

1994

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Recommended Citation

Gregor C. Heinrich, *Funds Transfers, Payments, and Payments Systems - International Initiatives towards Legla Harmonization*, 28 INT'L L. 787 (1994)
<https://scholar.smu.edu/til/vol28/iss3/11>

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BIBLIOGRAPHY

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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

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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.⁴ 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.⁵

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 transfers⁶ 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.⁷ 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.⁸

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

4. On international initiatives in general, see UNIDROIT, *Digest of Legal Activities of International Organisations and Other Institutions*, 9th ed., November 1990; UNCITRAL, "Current activities of international organizations related to the harmonization and unification of international trade law," Report of the Secretary-General, UN Doc. A/CN.9/324, 22nd March 1989 (published yearly in connection with UNCITRAL's annual sessions).

5. See for instance: Bank for International Settlements, *Large-Value Funds Transfer Systems in the Group of Ten Countries*, Basle, May 1990; Organisation for Economic Co-operation and Development (OECD), *Banking and Electronic Funds Transfers*, by J.R.S. Revell, Paris 1983; UNCITRAL, "Report on the Legal Value of Computer Records," UN Doc. A/CN.9/265, 21st February 1985. See also UNCITRAL, *Legal Guide on Electronic Funds Transfers*, Vienna 1987 (published in all the official UN languages); Gutwirth/Joris, "Electronic Funds Transfers and the Consumer: The 'Soft Law' Approach in the European Community and Australia," *I.C.L.Q.* 40(1991)265-301.

6. Commission des Communautés Européennes (DG XV/1), *Rapport du groupe de développement technique des systèmes de paiement*, 20th February 1992, pp. 14-17.

7. D'Archirafi, *supra*, note 1.

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 statutory⁹—initiatives. Debt instruments are, however, not included.¹⁰ 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

General bibliography: See Schönle, "Ort und Zeit bargeldloser Zahlung," in: *Festschrift für Winfried Werner zum 65. Geburtstag*, Berlin/New York 1984,

9. However, of the many private contractual initiatives not used as examples in this article, the following deserves mention: IFEMA—International Foreign Exchange Master Agreement, a cooperative effort by the British Bankers' Association (BBA) and the [U.S.] Foreign Exchange Committee (FXC), finalized in 1993; the IFEMA is intended as a common agreement for spot and forward foreign exchange transactions; it contains provisions that reflect the best market practice for inter-dealer transactions and has been applied as from 1st December 1993 to all foreign exchange dealings; apparently it is not clear to what extent the IFEMA can be applied without further formal agreement (e.g. as general terms and conditions "on the London market") or whether it needs to be explicitly incorporated into a formal contract (e.g. New York).

10. The most widely known are the six Geneva Conventions of 1930-31 on bills of exchange and notes, cheques, and related issues. The United Kingdom Bills of Exchange Act 1882 is domestic legislation, but formed the basis for the legislation of many other common law countries throughout the world. The UNCITRAL UN Convention on International Bills of Exchange and International Promissory Notes has to date been ratified by Guinea and Mexico and needs ten ratifications in order to come into force.

pp. 817-839; Vroegop, "The time of payment in paper-based and electronic funds transfer systems," *Lloyd's Maritime and Comm.L.Q.* (1990)64-87.

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.
- (h) Council of Europe, *Explanatory Report on the European Convention on the Place of Payment of Money Liabilities*, 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).
- (d) A = 11.8.1977; FL = 27.1.1983; LUX = 10.10.84 (in force on 11.1.85); P = 20.11.1979; CH = 20.5.1980.
- (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.
- (h) Council of Europe, *Explanatory report on the European Convention on the Calculation of Time Limits*, Strasbourg 1973.

3. HAGUE DIPLOMATIC CONFERENCE

- (a) **Convention relating to a Uniform Law on the International Sale of Goods / Convention portant sur la vente internationale des objets mobiliers corporels.**
- (b) The Hague, 1st July 1964.

- (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 acceded to the UN Sales Convention repealed the Hague Conventions of 1964 as from 1.1.1990; *see infra* part I.5(c)).
- (f) The purpose of the Uniform Law (104 articles)—that was elaborated together 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 nationality 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 subsequent 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 formality, 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 German on pp. 771-803); Graveson/Cohn/Graveson, *The Uniform Laws on International Sales Act 1967*, London 1968; Honnold, "The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods," *Am.J.Comp.L.* 13(1964)326ff.; Ndulo, "The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A comparative analysis," *I.C.L.Q.* 38(1989)1-25; Padovini, "La vendita internazionale dalle convenzioni dell'Aja alla convenzione di Vienna," *Riv.dir.int.priv.proc.* 23(1987)47-58.

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.

(f) 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.

- (g) International Law Association (ILA), *Report of the 62nd Conference held at Seoul, August 24th to August 30th 1986*, ILA, London 1987, pp. 24-25 (explanatory notes to draft model rules, pp. 497-510; minutes of working session, pp. 511-514); ILA, *Report of the 63rd Conference held at Warsaw, August 21st to August 27th 1988*, ILA, London 1988, p. 457 (remarks, definition and notes by Boechoten/Smits, pp. 440-453).
- (h) The model rules draw heavily upon the Report by Prof. Schönle of Geneva University, which MOCOMILA presented to the 1984 ILA Conference: ILA, *Report of the Sixty-first Conference, Paris, 1984*, London 1985, pp. 162-168; *see also supra* part I, *General bibliography*.

5. UNITED NATIONS—UNCITRAL

- (a) **United Nations Convention on Contracts for the International Sale of Goods / Convention des Nations Unies sur les contrats de vente internationale de marchandises.**
- (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.
- (e) Signatures only: Ghana = 11.04.1980; PL = 28.09.1981, Singapore = 11.04.80; Venezuela = 28.09.1981.
- (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 . . ."

- (g) United Nations, *Final Act of the UN Conference on Contracts for the International Sale of Goods*, UN Doc. A/CONF.97/18, 10 April 1980, Annex I.
- (h) Audit, *La vente internationale de marchandise. Conventions des Nations-Unies du 1 avril 1980*, Paris 1990; Bianca/Bonell (eds.), *Commentary on the International Sales Law: the 1980 Vienna Sales Convention*, Milan 1987 (Convention reprinted in all six UN official languages on pp. 683-806, German: pp. 807-823, Italian: pp. 825-840); Bonell, "L'entrata in vigore della convenzione di Vienna sulla vendita e le sue conseguenze nella prassi delle contrattazioni commerciali internazionali," *Dir. comm. int.* (1987)415-427 (Italian text of Convention on pp. 428-451); Brandi-Dohrn, "Das UN-Kaufrecht—Entstehungsgeschichte und Grundstruktur," *Computer & Recht* 7(1991)705-708; Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht*, München 1990; Conetti, "Problemi di diritto internazionale privato derivanti dalla partecipazione dell'Italia alla Convenzione di Vienna del 1980," *Riv.dir.int.priv.proc.* 23(1987)41-46; Conseil fédéral suisse, "Message (du 11 janvier 1989) concernant la Convention de Vienne sur les contrats de vente internationale de marchandises," *Feuille fédérale*, 21.3.1989, pp. 709-830; Enderlein/Maskow/Strobbach, *Internationales Kaufrecht: Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungskonvention*, Berlin 1991; Gert, *Kommentar zum Übereinkommen . . . über den internationalen Warenkauf*, Heidelberg 1991; Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Deventer 1982 (Convention reprinted on pp. 469-503); Ndulo, *supra* part I.3(h); Padovini, *supra* part I.3(h); Schlechtriem, *Einheitliches UN-Kaufrecht*, Tübingen 1981 (Convention reprinted in English and French on pp. 120-167); Witz, "L'adhésion de la RFA à la Convention des Nations Unies sur les contrats de vente internationale de marchandises," *RDAl/IBLJ* (1990)

N°1, pp. 57-63. The text of the Convention in English and German is also to be found in: *RabelsZ* 51(1987)135-195.

The United Nations periodically publish a *bibliography* on recent writings related to the work of UNCITRAL, not only on sale of goods but also on international arbitration and conciliation, transport, payments, and construction contracts; cf. A/CN.9/382 of 13th May 1993; in addition, abstracts of *case law* on UNCITRAL texts (CLOUT) are published: cf. A/CN.9/SER.C/ABSTRACTS/1 of 17th May 1993 and CLOUT User Guide: A/CN.9/SER.C/GUIDE/1 of 19th May 1993.

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.
- (h) Council of Europe, *Explanatory Report on the European Convention on Foreign Money Liabilities*, Strasbourg 1968.

III: Funds Transfer / Payments—General Issues

General bibliography:

General Problems: Banca d'Italia (ed.), *Proceedings of the Workshop on Payment Systems in the Perspective of European Monetary Unification*, Perugia, 22-23.11.1990, Roma 1991; Idem, *I rischi finanziari nei sistemi di pagamento interbancari*, March 1992; Crawford, "International money transfers," in: *Current developments in international banking and corporate financial operations* (Singapore Conferences on International Business Law), London 1989, pp. 6-39; Dole, "A Japanese insight with respect to the finality of wholesale wire transfers," *U.Pa.J.Int'l Bus.L.* 12(1991)661-710; Effros, "A Banker's Primer on

the Law of Electronic Funds Transfers," *Banking L.J.* (1988)510-543; Ellinger, "The GIRO System and Electronic Transfers of Funds," *L.M.C.L.Q.* (1986)178 *et seq.*; Hellner, "Rechtsfragen des Zahlungsverkehrs unter besonderer Berücksichtigung des Bildschirmtextverfahrens," in: *Festschrift für Winfried Werner zum 65. Geburtstag*, Berlin/New York 1984, pp. 252-280; L'Heureux, "L'harmonisation du droit dans les transferts de fonds internationaux par télécommunications interbancaires," *Cahiers de droit* 32(1991)937-970; Huber, "Grenzüberschreitender Zahlungsverkehr und Valutaverhältnis (underlying obligation)," in: Hadding/Schneider (ed.), *Rechtsprobleme der Auslandsüberweisung*, Berlin 1992, pp. 33-78; English version of that article: Huber, "The international credit transfer and the underlying obligation," in: Hadding/Schneider (eds.), *Legal issues in international credit transfers*, Berlin 1993, pp. 31-75; OECD, *Electronic funds transfer—Plastic cards and the consumer*, Paris 1989; Schönle, *supra* part I, *General bibliography*; Thunis, "Tendances récentes de la responsabilité des banques dans les opérations de transferts électroniques de fonds / Recent trends affecting the Bank's liability during EFT operations," *RDAI/IBJL* (1991)945-976; UNCITRAL, *Legal Guide on Electronic Fund Transfers*, Vienna 1987 (published in all the official UN languages); Vasseur, "Aspects juridiques des nouveaux moyens de paiement," *Rev. de la Banque* (1982)577-600; Idem, "Le paiement électronique—Aspects juridiques," *Sem. juridique-I*-(1985)3206.

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France: Gallouédec-Genuys, *Nouvelles technologies de l'information et droit de la preuve*, Paris 1990 (extensive bibliography at pp. 117-133); Martin, "Aspects juridiques du virement," *Rev. dr. bancaire et de la bourse* (1989)149-152.

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Italy: Banca d'Italia, *White Paper on the Payment System in Italy*, Roma 1986; Idem, "Analyzing the Italian Payment System: The Current Status and the Future," *World of Banking* (1987)6-12; Maccarone, "I trasferimenti elettronici di fondi nel diritto italiano," *Bancaria* (1984)1090-1101.

Latin America: Delpiazzo, "Regulación de las transferencias electrónicas de fondos," in: *Memorias FELABAN*, No. 7, Sept. 1991: X Encuentro Latinoamericano de abogados expertos en derecho bancario, Caracas, 3-5 de Junio de 1991, pp. 41-70; Mille, "Aspectos legales de la transferencia electrónica de fondos," *La Ley* (Buenos Aires), Año LIII No. 175, 11/09/89, pp. 1-3.

Switzerland: Bilotte-Tongue, *Aspects juridiques du virement bancaire—Implications des développements informatiques*, Zürich 1992; Goetz, *Das internationale Kreditkartenverfahren*, Basel 1992; Heini, *Rechtsprobleme der bargeldlosen Zahlung—Insbesondere zur Rechtzeitigkeit und zur Möglichkeit des Widerrufs*, Zürich 1991; Thévenoz, "Le banquier, son client et l'ordinateur," *Sem. judiciaire* 115(1993)17-52.

U.S.A.: American Bankers Association (ed.), *UCC Article 4A—A practical guide for bankers and bank counsel*, 1991; Patrikis/Baxter/Bhala, *Wire transfers—A Guide to U.S. and International Laws Governing Funds Transfers*, Chicago, Cambridge 1993; Patrikis, "Developments in the Law of Large Dollar Electronic Payment in the United States," *RDAI/IBLJ* (1987)639-648; (various authors), Special issue on the UCC (in particular Article 4A, EDI, financial services), *Bus. Lawyer* 45(1990)1389-2052; Ballen/Diana, "Walking a high wire," *Banking Technology*, July/August 1991, pp. 38-40; Lewis, "Allocation of loss due to fraudulent wholesale wire transfers: Is there a negligence action against a beneficiary's bank after Article 4A of the Uniform Commercial Code?" *Michigan L.Rev.* 90(1992)2565-2611; Lingl, "Risk Allocation in International Interbank Electronic Funds Transfers: CHIPS & SWIFT," *Harvard Int'l L.J.* 22(1981)621-660; Shah, "Riding out the storm of daylight overdraft pricing," *Corporate Cashflow*, November 1993.

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.
- (g) Council on International Banking, Approved Rules (09A-069G), 23.09.1982.
- (h) Garrison, "Interbank Standards Set for Misdirected Wire Transfers," *American Banker*, March 23, 1983, p. 10; Lingl, *supra* part III, *General bibliography* "U.S.A.," pp. 639-640 nn.103-110; Preston, "Banks now have rules on international transfer errors," in *American Banker*, April 6, 1983, p. 14; Scott, "Corporate wire transfers and the Uniform New Payments Code," *Col.L.Rev.* 83(1983)1664-1715, nn. 47, 60. See also *infra* part III.9 (N.C.U.I.C.).

2. EUROPEAN COMMUNITY

- (a) **Commission Recommendation on a European Code of Conduct relating to electronic payment / Recommandation de la Commission portant sur un code européen de bonne conduite en matière de paiement électronique.**
- (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.
- (g) *Official Journal of the EC* (1987), No. L 365/72 (Recommendation 87/598).
- (h) Commission EC, *infra* part III.5; Favre-Bulle, *infra* part III.5; Schauss/Thunis, "Quelques réflexions à propos du Code européen de bonne conduite en matière de paiement électronique," *Droit de l'informatique et de Télécoms* (1988)54-56; Thouvenel, *Les aspects juridiques des moyens de paiement français et le contexte européen*, Paris 1990.

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.
- (g) *Official Journal of the EC*, No. L 317/55 (24.11.1988) (Recommendation 88/590).
- (h) Commission EC, *infra* part III.5; Favre-Bulle, *infra* part III.5; Knobbout-Bethlem, "La recommandation européenne du 17 novembre 1988—les systèmes de paiement," *Rev.europ.dr. de la consommation* (1990)241-254; Nicolas, "La recommandation de la Commission des Communautés européennes du 17 novembre 1988 concernant les systèmes de paiement," *Banque et Droit* (1989)67-81; Sousi-Roubi, "Les dispositions communautaires en matière de cartes," *Rev.dr.bancaire et de la bourse*, N°13 (1989)87-91; Thouvenel, *supra* part III.2(h); Trinquet, "Relations entre organismes finan-

ciers et consommateurs dans un système de paiement étendu à l'ensemble de la Communauté," *Rev.Banque* (1989)423-431, 435.

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

- (i) Commission of the EC, *Discussion Paper—Making Payments in the Internal Market*, Doc. COM(90) 447, 26.09.1990; Idem, *Easier cross-border payments: Breaking down the barriers—Commission Working Document*, SEC(92)621 final, 27.03.1992;
- (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);
- (h) Dixon, "Breaking down the barriers on cross-border payments," *SMM*, October 1992, pp. 2-3; Favre-Bulle, *Le droit communautaire du paiement électronique*, Zurich 1992; Gutwirth/Joris, *supra* note 5; Levitt, "Payment systems in EMU," *De Pecunia* 3(1991)63-84; Troberg, "Integration of EEC payment systems: European Commission initiatives," in: Banca d'Italia (ed.), *Proceedings . . . , supra* part III, *General bibliography "General problems,"* pp. 285-313. See also *supra* note 6.

6. FÉDÉRATION BANCAIRE DE LA 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.**

- (b) Brussels, 2nd March 1992.
- (f) 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.
- (g) Attached as "Annex A" to EC Commission Document SEC(92)621, 27.03.92, *supra* part III.4.

7. INTERNATIONAL 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.
- (g) ICC Publication No. 457 (February 1990); identical draft of 8.07.1988: ICC—Policy and Programme Department, Document No. 470-30/5.
- (h) ICC, Commission on Banking Technique and Practice, *Working Party Report "Inter-bank Funds Transfer and Compensation Rules,"* Document No. 470/Int. 232, 21st September 1987.

8. INTERNATIONAL ORGANISATION FOR STANDARDISATION

- (a) **Bank telecommunication—Funds transfer messages / Télécommunication bancaire—Messages de transfert de fonds.**
- (b) Geneva, 15th September 1987.
- (c) Part 1: International Standard; Part 2: Draft (*see infra* part III.8(f)).
- (f) Part 1 (ISO 7982-1) Vocabulary and data elements; Annex A: Parties to a transfer; Annex B: Telex funds transfer message field descriptors [The annexes do not form part of the Standard]. The standard is currently under revision and will extend to documentary credits: "Bank telecommunication—Documentary credit messages: Part 1: Universal set of data segments and elements for electronic funds transfer messages." [The revision was confirmed at ISO on 14th May 1993.]

[Part 2 (ISO 7982-2): Universal set of data segments and elements

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 encypherment (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 misssent 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.

- (g) Text available from N.C.U.I.C. (1120 Connecticut Ave. N.W., Washington, D.C. 20036).
- (h) Ferris, "New Council adopts rules for settling wire transfer disputes," *American Banker*, July 24, 1985, p. 10.

10. UNITED NATIONS—UNCITRAL

- (a) **Model Law on International Credit Transfers / Loi type sur les virements internationaux.**
- (b) New York, 15th May 1992.
- (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*.
- (g) Annex I to: United Nations, Report of the Annual Session of UNCITRAL on the work of its 25th Session, New York, 4th-22nd May 1992, Official Records of the General Assembly, 47th Session (A/47/17).
Informational overview: "Uncitral Model Law on International Credit Transfers: Note by the Secretariat," UN Doc. A/CN.9/384 (19.11.1993).
On *preliminary work*, see: Report of the United Nations, UNCITRAL, "Comments on the Draft Model Law on International Credit Transfers, Report of the Secretary General," UN Doc. A/CN.9/346, 15th May 1991, *UNCITRAL Yb.* 22(1991)52-102; Idem, "Report of the Working Group on International Payments on the work of its twenty-second session, Vienna, 26th November-7th December 1990," UN Doc. A/CN.9/344, 10th January 1991, *UNCITRAL Yb.* 22(1991)195-214.
- (h) Articles taking account of the final text of the Model Law (or very late drafts): Bergsten, "The work of the United Nations Commission on International Trade Law in electronic funds transfers," in: Effros (ed.), *Current Legal Issues Affecting Central Banks*, Washington, D.C. 1992, pp. 447-460; Bischoff, "Das UNCITRAL-Modellgesetz über den internationalen Überweisungsverkehr," *SZIER* 3(1993)285-311 [English text of Model Law at pp. 312-323]; Idem, "Das UNCITRAL-Modellgesetz über den internationalen Überweisungsverkehr—Ein Kurzporträt," *SZW*/

RSDA 65(1993)217-222; Crawford, *The UNCITRAL Model Law on International Credit Transfers* (Remarks made at the International Trade Law Conference, Canberra, 18-19 October 1991), Canberra 1992; Crawford, "International credit transfers—The influence of article 4A on the Model Law," in: Essays in honor of Jacob S. Ziegel, *Can. Bus. L. J/Rev. can. dr. comm.* 19(1991)166-190; Felsenfeld, "The compatibility of the UNCITRAL Model Law on International Credit Transfers with Article 4A of the UCC," *Fordham L. Rev.* 60(1992)53-75; Geva, "UNCITRAL Model Law on International Credit Transfers," in *The law of electronic funds transfers*, New York 1992 (looseleaf release), ch. 4, pp. 133-148 (text of Model Law reproduced in Appendix); Hadding/Schneider, "Die einheitliche Regelung des internationalen Überweisungsverkehrs durch das UNCITRAL-Modellgesetz," *WM* 47(1993)629-638 (English text of Model Law reproduced at pp. 664-668, and German translation by the Commission European Communities for its internal use, pp. 668-673); Heinrich, "UNCITRAL—International credit transfers," *Int'l Banking and Fin. L.* 11(1992)78-79; Lojendo Osborne, "La ley modelo de UNCITRAL sobre transferencias internacionales de credito," *Rev. Der. Mercantil* (1993) No. 207, p. 95; Patrikis/Baxter/Bhala, *Wire transfers—A Guide to U.S. and International Laws Governing Funds Transfers*, Chicago, Cambridge 1993, Part V (pp. 235-327); United Nations Model Law on International Credit Transfers; Schneider, "Die einheitliche Regelung des internationalen Überweisungsverkehrs durch das UNCITRAL-Modellgesetz," in: Hadding/Schneider (eds.), *Rechtsprobleme der Auslandsüberweisung*, Berlin 1992, pp. 491-516; an English version of this article is: Schneider, "The uniform rules for international credit transfers under the UNCITRAL Model Law," in: Hadding/Schneider (eds.), *Legal issues in international credit transfers*, Berlin 1993, pp. 451-474; Vasseur, "Brèves observations [Loi-type de la CNUDCI sur les virements internationaux]," *Banque & Droit*, No. 26 (1992)196-198 (text of the law at pp. 191-196); Idem, "Les principaux articles de la loi-type de la CNUDCI sur les virements internationaux et leur influence sur les travaux de la Commission de Bruxelles concernant les paiements transfrontalières," *RDAI/IBJL* (1993)155-207 [with English translation] ("The main articles of UNCITRAL's Model Law governing international credit transfers and their influence on the EC Commission's work concerning transfrontier payments") (French text of the Model Law at pp. 207-210).

Articles considering earlier drafts of the Model Law: Bergsten, "Legal aspects of international electronic funds transfers," *RDAI/IBLJ* (1987)1-20; Idem, "UNCITRAL Model Law on International Credit Transfers," *JIBL* (1991)276-283; Idem, "The draft UNCITRAL Model Law on International Credit Transfers," in: *International Contracts and Payments*, London 1991, p. 33; Carey, "Electronic funds transfers: model rules,"

Int'l Bus. Lawyer 16(1988)104-105; Dole, *supra* part III, *General bibliography "General problems"*; Federación Latinoamericana de Bancos (ed.) (Bogotá), "Reunión conjunta de FELABAN y la Secretaría de UNCITRAL sobre letras de cambio y aspectos legales de la transferencia electrónica de fondos," *Rev. FELABAN*, 1988, pp. 13-209; Felsenfeld, "Strange bedfellows for electronic funds transfers—Proposed Article 4A of the Uniform Commercial Code and the UNCITRAL Model Law," *Alabama L. Rev.* 42(1991)723-772; Gómez Araújo, "Introducción al estudio del proyecto de Ley Modelo sobre Transferencias Internacionales de Crédito," *Rev. FELABAN*, Jul.-Sept. 1990, pp. 8-10; Gottlieb, "A perspective on the UNCITRAL Draft Model Law on International Credit Transfers," *Payment Systems Worldwide*, Autumn 1991, pp. 30-33; Hascher/Le Guen, "Le projet de loi modèle de la CNUDCI sur les virements internationaux," *Droit de l'informatique*, No. 4, 1990, pp. 95-106; Heinrich, "Building a universal payments law?—The UNCITRAL Model Law on International Credit Transfers," *Payment Systems Worldwide*, Summer 1991, pp. 4-16; Patrikis, "UNCITRAL payments efforts," *Brooklyn J. Int'l L.* (1989)45-58; Radcliffe, "Towards uniformity in the rules governing electronic funds transfers," *Butterworths* (1988)364-366; Schinnerer, "Zum 'Leitfaden'-Entwurf von UNCITRAL über den internationalen elektronischen Überweisungsverkehr," *ZfRV* 26(1985)226-240; Schneider, "Das UNCITRAL-Modellgesetz über den internationalen Überweisungsverkehr," *WM* 43(1989)285-293; Thévenoz, *Error and Fraud in Wholesale Funds Transfers: U. C. C. Article 4A and the UNCITRAL Harmonization Process*, Zürich 1990; Vasseur, "Informations sur les aspects juridiques des transferts internationaux de fonds par d'autres moyens que les cartes," *Banque & Droit* (1989)61-66; Wulff, "Two ways to achieve the same goal: The model law on international credit transfers and the new UCC Article 4A in the national and international contexts," *Wisconsin Int'l L. J.* 9(1990)69-123.

On UNCITRAL bibliography in general, *see supra* part I.5(h).

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).
- (g) Universal Postal Union, *Annotated Code*, Vol. 4, Berne 1991, pp. 4-78. [Acts of the UPU revised at Washington 1989 and annotated by the International Bureau—available in Arabic, English, French, and Spanish. The Arrangement is published as a law in Switzerland: *RO*, 1991, pp. 1797-1805; in Germany: *BGBI.* 1992, Teil II, pp. 887-893.]

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.
- (g) Universal Postal Union, *Annotated Code*, Vol. 4, Berne 1991, pp. 79-140. [Acts of the UPU revised at Washington 1989 and annotated by the International Bureau—available in Arabic, English, French, and Spanish. The Arrangement is published as a law in Switzerland: *RO*, 1991, pp. 1806-1814.]

IV: Payment Systems / Clearing / Netting

General bibliography: Cunningham/Rogers, "Netting in the law," *Butterworths* 5(1990)354-362; Financial Law Panel, *Guidance notice. Netting of coun-*

terparty exposure, London, 19th November 1993; Folkerts-Landau, "Systemic financial risk in payment systems," in: *Determinants and systemic consequences of international capital flows*, IMF: Washington, DC, March 1991, pp. 46-64; Hess, "Zur Rolle der Girokonten bei der Schweizerischen Nationalbank im Zusammenhang mit dem Swiss Interbank Clearing (SIC)," *Wirtschaft und Recht* (1988)31-49; Idem, "Rechtliche Aspekte der Banküberweisung, unter besonderer Berücksichtigung des Interbankzahlungsverkehrssystems Swiss Interbank Clearing (SIC)," *SZW/RSDA* (1991)101-116; *Wirtschaft und Recht*, Sonderheft elektronischer Interbank-Zahlungsverkehr in der Schweiz, Heft 1 (1988)1-83; Jacklin, "Netting and close out: Understanding the scope of US law," *Clifford Chance—EC Financial Services*, September 1992, pp. 29-32; Juncker, "A primer on the settlement of payments in the United States," *Federal Reserve Bulletin*, Feb. 1992, pp. 847-858; McGaw, *The world's clearing houses—A comprehensive report and analysis of clearing for exchange traded futures and options*, looseleaf: FOW, London 1993; Nalbantian/Smedresman/Hoser, "Netting and derivatives—a practical guide," *IFL Rev.*, September 1993, pp. 38-41; Patrikis/Walraven, "The netting provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991," *Futures Int'l L. Letter*, No. 3, 12(1992)1-8; Summers, "Clearing and payment systems: The role of the central bank," *Federal Reserve Bulletin*, Feb. 1991, pp. 81-90; Borio/Van Den Bergh, *The nature and management of payment system risks: An international perspective*, BIS Economic Paper No. 36, Basle, February 1993; Wood/Terray, "Foreign exchange netting in France and England," *IFL Rev.*, Oct. 1989, pp. 18-20.1. *See also supra*, part III, *General bibliography*.

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).

- (h) *World of Banking* (1989)4-8; Commission Bancaire, "Les compensations ('netting') bilatérales ou unilatérales d'obligations et de paiements," in: *Rapport 1989*, Paris, pp. 361-(h)366.

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

- (a) **Report of the Committee on Interbank Netting Schemes of the Central Banks of the Group of Ten Countries / Rapport du comité sur les systèmes de compensation interbancaires des banques centrales des pays du Groupe des Dix.**
- (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).

- (g) Bank for International Settlements, *Report of the Committee on Interbank Netting Schemes*, Basle, November 1990 (available in English, French, Italian, and German).

- (h) A summary of the report is published in: *World of Banking*, November-December 1990, pp. 25-27, and 30; Lamfalussy, "The Report on Netting Schemes," in: Banca d'Italia (ed.), *Proceedings . . . , supra* part III, *General bibliography "General Problems,"* pp. 99-104. Further co-operative efforts with regard to payments/electronic funds transfers published at the BIS include: Bank for International Settlements, *Large-value Funds Transfer Systems in the Group of Ten Countries*, Basle, May 1990; Idem, *Payment Systems in Eleven Developed Countries* [a.k.a. *Red Book*], Basle, April 1989; extensively revised edition (renamed *Payment Systems in the Group of Ten Countries*), December 1993; Idem, *Security and Reliability in Electronic Systems for Payments*, Basle, revised edition, May 1978. On the BIS, see Giovanoli, "The role of the BIS in international monetary cooperation and its tasks relating to the ECU," in *Current Legal Issues Affecting Central Banks* (R. Effros, ed.), IMF, May 1992.

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.**

- (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.**
- (b) New York/London, March 1989.
- (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.

- (h) G-30, *Clearance and Settlement Systems, Status Reports*: Spring 1990 [17 country reports]; *Idem*, *Status Reports—Year-End 1990*, New York/London, May 1991; *Idem*, *Status Reports—Autumn 1992*, Washington, D.C., December 1992 [34 country reports].

10. GROUP OF THIRTY

- (a) **Derivatives: Practices and Principles.**
- (b) Washington, D.C., July 1993.
- (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*).

- (h) Woodman/Plews, "The Group of Thirty: Global derivatives report—Part two, Enforceability issues," *Clifford Chance—Asian Financial Services Newsletter*, October 1993; Plews/Woodman, "The Group of Thirty derivatives report—Enforceability issues," *Clifford Chance—EC Financial Services Newsletter*, October 1993; Plews, "The Group of Thirty—Global derivatives report (Part. 1)," *Clifford Chance—EC Financial Services Newsletter*, September 1993, pp. 30-33.

V: Electronic Data Interchange—EDI

General bibliography: UNCITRAL, *Legal Value of Computer Records—Report by the Secretary-General*, UN Doc. A/CN.9/265, 1985; Baum/Perritt, Jr., *Electronic Contracting, Publishing and EDI LAW*, New York: Wiley Law Publications 1991; Bizer, "Das Schriftformprinzip in Rahmen rechtsverbindlicher Telekooperation," *Datenschutz und Datensicherung* 4(1992)169-176; Chandler, "Negotiable transactions using EDI," *Diritto del Commercio Internazionale* (1992)505-509 [pp. 510-514: CMI Rules for Electronic Bills of Lading]; Deeg, "EDIFACT—The bank and its EDI link to the customer," *Payment Systems Worldwide*, Summer 1991, 16-23; De Sèze, "Electronic Data Interchange Developments in Europe," in: Banca d'Italia (ed.), *Proceedings . . . , supra* part III, *General bibliography "General problems,"* pp. 233-241; Electronic Messaging Services Task Force: (Boss/Ritter), "The commercial use of electronic data interchange—A report and Model Trading Partner Agreement," *Bus.Lawyer* 45(1990)1645-1716 (Model Agreement and commentary: pp. 1717-1749); Franke, "EDI—Ohne Edifact droht die Kleinstaaterei wie anno 1648," *Computerwoche*, 23.10.1992, pp. 43-47; Fritzmeier/Heun, "Rechtsfragen des EDI," *Computer & Recht* 8(1992)129-133; Gallouédec et al., *Une société sans papier? Nouvelles technologies de l'information et droit de la preuve*, Paris: Observatoire juridique des technologies de l'information, 1990; Giovannoli, "Télécommunications et forme écrite dans les contrats internationaux," in: *Mélanges Paul Piotet*, Berne 1990, pp. 425-449; ICC—Joint Working Party on Legal and Commercial aspects of EDI, *Draft ICC policy statement on the development of EDI in international trade*, ICC Doc. No. 460-10, 12th April 1991; Rossnagel, "Digitale Signaturen im Rechtsverkehr," *NJW COR* (1994)96-101; Schmalfuss, "Edifact-Konzept sollte auch Migrationshilfen beinhalten," *Computerwoche*, 23.10.1992, pp. 51-54; Swatman/Swatman, "EDI system integration: A definition and literature survey," *The Information Society*, 8(1992)169-205; Tapper/Tombs, *The Legal Admissibility of Document Imaging Systems*, Westport, CT 1992; Walden,

"EDI-Austauschvereinbarungen," *Computer und Recht* 10(1994)1-13; Whitaker, "Electronic documentary credits," *Bus.Lawyer* 46(1991)1781-1786; Whybrow, "The storm before the calm—Legal and technical issues continue to thwart the growth of EDI for payments," *Banking Technology*, October 1992, pp. 18-22; Xuerf/Brousse, "EDI: des 'Editerms' pour traiter les problèmes juridique de l'Echange de Données Informatisées," *Computer & Telecoms L.Rev.* (1992)6-11.

On EDI efforts of the Commission of the EC: Bertrand, "EDI—The final draft of the European Interchange Agreement," *Int'l Computer Law Adviser* 5(1991)4-15 [contains final draft of the European Model EDI Agreements and Commentary by TEDIS]; Commission of the EC, *EDI Perspectives*, Brussels/Luxembourg 1989 [a brochure published in all official EC languages by the General Directorate XIII, Telecommunications, Information-Industry and Innovation, document number EUR-CD-NA-11883 (ISBN for English version: 92-825-9874-8)]; Idem, *EDI et sécurité—Comment gérer le problème* (EDI and security—How to manage the problem) [prepared by KPMG for the TEDIS programme], Brussels/Luxembourg 1992 [document number EUR 13794; ISBN for French version: 92-826-2876-0; for German version: 92-826-2873-6]; Available only in English and French: Commission of the EC, *TEDIS—The legal situation in the Member States regarding trade electronic data interchange*, September 1989; Idem, *Implementing EDI—an evaluation of 12 pilot projects*, 1992; Idem, *Survey of the current level of implementation, use and general awareness of electronic data interchange in all the EC Member States and the EFTA countries*, 1989-1990. See also related ISO-standards, *supra* part III.8, and ISO 9736:1988—Electronic data interchange for administration, commerce and transport (EDI-FACT)—Application level syntax rules (amended 1990).

1. INTERNATIONAL CHAMBER OF COMMERCE

- (a) **Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission ("UNCID").**
- (b) Paris, 1988.
- (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*

5(1991)15-23; Wheble, "The legal obstacles to efficient use of EDI," in: Del Busto (ed.), *Funds transfer in international banking—A Compendium on capital adequacy, SWIFT, EDI, bank's liability, and payment systems in the 1990s*, Paris: ICC, 1992, pp. 76-81.

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].
- (g) UNCITRAL, Draft uniform rules . . . : UN Doc. A/CN.9/WG.IV/WP.57 of 9th August 1993; Idem, "Report of the Working Group on Electronic Data Interchange (EDI), 26th Session (11th-22nd October 1993)," UN Doc. A/CN.9/387 (17.11.1993).

Preliminary documents: UNCITRAL, "Electronic Data Interchange, Preliminary Study of legal issues related to the formation of contracts by electronic means—Report by the Secretary General," UN Doc. A/CN.9/333 (1990); Idem, "Legal issues of electronic data interchange—Report of the Secretary-General," UN Doc. A/CN.9/350: *UNCITRAL Yb.* 22(1991)381-397; Idem, "Report of the Working Group on International Payments, 24th Session (27th January-7th February 1992)," UN Doc. A/CN.9/360 (17.02.1992), pp. 7-35; Idem, "Outline of possible uniform rules on the legal aspects of electronic data interchange," UN Doc. A/CN.9/WG.IV/WP.55 (27.11.1992); Idem, "Report of the Working Group on Electronic Data Interchange (EDI), 25th Session (4th-15th January 1993)," UN Doc. A/CN.9/373 (9.03.1993).

- (h) Heinrich, "UNCITRAL und EDI," *Computer und Recht* 10(1994)118-

121; Madrid Parra, "Sobre los trabajos de UNCITRAL en materia de intercambio electrónico de datos—EDI (Electronic Data Interchange)," *Rev. der. bancario y bursátil* 45(1992)284-288.

On UNCITRAL bibliography in general, *see supra* part I.5(h).

VI: Collections

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

1. INTERNATIONAL CHAMBER OF COMMERCE

- (a) **Uniform Rules for Collections.**
- (b) Paris, 1978.
- (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

agreement. See Didier, "La problématique du droit de la faillite internationale," *RDAL* (1989)201-206; Flessner, "Internationales Insolvenzrecht in Europa," in: *Festschrift für Th. Heinsius*, Berlin/New York, 1991, pp. 111-127; Kirchhof, "Grenzüberschreitende Insolvenzen im Europäischen Binnenmarkt—Insbesondere unter Beteiligung von Kreditinstituten," *WM* 47(1993)1364-1370, 1401-1407; Scoles/Hay, *Conflict of Laws*, 2nd ed., St. Paul, MN 1992, pp. 938-946 (international bankruptcy); Volken, "Europäische Harmonisierung des Konkursrechts: frühe Staatsverträge," in: *Festschrift für Oscar Vogel*, Freiburg (Schweiz) 1991, pp. 465-481; Idem, "L'harmonisation du droit international privé de la faillite," *Rec.des cours*, 1991, V, pp. 343-431; Idem, "Der internationale Konkurs in neuer Sicht," in: *L'Image de l'homme en droit/Das Menschenbild im Recht*, Freiburg (Schweiz), 1992, pp. 538-561.

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).
- (h) Fletcher, "Cross-border developments," *Financial Times—Business Law Brief*, May 1992, pp. 7-9; Ramackers, "Reflexions critiques sur la Convention européenne relative à certains aspects internationaux de la faillite," *J.C.P. [Doctrine]* 67(1993)277-284; Vallens, "La convention du Conseil de l'Europe sur certains aspects internationaux de la faillite," *Rev.crit.dr.priv.* 82(1993)136-166 (French text of Convention at pp. 121-136).

On the previous draft convention of 1984, prepared by the Committee of Experts on Bankruptcy Law: Albanese, "Activités du Conseil de l'Europe en matière de droit de faillite," in: *Le droit de la faillite internationale*, Zürich 1986; Arnold, "Entwurf eines Europäischen Übereinkommens über den Konkurs," *ZIP/Zeitschrift für Wirtschafts-*

recht 5(1984)1114-1152 (German translation of draft convention at pp. 1152-1155); Guillenschmidt, "Projet de convention du Conseil de l'Europe sur certains aspects internationaux de la faillite," *Banque & Droit*, No. 7, 1989, pp. 191-194; Lowry, "The harmonisation of bankruptcy law in Europe, The role of the Council of Europe," *J.Bus.L.* (1985)73-76.

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.
- (f) The Convention contains 87 articles in 9 Titles: I: scope, II: jurisdiction, III: applicable law, IV: general effects of bankruptcy, V: recognition and enforcement, VI: interpretation by the Courts of Justice, VII: transitional provisions, VIII: relationship to other conventions, IX: final provisions. Title IV, Sec. V (effects of the bankruptcy on past acts and on current contracts), article 36 [set-off]: "The laws of the Contracting States must allow set-off in the event of bankruptcy . . ."

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

- (g) *EC Bulletin*, 1982, Supplement No. 2 (a report/commentary is published at pp. 45-116 of the Supplement); Lemontey, "Rapport sur la Convention . . .," III D/222/80-FR (Commission, Direction III).
- (h) Aminoff, "The EEC Draft Bankruptcy Convention—an exercise in harmonising private international law," *Legal Issues in European Integration* (1990)121-137; Celle, "Sulla legge regolatrice degli effetti del fallimento sui rapporti giuridici preesistenti," *Riv.dir.int.priv.proc.* 25(1989)837-862; Farrar, "The EEC Draft Convention on Bankruptcy and Winding Up, a progress report and evaluation," *J.Bus.L.* (1977)320-337; Hunter, "EEC Bankruptcy Convention and the development of insolvency law in the UK," *Bus.L.Rev.* (1980)250-252; Thieme, "Der Entwurf eines Konkursübereinkommens der EG-Staaten von 1980," *RabelsZ* 45(1981)459-499; Idem (ed.), *Materialien zum ausländischen und Internationalen Privatrecht*, Tübingen 1988, Bd. 32: Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens [Bearb. von J. Thieme]. On the preliminary draft, Fletcher, "The proposed Community Convention on bankruptcy and related matters," in: Lipstein (ed.), *Harmonisation of Private International Law by the E.E.C.*, London 1978, pp. 119-137.

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.
- (h) Glosband/Katucki, "Current Developments in International Insolvency Law and Practice," *Business Lawyer* 45(1990)2273-2280, at pp. 2279-2280.

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, UNCITRAL, 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.
- (d) B-14.7.1987, D-8.1.1987, DK-7.1.1986, F-10.11.1983 (J.O.3.3.1991), GB-29.1.1991, I-25.6.1985, LUX-1.10.1986, NL-1.9.91.
- (e) E (Convention d'adhésion du 18.5.1992); GR (Convention d'adhésion du 10.4.1984), Ireland (in force: 1.1.1992); P (Convention d'adhésion du 18.5.1992).
- (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).
- (g) *Official Journal of the EC*, 1980, No. L 266 (9.10.1980); Report by Professors Giuliano and LaGarde, *O.J.* 1980, C 282 (31.10.1980).
- (h) Bonomi, "I nuovo diritto internazionale privato dei contratti," *Banca Borsa I*, 55(1992)36-107; Jaffey, "The English proper law doctrine and the EEC Convention," *I.C.L.Q.* 33(1984)531-557; Foyer, "Entrée en vigueur de la Convention de Rome du 19 juin 1980 sur la loi applicable aux obligations contractuelles," *J.D.I.* 118(1991)601-631; LaGarde, "Les limites objectives de la Convention de Rome (conflits de lois, primauté du droit communautaire, rapports avec les autres conventions," *Riv.dir.-int.priv.proc.* 29(1993)33-42; Lesguillons, "Loi applicable aux obligations contractuelles: entrée en vigueur de la Convention de Rome du 19 juin 1980," *RDAL/JIBL* (1991)267-283; Malatesta, "Considerazioni sull'ambito di applicazione della convenzione di Roma del 1980: Il caso

dei titoli di credito," *Riv.dir.int.priv.proc.* 28(1992)887-904; Pelichet, "Quelques réflexions sur l'article 23 de la Convention de Rome sur la loi applicable aux obligations contractuelles," in: *Mélanges en l'honneur de M. Van Rijn van Alkemand*, Dordrecht 1993; Plender, *The European Contracts Convention—The Rome Convention on the Choice of Law for Contracts*, London 1991; Reithmann-Martiny, *Internationales Vertragsrecht*, 4. Auflage, Köln 1988, pp. 1-33, Scoles/Hay, *supra* part VII, *General remarks and bibliography*, pp. 725-727, Sousi-Roubi, "La Convention de Rome et la loi applicable aux contrats bancaires," *Rec.Dalloz Sirey—Chronique*, No. 26 (1993)183-190; text and report of Convention also reprinted in North (ed.), *Contract Conflicts*, 1982.

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").
- (g) *Official Journal of the EC*, No. L 299/32 (1972). "Conventions d'adhésion": *O.J. EC*, No. L 304/1 (1978), L 388/1 (1982), C 97/1 (1983).
- (h) Basedow, "Allgemeine Fragen des Europäischen Gerichtsstands und Vollstreckungsübereinkommens (GVU)," in: *Handbuch des internationalen Zivilverfahrensrechts*, Bd.I, Tübingen 1982, pp. 99-179; Focsa-neanu, *Compétence judiciaire, reconnaissance et exécution des décisions civiles et commerciales dans la CEE*, Paris 1982; Hartley, *Civil Jurisdiction and Judgements—The application in England of the Convention on Jurisdiction . . . under the Civil Jurisdiction and Judgements Act 1982*, London 1984; *Juris Classeur de droit international*, T. 9, fasc. 630 (Convention), 631 (commentary on "Généralités" by P. Jenard/J. Lemontey), and fasc. 632-633 (commentary on specific matters by J.-P. Beraudo); Moloney/Robinson (eds.), *The Brussels Convention . . .*, Dublin: I.C.E.L. 1989; Vander Elst/M. Weser, *Droit international privé belge et droit conventionnel international*, T. II, Bruxelles 1985.

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.

- (c) In force for CH, F, and NL on 1.1.92; for LUX on 1.2.92.
- (d) CH: 18.10.91; LUX: 5.11.91.
- (f) (68 articles).
- (g) *Official Journal of the EC*, No. L 319 (25.11.1988) (Convention and Protocols). Text and Explanatory report/"Travaux préparatoires" in: *Lugano Convention*, Vols. I and II, Zürich 1991. Text also reprinted in: *Rev.crit.d.i.p.* 78(1989)149-175; English text in: *I.L.M.* 28(1989)620-643; Italian text in: *Riv.dir.int.priv.proc.* 25(1989)735ff.
- (h) Bernet/Heim, "The EC/EFTA Parallel Convention . . .," *Butterworths* (1989)80-82; Bernasconi/Gerber, "Der räumlichpersönliche Anwendungsbereich des Lugano-Übereinkommens," *SZIER* 3(1993)39-72; Broggini, "La Convention parallèle de Lugano, vue par un juriste suisse," *Sem.judiciaire* 112(1990)481-512; Conseil fédéral suisse, "Message du 21 février 1990 au Parlement suisse et texte de la Convention," *Feuille fédérale/Bundesblatt* n.16, vol. II, 24 avril 1990, pp. 269 *et seq.*; Droz, "La Convention de Lugano parallèle," *Rev.crit.d.i.p.* 78(1989)1-51; Dutzak (ed.), *The Lugano and San Sebastian Conventions*, London 1990; Gillard (ed.), *L'espace judiciaire européen—La Convention de Lugano du 16 septembre 1988* (contributions by: Voyame, Broggini, Poudret, Patocchi, Volken), Lausanne 1992; Meijknecht, "The Lugano Convention and the San Sebastián Accession Convention viewed in their mutual context," *NILR* XL(1993)487-495; Mercier/Dutoit, *L'europe judiciaire: les Conventions de Bruxelles et de Lugano*, Bâle, Frankfurt a.M., 1991; Minor, "The Lugano Convention—some problems of interpretation," *Common Market L.Rev.* 27(1990)507.

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).

- (g) *Act.Doc. La Haye* (1987)690-708 (official text in English/French) an annex contains unofficial UN-translations in Arabic, Chinese, Spanish and Russian; Hague Conference, Collection of Conventions (1951-1988), pp. 326-339; the official text ("édition définitive" of the Extraordinary Sessions, 30th October 1985) is also reprinted in: *RabelsZ* 51(1987)197-213; Hague Conference, *Convention . . . , and Explanatory Report/Rapport explicatif* (by von Mehren), Den Haag, May 1987.
- (h) Boschiero, "La nuova convenzione dell'Aja sulla legge applicabile alla vendita internazionale," *Riv.dir.int.priv.proc.* 22(1986)507-540; Cohen/Ughetto, "La nouvelle Convention de La Haye relative à la loi applicable aux ventes internationales de marchandises," *Rec. Dalloz* (1986) No. 20, pp. 20 *et seq.*, No. 21, pp. 157 *et seq.*; Enderlein/Maskow/Strohbach, *supra* part I.5(h); Lando, "The 1985 Hague Convention on the Law Applicable to Sales," *RabelsZ* 51(1987)60-85; Loussouarn, "La Convention de La Haye d'octobre 1985 sur la loi applicable aux contrats de vente internationale de marchandises," *Rev.crit.d.i.p.* 75(1986)271-296; Napolitano, "Il progetto di una nuova convenzione sulla legge applicabile alla compravendita internazionale di merci," *Dir.comunit.scambi int.* 24(1985)19-54; Pelichet, "La vente internationale general bibliography 'European Community' de marchandises et le conflit de lois," *Rec.des Cours*, tome 201, 1987, I, pp. 9-193 (text of Convention in English and French, pp. 195-209).

On the Convention of 1955: Zweigert/Drobnig, "Einheitliches Kaufrecht und IPR," *RabelsZ* 29(1965)146-165. On the history of the Hague Conference, see Lipstein, "One Hundred Years of Hague Conferences on Private International Law," *I.C.L.Q.* 42(1993)553-653; von Overbeck, "Les cent ans de la Conférence de La Haye de droit international privé," *SZIER/RSDIE* 3(1993)137-153; Idem, "La contribution de la Conférence de La Haye au développement du droit international privé," *RCDAl* (1992-II)9-98.

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.**
- (b) The Hague, November 1991.

- (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.
- (g) Hague Conference, Prel. Doc. No. 1, (drawn up by Michel Pelichet) for the attention of the Special Commission of June 1992. *See also* Hague Conference, Note on conflicts of laws occasioned by transfrontier data flows: Preliminary Document No. 5 of November 1987; Hague Conference, Questionnaire on the law applicable to international credit transfers—Synthesis of replies: Preliminary Document No. 20 of March 1993.