the study places emphasis on cross-border arrangements, on the role of central banks and on large-value funds transfer systems. The study contains thirteen papers, one per EC country and a final one on cross-border arrangements.

3. **European Community: Committee of Governors of the Central Banks of the Member States of the EEC**

(a) Issues of common concern for EC central banks in the field of payment systems.
(b) September 1992.
(f) The report was prepared by the Ad-Hoc Working Group on EC Payment Systems. It identifies six areas as requiring specification in terms of minimum common features: access conditions, risk management policies, legal issues, standards and infrastructures, pricing policies and business hours. The report sets up four lines of action for a Working Group on EC Payment Systems which was subsequently set up: (1) the definition of principles for the cooperative oversight of payment systems in EC countries; (2) the establishment and implementation of minimum common features for domestic systems; (3) preparatory work in the area of large-value cross-border payments in view of the EMU; (4) the continuation of the oversight of the ECU Clearing and Settlement System.

4. **European Community: Working Group on EC Payment Systems**

(a) Minimum common features for domestic payment systems.
(b) November 1993.
(f) The report to the Committee of Governors of the Central Banks of the Member States of the European Community represents a follow-up to the report "Issues of common concern" (*supra* part IV.3). The report was released mainly to the attention of the banking communities, in order to help them to understand the concerns of EC central banks in the field of...
payment systems, and the policies which they intend to conduct in the years to come. The document concludes with comments on 10 principles, covering the six areas that were identified in the report "Issues of common concern" (supra part IV.3): (1) direct access to interbank funds transfer systems; (2) no discrimination in access; (3) transparency of access criteria; (4) real-time gross settlement systems; (5) large-value net-settlement systems; (6) other interbank funds transfer systems; (7) legal issues: "The legal basis of domestic payment systems should be sound and enforceable. Inconsistencies between domestic legal systems in the EC which increase risks in payment systems need to be analysed and, as far as possible, reduced. As a first step, where necessary, EC central banks will press for changes to certain aspects of national bankruptcy laws (e.g. 'zero-hour clause')."; (8) technical issues; (9) pricing policies of EC central banks; (10) operating hours.

Implementation of the principles in every Member State of the European Union should enable banks to benefit from the new possibilities of the common market. On the other hand, assurance is needed that new cross-border payment systems do not result in increased risk for domestic payment systems.

(d) Tehan, "Cross-border bank payments to be made safer," The Times, 15th November 1993.

5. "GROUP OF TEN" CENTRAL BANKS [BANK FOR INTERNATIONAL SETTLEMENTS]

(a) Report on Netting Schemes.
(b) Basle, February 1989.
(f) This preparatory report (a.k.a. Angell Report) to the Lamfalussy Report (infra part IV.6) assesses arrangements that are used to net out amounts due between banks arising from foreign exchange contracts or from the exchange of payment instructions, on either a bilateral or multilateral basis. The analysis focuses on allocation of credit risk and international financial policy issues raised by the development and operation of "cross-border" (or "offshore") payment systems and contract netting arrangements. Chapter 5 (pp. 11-14) contains a brief analysis of the legal basis for netting.

(g) Bank for International Settlements, Report on Netting Schemes, prepared by the Group of Experts on Payment Systems of the central banks of the Group of Ten countries, Basle, February 1989 (available in English, French, German and Italian).

6. **“Group of Ten” Central Banks** [Bank for International Settlements]


(b) Basle, November 1990.

(f) The report (a.k.a. *Lamfalussy Report*) describes the policy objectives that central banks have in common with respect to the analyzed netting systems, presents the Committee's analysis of the impact of netting on credit and liquidity risks and on the level of systemic risk and describes the broader implications of netting arrangements for central banks and supervisory authorities. It sets forth the Committee's recommended minimum standards for the design and operation of cross-border and multi-currency netting and settlement schemes, and presents principles for co-operative central bank oversight of these schemes.

The **minimum standards** are:

1. Netting schemes should have a well-founded legal basis under all relevant jurisdictions.

2. Netting scheme participants should have a clear understanding of the impact of the particular scheme on each of the financial risks affected by the netting process.

3. Multilateral netting systems should have clearly defined procedures for the management of credit risks and liquidity risks that specify the respective responsibilities of the netting provider and the participants. These procedures should also ensure that all parties have both the incentives and the capabilities to manage and contain each of the risks they bear and that limits are placed on the maximum level of credit exposure that can be produced by each participant.

4. Multilateral netting systems should, at a minimum, be capable of ensuring the timely completion of daily settlements in the event of an inability to settle by the participant with the largest net-debit position.

5. Multilateral netting systems should have objective and publicly disclosed criteria for admission that permit fair and open access.

6. All netting systems should ensure the operational reliability of technical systems and the availability of back-up facilities capable of completing daily processing requirements.

The report also suggests the harmonization of national laws in order to prevent conflict-of-law problems related to achieving binding net exposures (p. 17).


7. "GROUP OF TEN" CENTRAL BANKS [BANK FOR INTERNATIONAL SETTLEMENTS]

(a) Delivery Versus Payment in Securities Settlement Systems / Livraison contre paiement dans les systemes de règlement de titres.

(b) Basle, September 1992.

(f) The first part of the report contains the analysis made by the study group of the types and sources of risk in securities clearing and settlement, including the concept of delivery versus payment (DVP). It describes the common approaches to DVP and evaluates the implications of the various approaches for central bank policy objectives. A second part of the report includes a glossary and a schematic overview of the key features of securities transfer systems in the G-10 countries. The report is of analytical nature and does not contain any formal policy recommendations; however, in Chapter 5 (pp. 30-38) the report explores whether the implications of securities settlement systems for financial stability are similar to those identified in the Lamfalussy Report (supra part IV.6). The report also points to the need for further work on issues relating to cross-border securities transactions.

(g) Bank for International Settlements, Delivery Versus Payment in Securities Settlement Systems—Report prepared by the Committee on Payment and Settlement Systems of the central banks of the Group of Ten countries, Basle, September 1992 (available in English, French, German and Italian).

8. "GROUP OF TEN" CENTRAL BANKS [BANK FOR INTERNATIONAL SETTLEMENTS]

(a) Central Bank Payment and Settlement Services with Respect to Cross-Border and Multi-Currency Transactions.

FALL 1994
(b) Basle, September 1993.

(f) This report (a.k.a. Noël Report) is a follow-up to the Lamfalussy Report (supra part IV.6) and examines a range of options that central banks might consider in an effort to help reduce risk and increase efficiency in the settlement of cross-border and multi-currency interbank transactions. The goal was to "identify and promote a common understanding of the advantages and disadvantages of different payment and settlement services that central banks might offer," without recommending a preferred option. The report highlights how changes in certain features of home-currency payments systems can influence the risk and efficiency of international settlements. In addition, it emphasizes the scope and need for private sector efforts to reduce risk and increase efficiency in the settlement process.

(g) Bank for International Settlements, Central Bank Payment and Settlement Services with Respect to Cross-Border and Multi-Currency Transactions, prepared by the Committee on Payment and Settlement Systems of the central banks of the Group of Ten countries, Basle, September 1993.

9. GROUP OF THIRTY

(a) Clearance and Settlement Systems in the World’s Securities Markets.


(f) The report was prepared by an international Steering Committee with the support of an expert international Working Committee. It responds to a widespread perception that clearance and settlement practices in most security markets were deficient, in that they involved participants in undue risks and unnecessary costs. The report lists nine recommended standards designed to be applicable to all markets in corporate securities, mainly equities, and a suggested time-frame for implementation; they address inter alia issues such as central securities depositories, benefits of a trade netting system, employment of delivery versus payment (DVP), "same day" funds conversion, and "rolling settlement system."

The G-30 is a financial industry organization, based originally in New York and London and since 1992 exclusively in Washington, D.C.


10. GROUP OF THIRTY

(a) Derivatives: Practices and Principles.


(f) The private study focuses on market practices (separately from the continuing efforts of central bankers and other regulators to develop appropriate supervi-
sory practices). It defines a set of sound risk management practices for dealers and end-users. The Recommendations and Working Papers which form part of the study lay these out in detail. Problems related to netting are discussed mainly in the "Working Paper of the Enforceability Subcommittee" (Appendix I: Working Papers, pp. 42-61) and in various country reports (Appendix II: Legal enforceability—Survey of nine jurisdictions).


V: Electronic Data Interchange—EDI


1. INTERNATIONAL CHAMBER OF COMMERCE

(a) Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission ("UNCID").


(f) A set of nonmandatory rules that users of electronic communications technology and suppliers of network services could incorporate by reference into their communication agreement. Its primary provisions cover: required care for transferring and receiving messages; identification of the parties; acknowledgement of receipt; verification of completeness of a received message; protection of the information exchanged; maintenance of records and storage of data.

(g) ICC Publication No. 452.

(h) Boss, "The international commercial use of electronic data interchange and electronic communications technologies," Bus.Lawyer 46(1991)1787-1802, at pp. 1791-1792; Cunliffe, "Electronic Data Interchange (EDI) and international trade," Int'l Computer Law Adviser
INTERNATIONAL FUNDS TRANSFERS


2. UNCITRAL

(a) Uniform rules on the legal aspects of electronic data interchange (EDI) and related means of trade data communication / Règles uniformes sur les aspects juridiques de l'échange de données informatisées et les moyens connexes de communication des données commerciales.

(b) Draft, 9th August 1993.

(f) In its 25th session (New York, May 1992) UNCITRAL entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on International Data Interchange. The 15 articles of the first draft—that were discussed at the Working Group’s session from 11th to 22nd October 1993—cover:

(1) General Provisions: sphere of application, definitions, interpretation of the uniform rules, rules of interpretation, variation by agreement;

(2) Form Requirements: functional equivalent of “writing,” functional equivalent of “signature,” functional equivalent of “original,” equivalent value of trade data messages;

(3) Communication of Trade Data Messages: [binding nature] [effectiveness] of trade data messages, obligations subsequent to transmission, formation of contracts, receipt of trade data messages, recording and storage of trade data messages, [liability].


(h) Heinrich, "UNCITRAL und EDI," Computer und Recht 10(1994)118-
VI: Collections

See also related ISO-standards, supra part III.8.

1. INTERNATIONAL CHAMBER OF COMMERCE

(a) Uniform Rules for Collections.

(f) Parties to a contract have to agree to the rules (23 articles); under a certain legal opinion, however, the rules define current trade practice. The rules are binding, unless contrary to a national, state, or local law. "Collection" means the handling of documents by banks on instructions received. The Rules cover, inter alia, liabilities and responsibilities, payment (documents payable in local currency [art. 11] or in currency other than that of country of payment [art. 12], interest, charges and expenses.

(g) ICC publication No. 322.
(h) Nielsen, Das Inkassogeschäft, Köln 1987.

2. UNIVERSAL POSTAL UNION / UNION POSTALE UNIVERSELLE

(a) Collection of Bills Agreement / Arrangement concernant les recouvrements.
(b) Hamburg, 27th July 1984.
(c) In force, 1.1.1986, abolished at the 1989 Washington Congress of the Union in light of an EC study that was initiated pursuant to a resolution at the 1984 Hamburg Congress.

(f) The "arrangement" (23 articles) regulated the collection of a wide range of commercial paper. The rules covered, inter alia, deposit of collectibles, the collection and forwarding of funds, liabilities.

(g) Acts of the Universal Postal Union, Vol. IV (Berne) (also available in French, Spanish, etc.). [The Agreement was published as a law in Switzerland: RO, 1985, pp. 2213-2218.]

VII: Bankruptcy

General remarks and bibliography: Bankruptcy appears to be the most difficult legal domain to harmonize. The regulation of bankruptcies touches the heart of the organization of an economic framework for any country. Therefore bankruptcy regulations are generally mandatory, are often considered to be part of the public—and not commercial—law, and therefore bankruptcy rules cannot be varied by

1. **COUNCIL OF EUROPE**

   (a) **European Convention on Certain International Aspects of Bankruptcy / Convention européenne sur certains aspects internationaux de la faillite.**

   (b) Istanbul, 5th June 1990.

   (c) Not yet in force; requires three ratifications.

   (e) As of November 1990: B, D, F, GR, LUX, TR.

   (f) The Convention (44 articles) ends a project that was begun in 1981. In particular, it allows the opening of secondary bankruptcies in any other signatory country in which the bankrupt party possesses assets, without the need for his insolvency to be established at local level; the secondary bankruptcy is governed by the national law of the state in which it is opened. It allows a bankruptcy administrator appointed abroad to take measures to protect property and institute legal proceedings; and contains safeguards for foreign creditors to enable them to prove their claims in national bankruptcy proceedings.

   (g) *I.L.M.* 30(1991)167-180 (English text).


2. European Community

(a) Commission, Draft of a Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings / Projet de Convention relative à la faillite, aux concordats et aux procédures analogues.

(b) Brussels, 26th June 1980.

(c) Draft.


The harmonized rules will eventually be a lex specialis in bankruptcy matters with regard to the "Brussels Convention" (see supra part VII.3).


3. **European Community**

(a) Amended proposal for a Council Directive concerning the reorganisation and the winding-up of credit institutions and deposit-guarantee schemes.

(b) Brussels, 8th February 1988.

(c) Draft.

(f) The proposal takes into account the tendency in the laws and practices in force in Member States of the EC to institute reorganization procedures that are aimed at preventing credit institutions from becoming insolvent, as soon as financial difficulties become apparent. The draft directive contains rules on, *inter alia*, mutual information of reorganization procedures, division of competences in winding-up procedures, and the exercise of powers on appointed liquidators in another Member State.

(g) *O.J. C* 36, 8.2.1988, pp. 1-22.

4. **International Bar Association**

(a) Model International Insolvency Cooperation Act (MIICA).

(b) Helsinki, June 1989.

(f) MIICA is a model statute proposed, not as a treaty, but in a format for enactment as domestic legislation. The model act provides mechanisms by which courts may assist and act in aid of insolvency proceedings in other countries; the basic purpose is to obtain a universal right for a representative of a foreign insolvency proceeding to appear and request ancillary relief with respect to assets located in another jurisdiction.


5. **United Nations—UNCITRAL**

(a) Cross border insolvency.

(b) 23rd June 1993.

(f) At the UNCITRAL Congress held in May 1992 in New York proposals were made that the Commission consider undertaking work on international aspects of bankruptcy. This document was prepared in order to assist the Commission to decide whether an in-depth study on the desirability and feasibility of harmonized rules in this field should be taken. The document considers some legal issues that may give rise to problems due to a lack of harmony among national laws (effect of liquidation proceedings in one State on assets located in another State; cross-border judicial assistance; right of creditors to participate in insolvency proceedings; priority rules in distribution of assets; cross-border compositions; recognition of security interests; impeachment of debtor’s transactions prejudicial to creditors).
In a further part, the document provides a brief description of work at the international level towards harmonization (Codigo Bustamante; Montevideo Treaties; Nordic Council; Council of Europe; European Communities; and other initiatives).

(g) United Nations, UNICTRAL, A/CN.9/378/Add.4.

VIII: Private International Law

1. European Community

(a) Convention on the Law Applicable to Contractual Obligations ("Rome Convention").
(b) Rome, 19th June 1980.
(c) In force, 1.4.1991. In some countries, the provisions of the Convention had been prior introduced into the respective legal system by specific laws, e.g. B-law of 14.7.87, D-25.7.86, DK-9.5.84, LUX-27.3.86.
(f) Its rules (33 articles) apply within the Member States of the European Union even as regards contracts with a link to a non-EC country. Some main provisions: an express choice of law will be given effect (art. 3); otherwise, a contract will be governed by the law of the country with which it is most closely connected, i.e. the country where the party who is to effect the performance that is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, central administration, or principal place of business (art. 4); under certain circumstances, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection (art. 7.1).
INTERNATIONAL FUNDS TRANSFERS


2. EUROPEAN COMMUNITY

(a) Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (‘‘Brussels Convention’’).
(b) Brussels, 27th July 1968.
(c) In force (for respective dates, see infra part VIII.2(d).
(d) B, D, F, I, LUX, NL = 1.2.1973; GB = 1.1.1987; IRE = 1.6.1988 (see ‘‘Conventions d’adhésion,’’ infra part VII.2(g)).
(f) 41 articles (partially altered by the ‘‘Conventions d’adhésion’’).

3. EUROPEAN COMMUNITY/EFTA

(a) EC/EFTA Parallel Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters / Convention concernant la compétence judiciaire et l'exécution en matières civile et commerciale (‘‘Lugano Convention’’).
(b) Lugano, 16th September 1988.

FALL 1994
4. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

(a) Convention on the law applicable to contracts for the international sale of goods / Convention sur la loi applicable aux contrats de vente internationale de marchandises.

(b) 22nd December 1986.

(c) Not in force (requires ratification, acceptance, approval, or accession by at least five States).

(d) Argentina

(e) (as of February 1993) NL, Czech Republic, Slovak Republic [In lieu of Czechoslovakia that had signed the Convention on 22.12.86, but ceased to exist as a federal State on 1st January 1993].

(f) The Convention (31 articles), bearing in mind the UN Convention on Contracts for the International Sale of Goods (supra part I.5), determines the law applicable to such contracts between parties (i) having their places of business in different States; (ii) in all other cases involving a choice between the laws of different States, unless such choice arises solely from
a stipulation by the parties as to the applicable law, even if accompanied by a choice of court or arbitration (art. 1). The law applicable to a contract governs, *inter alia*, also the various ways of extinguishing obligations, as well as prescription and limitation of actions (art. 12 g).

The Convention is intended to replace the Convention of 1955 on the same subject (in force for B, CH, DK, E, F, I, L, N, NL, S, SF, Niger).


5. **Hague Conference on Private International Law**

(a) **Note on the problem of the law applicable to international credit transfers / Note sur le problème de la loi applicable aux virements internationaux.**

(f) The document points out various problems of conflicts of laws in connection with UNCITRAL’s Model Law on International Credit Transfers. The main issues concern the scope of the Model Law, the revocability of a payment order, the duty to refund, and conflict of laws. It comes to the conclusion that it does not seem possible to treat a transfer conducted electronically in exactly the same way as one carried out by the paper-based method for conflict of law purposes. Before entering into detailed work on the elaboration of a possible convention on the law applicable to international credit transfers, the Conference intends to thoroughly consult the banks and the “funds transfer systems” that currently exist by means of a questionnaire.