

A JAPANESE INSIGHT WITH RESPECT TO THE FINALITY OF WHOLESALE WIRE TRANSFERS

RICHARD F. DOLE, JR.*

1. INTRODUCTION

In the 1980s, electronic bank services, including electronic funds transfers, became increasingly common in developed countries. With respect to the period from 1978 to 1983, the Bank for International Settlements commented:

During the past five years the wider use made of electronic data processing has made it possible in certain countries for large corporate customers to establish direct links between their own accounting procedures and those of the banks, and to make direct transfers to the debit or credit of other customers and other banks via telecommunications.

For smaller business customers and individuals, banking automation has had less of an impact. . . .¹

Today, electronic funds transfers by banks are more common than ever before. The type of funds transfer made by large corporate customers, often referred to as a "wholesale wire transfer,"² nevertheless remains distinctive. Its salient characteristics include use of the banking system, a large amount of money, initiation by a payor, a transferor and a transferee that are sophisticated business or financial organizations, individual rather than batch processing, extremely low fees, and use of high-speed computers, telecommunications, and security procedures.³ The purpose of a wholesale wire transfer usually is to pay an

* B. W. Young Professor of Law, University of Houston Law Center.

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¹ BANK FOR INTERNATIONAL SETTLEMENTS, PAYMENT SYSTEMS IN ELEVEN DEVELOPED COUNTRIES at 1 (1985).

² See FEDERAL RESERVE BANK OF NEW YORK, THE FEDERAL RESERVE WIRE TRANSFER NETWORK at 1 (August, 1989) [hereinafter cited as FEDWIRE REPORT]. "Wholesale" refers to the customary large amounts of these transfers and "wire" refers to the typical use of electronic means of transmission. See Scott, *Corporate Wire Transfers and the Uniform New Payments Code*, 83 COLUM. L. REV. 1664 (1983).

³ See U.C.C. art. 4A prefatory note at 477, § 4A-103(a)(1), § 4A-201 and official comment and § 4A-104 official comment 2 (West ed. 1991) [hereinafter cited by section number if there is one, otherwise as Article 4A]; FEDWIRE REPORT, *supra* note 2, at 1, 7.

obligation of a transferor.⁴ Such transfers typically are effected by entries in bank accounts.⁵

The economic significance of wholesale wire transfers is immense. In March, 1988, the volume of payments upon the two American systems used for wholesale wire transfers — the Federal Reserve Wire Transfer Network (FEDWIRE) and the New York City Clearing House Interbank Payments System (CHIPS) — approximated 1.3 trillion dollars per day.⁶ The average FEDWIRE transfer was \$2.9 million and the average CHIPS transfer was \$4.6 million.⁷ Gerald Corrigan, President of the Federal Reserve Bank of New York, has observed that “the safe and uninterrupted operations of the large-dollar electronic payments system is absolutely indispensable to the safe and prudent operations of the banking and financial system and to the economy at large.”⁸

Despite their economic significance, the United States is one of the few nations that regulates wholesale wire transfers through specialized legislation. The National Conference of Commissioners on Uniform State Laws promulgated Article 4A of the Uniform Commercial Code in 1989 and recommended its enactment by every American state.⁹ As evidenced by its 1990 passage in twelve states, including commercially-important New York, California, and Illinois, and by its 1991 enactment by eighteen additional states, Article 4A should be adopted throughout the United States.¹⁰

Additionally, since January 1, 1991, the Federal Reserve Board has designated the Official Text of Article 4A as the law governing FEDWIRE.¹¹ This was the same date upon which most of the twelve

A bank transfer that is initiated by a payor is referred to as a “credit transfer” and a bank transfer that is initiated by a payee is referred to as a “debit transfer.” U.C.C. § 4A-104 official comment 4.

⁴ U.C.C. § 4A-104 official comment 2.

⁵ See *id.*; FEDWIRE REPORT, *supra* note 2, at 9.

⁶ Mengle, *Legal and Regulatory Reform in Electronic Payments: An Evaluation of Payment Finality Rules*, THE U.S. PAYMENT SYSTEM: EFFICIENCY, RISK AND THE ROLE OF THE FEDERAL RESERVE 145, 175 n.1 (1990) [hereinafter cited as Mengle].

⁷ *Id.*

⁸ FEDERAL RESERVE BANK OF NEW YORK, 1986 ANNUAL REPORT at 17 (1987) [hereinafter cited as 1986 ANNUAL REPORT].

⁹ See art. 4A prefatory note at 476.

¹⁰ As of September, 1991, Article 4A had been adopted in Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wyoming. STATE CORRELATION TABLES, UCC REP. SERV. xvii (Callaghan 1991) [hereinafter STATE CORRELATION TABLES].

¹¹ Regulation J, 55 Fed. Reg. 40791-40814 (1990). Although the Federal Reserve Board made as few changes as possible in the Official Text of Article 4A, changes were

1990 state enactments of Article 4A became effective.¹² January 1, 1991 thus marked the applicability of Article 4A to virtually all wholesale wire transfers in the United States.¹³

The United Nations Commission on International Trade Law (UNCITRAL) also is developing a Model Law on International Credit Transfers, the most recent UNCITRAL draft with Comments being the product of the Twenty-Second Session of the UNCITRAL International Payments Working Group that was held in November and December, 1990.¹⁴ Both Article 4A and the Model Law are limited to credit transfers that are initiated by payors,¹⁵ but otherwise cover most wholesale wire transfers¹⁶ that utilize "banks."¹⁷ In 1989,

made. *Id.* at 40792-93.

Subpart B of Federal Reserve Board Regulation J governs FEDWIRE. *Id.* at 40801. The Board's adoption of Article 4A hereinafter will be cited as Regulation J.

¹² See STATE CORRELATION TABLES, *supra* note 10. The California, New York, and Illinois enactments all became effective on January 1, 1991. *Id.*

¹³ Under the Federal Reserve Board's Regulation J, Article 4A applies to all FEDWIRE transfers whether or not a Federal Reserve Bank participating in a funds transfer is located in an enacting jurisdiction. Regulation J, *supra* note 11, at 40792. CHIPS, the other American system that transmits wholesale wire transfers, is located in New York City and is subject to the New York state enactment of Article 4A.

¹⁴ U.N. Doc. A/CN.9/346 (May, 1991) [hereinafter cited as U.N. Model Law with article number if one exists, otherwise as UNCITRAL MAY, 1991 REPORT]. The principal prior draft of the U.N. Model Law was WORKING PAPER 49, U.N. Doc. A/CN.9/WG.IV/WP.49 (1990) [hereinafter cited as WORKING PAPER 49].

¹⁵ U.C.C. § 4A-103(a)(1)(ii), § 4A-104 official comment 4; U.N. Model Law arts. 1(1), 2(a)-(d).

By requiring that a sender transmit a payment order to a receiving bank, both statutes are intended to preclude a check and a credit card slip from per se constituting a payment order. See U.C.C. § 4A-103(a)(1)(iii); U.N. Model Law art. 2(a),(b),(e). A debtor typically delivers a check or a credit card slip to a payee, a counterpart of an Article 4A and a Model Law beneficiary, and it is the payee that utilizes the banking system to obtain payment. U.C.C. § 4A-104 official comment 5. In contrast to a sender of a payment order who must pay the order, a payee utilizes a check or a credit card slip to obtain payment.

¹⁶ See U.C.C. art. 4A prefatory note at 477-79 (wholesale wire transfers principal transfers covered), § 4A-108 (a funds transfer, any part of which is governed by the federal Electronic Fund Transfer Act, excluded), § 4A-108 official comment (the federal Electronic Fund Transfer Act covers transfers involving consumers); U.N. Model Law art. 1 comments 15-17 (all international credit transfers, including transfers for consumer purposes, are covered, but the Model Law omits consumer protection issues).

For discussion of the types of consumer transactions excluded from Article 4A, see Note, *Commercial Law: Electronic Funds Transfers: How New U.C.C. Article 4A May Affect Consumers*, 43 OKLA. L. REV. 339 (1990).

¹⁷ Both statutes require that a payment order instruct a "receiving bank" to make payment. U.C.C. § 4A-103(a)(1); U.N. Model Law art. 2(b). Their respective definitions of "bank" determine the nature of this requirement. The Article 4A definition includes Federal Reserve and foreign banks and some domestic financial institutions that are not commercial banks. A "bank" is any person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. U.C.C. § 4A-105(a)(2); U.C.C. § 4A-105 official comment 1. The Model Law, on the other hand, treats as a "bank" any "entity which, as an ordinary

the differences in approach between Article 4A and the Model Law were so great that the United States delegation to UNCITRAL proposed subdividing the Model Law into one series of rules, like those in Article 4A, for high-speed, electronic payments systems, and a second series of rules, like those in the Model Law, for slower, more paper-based payments systems.¹⁸ Although subsequent changes have been made in the Model Law, significant substantive differences between it and Article 4A remain.¹⁹ The jurisdictions and transactions the statutes purport to cover also differ. Article 4A is to be enacted by American states for credit transfers involving banks within each state; the Model Law is to be enacted by national legislatures for credit transfers involving banks in different countries.²⁰ Notwithstanding their differences, Article 4A and the Model Law contain contemporary notions of the legal finality rules appropriate for wholesale wire transfers. These finality rules will be compared and contrasted with the finality rules currently used by BOJ-NET, a domestic Japanese electronic funds-transfer system that is operated by the Bank of Japan (BOJ).²¹

If an attempted wholesale wire transfer fails, both Article 4A and the Model Law provide a "money-back guarantee" that cancels a sender's executory obligation to make payment and also entitles a sender to a refund of any payment that has been made.²² The money-back guarantee effectively postpones the legal finality of a transfer until its completion. Article 4A, moreover, contains statutory exceptions to the legal finality of completed wholesale wire transfers that are no longer subject to the money-back guarantee.²³ The BOJ-NET rules, on the other hand, allow an initial sender to establish a limited period of unequivocal nonfinality in which the desirability of completing an exec-

part of its business, engages in executing payment orders." U.N. Model Law art. 2(f). This open-ended definition clearly includes securities dealers and post offices that execute payment orders for customers and also seems to include clearing houses and some message systems. U.N. Model Law art. 2 comments 3-37.

¹⁸ U.N. Doc. A/CN.9/329 at 31 (1989).

¹⁹ See, e.g., UNCITRAL MAY, 1991 REPORT *supra* note 14, introductory comment 8 at 4. A proposal by the United States delegation that funds-transfer system rules supersede Model Law gap-filling rules, for example, has been rejected. U.N. Model Law art. 3 comment 1. See also the markedly-different definitions of "bank" that are discussed in *supra* note 17.

²⁰ See U.C.C. § 4A-507(a) (choice-of-law rule can depend upon bank location); U.N. Model Law art. 1 comments 2-13. Comment 3 discusses an amendment that would make the Model Law applicable to domestic as well as international credit transfers.

²¹ See PAYMENT SYSTEM PROJECT TEAM OF THE BANK OF JAPAN, OUTLINE OF BANK OF JAPAN FINANCIAL NETWORK SYSTEM (BOJ-NET) (1989) [hereinafter BOJ-NET].

²² See *infra* notes 108-113 and accompanying text.

²³ See *infra* notes 256-76 and accompanying text.

utory transfer can be re-evaluated.²⁴ In view of the importance of wholesale wire transfers, these differing approaches to legal finality merit careful consideration.

2. FINALITY CONCEPTS

Wholesale wire transfers typically involve extensions of large amounts of short-term credit.²⁵ Literally every relationship in a wholesale wire transfer can involve the extension of credit. A receiver typically has extended either long-term or short-term credit to a sender in the transaction underlying a transfer. During a transfer, an initial sender can extend short-term credit to a sending bank by prepaying a transfer, or, alternatively, a sending bank can extend short-term credit to an initial sender by executing a transfer that is not fully prepaid. Subsequent sending banks similarly either can extend short-term credit to, or receive short-term credit from, their sending banks. Additionally, a receiving bank can extend short-term credit either by giving irrevocable credit to a receiver or by allowing a receiver to withdraw provisional credit prior to the bank's receipt of settlement. Finally, to the extent that a receiver does not withdraw the credit for a transfer following a receiving bank's receipt of settlement, the receiver extends short-term credit to the receiving bank.²⁶

Because of their volume and the large amounts of money involved,²⁷ wholesale wire transfers generate huge aggregate amounts of short-term credit on a daily basis.²⁸ This aggregate short-term credit enhances the theoretical possibility of systemic failure—an insolvency of one or more major participants in a funds-transfer system that triggers a chain of defaults and financial chaos.²⁹ Payment system regulators, including the American Regional Federal Reserve Banks that administer FEDWIRE, consider that imposing legal finality upon wholesale wire transfers reduces systemic risk.³⁰

Legal finality is primarily important with respect to payment instructions for wholesale wire transfers that have been accepted by a bank. Prior to its acceptance, a payment instruction³¹ does not create

²⁴ See *infra* notes 298-307 and accompanying text.

²⁵ 1986 ANNUAL REPORT, *supra* note 8, at 16.

²⁶ See Mengle, *supra* note 6, at 150-51.

²⁷ See, e.g., *supra* notes 6-8 and accompanying text.

²⁸ 1986 ANNUAL REPORT, *supra* note 8, at 30.

²⁹ *Id.* at 16.

³⁰ See *id.* at 29-32.

³¹ The reasons a payment instruction may not have been accepted by a bank include: cancellation prior to acceptance by a receiving bank, U.C.C. § 4A-211(b)(cancellation that allows a receiving bank a reasonable time to act is effective);

short-term credit. With respect to payment instructions that have been accepted by a bank, "settlement," the satisfaction of obligations between banks,³² is a key concept.

Possible elements of legal finality include "sender finality," "receiver finality," and "settlement finality."³³ "Sender finality" precludes a sender from unilaterally cancelling a payment instruction. Irrespective of receipt of settlement, "receiver finality" obligates a receiving bank to give irrevocable credit to a receiving customer. "Settlement finality," on the other hand, requires that the banks participating in a payments system cover the net debts of a failed sending bank in order to assure that settlement takes place.³⁴ Sender finality, receiver finality, and settlement finality are imposed prior to a receiving bank's receipt of an incontestably "good-money"³⁵ settlement for a funds transfer, which is another possible criterion for legal finality.³⁶ Under a good-money settlement approach, a funds transfer remains incomplete and a receiver retains his or her underlying claim against a sender until a receiver's bank has received a good-money settlement.³⁷

Pre-settlement finality is related to the short-term credit that is generated by wholesale wire transfers. Sender finality requires a sender to settle for a payment instruction upon which a receiving bank has extended short-term credit.³⁸ Settlement finality also protects the extension of short-term credit by assuring completion of a transfer notwith-

the insolvency of either a sender or a receiving bank, U.C.C. § 4A-210(c) (all unaccepted orders are deemed rejected upon a receiving bank's suspension of payments); a receiving bank's knowledge of the death or legal incapacity of a sender that is a natural person, U.C.C. § 4A-211(g) (death or legal incapacity do not revoke an instruction unless a receiving bank both has knowledge and a reasonable opportunity to act prior to acceptance); and the staleness of an instruction, U.C.C. § 4A-211(d) (an unaccepted instruction is canceled by operation of law at the close of the fifth business day of a receiving bank following the date upon which acceptance should have taken place).

³² Patrikis, Baxter & Bhala, *Article 4A: The New Law of Funds Transfers and the Role of Counsel*, 23 U.C.C. L.J. 219, 252 n.105 (1991) [hereinafter Patrikis].

³³ See D. Humphrey, *Payments Finality and Risk of Settlement Failure: Implications for Financial Markets* at 16-21 (Paper prepared for the 1985 Conference on Technology and the Regulation of Financial Markets, N.Y.U. Graduate School of Business Administration) [hereinafter Humphrey].

³⁴ *Id.*

³⁵ "Good-money" is any form of settlement that is unaffected by the obligor's becoming insolvent the instant after settlement. Corrigan, *Perspectives on Payment System Risk Reduction*, in *THE U.S. PAYMENT SYSTEM: EFFICIENCY, RISK AND THE ROLE OF THE FEDERAL RESERVE* at 130-31 (1990).

³⁶ See Mengle, *supra* note 6, at 157-59. Mengle describes this approach as "check finality" because of its similarity to the current American rule concerning the finality of payment of a check. *Id.*

³⁷ *Id.*

³⁸ See Humphrey, *supra* note 33, at 17.

standing the insolvency of a participating bank.³⁹ Receiver finality, on the other hand, concentrates the risk of failure of settlement upon receiving banks, theoretically motivating those banks to reduce systemic risk by rejecting payment instructions involving unreasonable credit risks.⁴⁰

Post-settlement finality has a dual function. With respect to a transaction in which a receiving bank receives a good-money settlement, post-settlement finality protects the integrity of the completed funds transfer. With respect to a transaction in which a good-money settlement fails, good-money settlement finality allocates the risk of loss to a sender.

Finality rules can be utilized to create an incentive for the “cheapest cost avoider” to minimize losses and spread losses that occur.⁴¹ Both sender and receiver finality theoretically involve assignment of a loss to the cheapest cost avoider in order to encourage care by senders in issuing payment orders and by receiving banks in accepting them.⁴² Settlement finality, on the other hand, typically spreads losses caused by the failure of system participants. To the extent that liability for loss-spreading depends upon dealings with a failed bank, settlement finality may also create an incentive for system participants to avoid loss.⁴³ Finally, by allowing the recipient to retain a claim against the sender until receipt of good-money by the recipient’s bank, good-money settlement finality allocates the risk of failure of other system participants to the sender.⁴⁴

Article 4A and the Model Law adopt different positions with respect to the legal finality of funds transfers. A survey of the terminology of the statutes will facilitate discussion of their positions.

3. ARTICLE 4A AND MODEL LAW TERMINOLOGY

Under both Article 4A and the Model Law, a funds transfer involves: (1) an “originator,” an initiator of a funds transfer that may or may not be a bank; (2) an “originator’s bank;” (3) a “beneficiary,” the person intended by an originator to receive funds that may or may not be a bank; and (4) a “beneficiary’s bank.”⁴⁵

³⁹ See Mengle, *supra* note 6, at 159-61.

⁴⁰ *Id.* at 162-63.

⁴¹ *Id.* at 154.

⁴² See *id.* at 162-63 (discussion of receiver finality).

⁴³ See *id.* at 160-61.

⁴⁴ See *id.* at 158-59. A recipient naturally assumes the risk of failure of his or her own bank.

⁴⁵ See U.C.C. § 4A-103(a)(2)-(3), § 4A-104(c)-(d); U.N. Model Law art. 2(c)-(e),(g),(h).

Under Article 4A, one bank can perform multiple functions. An originator that is a bank, for example, is both an originator and an originator's bank.⁴⁶ If an originator is a bank and a beneficiary has an account with an originator, an Article 4A transfer can involve only two parties and one bank.⁴⁷ It is common, however, for both different originator's and beneficiary's banks, and other banks which both statutes refer to as "intermediary banks,"⁴⁸ to be involved. Article 4A, furthermore, treats each branch and separate office of a bank as a separate "bank."⁴⁹

Unlike Article 4A, the Model Law does not define either "originator's bank" or "beneficiary's bank." The Commentary, nevertheless, takes the position that a single bank can not be both an originator and an originator's bank.⁵⁰ The Model Law also does not uniformly treat each branch and separate office as a separate bank.⁵¹ These are not fundamental differences from Article 4A, however, and may be reconsidered.⁵²

Under both statutes, a "payment order" is an instruction by a "sender," a person making payment, to a "receiving bank" to pay either a fixed or a determinable amount of money to a "beneficiary."⁵³ Because the instruction to a receiving bank must be given by a payor, a payment order initiates what bankers refer to as a "credit transfer" rather than a "debit transfer."⁵⁴ Payment orders can be transmitted orally or in writing, as well as electronically.⁵⁵ With the exception of

⁴⁶ See U.C.C. § 4A-104(d) (originator's bank includes the originator if the originator is a bank).

⁴⁷ See U.C.C. § 4A-104(d), § 4A-104 official comment 1, case #1 (Article 4A applies to "book transfers" in which the originator and the beneficiary have accounts in the same bank). A "drawdown transfer," another atypically simple type of transfer covered, involves one party and two banks. A corporation with accounts in both Banks A and B, for example, that instructs Bank A to make a payment to the corporation's account in Bank B would be subject to Article 4A. U.C.C. § 4A-104 official comment 4.

⁴⁸ U.C.C. § 4A-104(b); U.N. Model Law art. 2(h).

⁴⁹ See U.C.C. § 4A-105(a)(2).

⁵⁰ U.N. Model Law art. 1 comment 4, art. 2 comments 25-26. The Commentary likewise states that, in view of its test for the internationality of a transfer, the Model Law would not apply to book transfers in which a nonbank originator and a nonbank beneficiary had accounts in the same branch of the same bank. U.N. Model Law art. 1 comment 12.

⁵¹ U.N. Model Law art. 2 comments 41-44.

⁵² Substantial changes have been made in the Model Law at each meeting of the UNCITRAL Working Group. See UNCITRAL MAY, 1991 REPORT, *supra* note 14, comment 4 at 3.

⁵³ U.C.C. § 4A-103(a)(1)-(a)(5); U.N. Model Law art. 2(b)-(e),(g).

⁵⁴ U.C.C. § 4A-104 official comment 4; U.N. Model Law art. 2(b)(ii) comments 21-23.

⁵⁵ U.C.C. § 4A-103(a)(1); see U.N. Model Law art. 2(b) comment 13.

optional designation of the time at which a receiving bank is to act upon an instruction, a payment order must be unconditional.⁵⁶

Except for a beneficiary and a beneficiary's bank, under both statutes each participant in a funds transfer is a sender and issues a payment order to a receiving bank.⁵⁷ Thus, an originator issues a payment order to an originator's bank, which is the originator's receiving bank; if the originator's bank issues a payment order to an intermediary bank, the intermediary bank is the originator's bank's receiving bank; if the intermediary bank issues a payment order to the beneficiary's bank, the beneficiary's bank is the intermediary bank's receiving bank. The beneficiary's bank, on the other hand, pays the beneficiary.⁵⁸

Both statutes frequently distinguish between a receiving bank that is, and a receiving bank that is not, a beneficiary's bank.⁵⁹ Where this distinction is unimportant, the generic term "receiving bank" is used hereinafter. A receiving bank that is not a beneficiary's bank otherwise is hereinafter referred to as an "executing bank,"⁶⁰ and a receiving bank that is a beneficiary's bank as a "beneficiary's bank."

The mere receipt of a payment order does not obligate a receiving bank to participate in a funds transfer that involves any significant credit risk. Unless an obligation to accept has been assumed by contract, under both statutes a receiving bank has discretion to reject a payment order that involves significant credit risk.⁶¹ If a payment order

⁵⁶ U.C.C. § 4A-103(1)(a)(i), § 4A-301(b), § 4A-401; U.N. Model Law art. 2(b),(k),(m); U.N. Model Law art. 2 comments 14-16.

Conditions unrelated to the time of payment are inconsistent with the high speed and low price of wholesale wire transfers, which in part is made possible by automated processing. U.C.C. § 4A-104 official comment 3. Both statutes, however, leave a bank customer and a bank free to include any conditions that they wish in an account agreement. See Baxter & Bhala, *Proper and Improper Execution of Payment Orders*, 45 BUS. LAW. 1447, 1448-49 (1990). The Model Law also provides that satisfaction of a condition prior to execution of a payment instruction by a bank cures the prior failure of the instruction to constitute a payment order. U.N. Model Law art. 2(b); U.N. Model Law art. 2 comments 17-19.

⁵⁷ See U.C.C. § 4A-103(a)(5), § 4A-104(c), § 4A-301(a), § 4A-404; U.N. Model Law arts. 2(d)-(e), 6(1)-(2), 8(1), 9(1).

⁵⁸ *Id.*

⁵⁹ See, e.g., U.C.C. § 4A-209(a)-(b); U.N. Model Law arts. 7, 9.

⁶⁰ This terminology is consistent with both the Uniform Act and the Model Law. Under both statutes "execution" consists of issue of a payment order that is intended to carry out a payment order previously issued to a receiving bank that is not a beneficiary's bank. U.C.C. § 4A-301(a); U.N. Model Law art. 2(l).

⁶¹ U.C.C. § 4A-209, § 4A-210; U.N. Model Law arts. 6, 8. If there is no significant credit risk because a beneficiary's bank has received final settlement from a sending bank through a Federal Reserve Bank or a funds-transfer system, Article 4A, however, ordinarily conclusively deems acceptance to occur and does not allow rejection. U.C.C. § 4A-209(b)(2), § 4A-209(c), § 4A-403(a)(1) (deemed acceptance does not occur if a beneficiary does not have an open account with a beneficiary's bank or the bank is not permitted by law to receive credits for the beneficiary's account). See *infra*

requires a receiving bank to issue its own payment order prior to receipt of settlement, the receiving bank, for example, can avoid extending short-term credit to its sender by rejecting the order.⁶²

The Model Law alone imposes duties upon a receiving bank with respect to unaccepted orders. Any bank that receives a payment order, for example, must notify an identified sender of errors, including erroneous issue of the order to an unintended receiving bank.⁶³ These provisions have no Article 4A counterparts.⁶⁴

Under both statutes, "acceptance" of a payment order by a receiving bank obligates both the sender and the receiving bank. A sender is obligated by its receiving bank's acceptance to pay the amount of the accepted order to the receiving bank.⁶⁵ An executing bank, on the other hand, is obligated by its acceptance to execute its sender's order by issuing a conforming order,⁶⁶ and a beneficiary's bank is obligated by its acceptance to pay the amount of an accepted order to the beneficiary.⁶⁷

Both statutes identify the voluntary conduct of a receiving bank that constitutes acceptance. To the extent that significant credit risk exists, a receiving bank's option to reject is preserved.⁶⁸ Under Article 4A, an executing bank can accept only by issuing a payment order intended to execute its sender's order.⁶⁹ Although additional forms of acceptance also are recognized, including a failure to make a timely rejection following receipt of payment, issue of a payment order also should be the most common form of acceptance by an executing bank under the Model Law.⁷⁰

A beneficiary's bank can accept in several ways under both stat-

note 73 and accompanying text for the Article 4A definition of a funds-transfer system.

⁶² See U.C.C. art. 4A, *supra* note 3, prefatory note at 480-81; U.N. Model Law art. 6 comments 8-9, 17-19; U.N. Model Law art. 8 comment 1.

In order to preclude an unnecessary entanglement with insolvency proceedings, U.C.C. § 4A-210(c) also provides that all previously unaccepted orders are deemed rejected upon the suspension of payments by a receiving bank.

⁶³ U.N. Model Law arts. 6(3)-(5), 8(2)-(4).

⁶⁴ U.C.C. art. 4A, moreover, defines a "receiving bank" as a bank to which a sender's instruction is addressed; whereas the Model Law treats any bank that receives a payment order as a receiving bank and subject to a duty to notify a sender of errors. Compare U.C.C. § 4A-103(a)(4) with U.N. Model Law art. 2(g).

⁶⁵ U.C.C. § 4A-402(b),(c); U.N. Model Law art. 4(6). The date that a sender's payment to a receiving bank is due can be designated in a payment order. See U.C.C. § 4A-402(b),(c); U.N. Model Law art. 4(6).

⁶⁶ U.C.C. § 4A-302(a); U.N. Model Law art. 7(2).

⁶⁷ U.C.C. § 4A-404(a); U.N. Model Law art. 9(1). In some instances, a beneficiary's bank also is obligated by its acceptance to notify a beneficiary of receipt of a payment order. U.C.C. § 4A-404(b); U.N. Model Law art. 9(5).

⁶⁸ See U.C.C. § 4A-209(a),(b); U.N. Model Law arts. 6(2), 8(1).

⁶⁹ U.C.C. § 4A-209(a), § 4A-301(a).

⁷⁰ See U.N. Model Law art. 6(2).

utes. As a general proposition, acceptance involves either the availability of settlement and a beneficiary's bank's failure to make a timely rejection of a payment order, or, regardless of the availability of settlement, conduct by a beneficiary's bank that could cause a beneficiary reasonably to believe that the credit for a payment order could be used.⁷¹ Either the presence of a sufficient withdrawable credit balance in an account of a sender with a beneficiary's bank plus the bank's failure to reject the payment order in timely fashion, or unconditional notice to a beneficiary of the crediting his or her account, for example, constitute acceptance.⁷² Under both statutes, the conduct that constitutes acceptance of a payment order can be varied by a contract with a receiving bank, and, with respect to participating banks, through rules adopted by a "funds-transfer system," an association of banks with a communications system for transmitting payment orders.⁷³

4. AN OVERVIEW OF ARTICLE 4A AND MODEL LAW FINALITY CONCEPTS

As a general proposition, the rights and obligations created by Article 4A can be varied with the agreement of an affected party.⁷⁴ There are relatively few exceptions to this deference to freedom of contract,⁷⁵

⁷¹ See U.C.C. § 4A-209(b), § 4A-403(a)(1), § 4A-403(2), § 4A-405(a)-(b); U.N. Model Law art. 8.

⁷² U.C.C. § 4A-209(b)(1),(3); U.N. Model Law arts. 8(1)(a), 8(1)(a)(e), 8(2).

⁷³ See U.C.C. § 4A-209 official comment 3; U.N. Model Law arts. 3, 6(2)(b), 8(1)(b).

Article 4A alone defines a funds-transfer system:

"Funds-transfer system" means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

U.C.C. § 4A-105(a)(5).

Under this Article 4A definition, a funds-transfer system merely communicates a sender's payment order. Neither the system nor its members issue payment orders of their own. Because Federal Reserve Banks execute a sender's FEDWIRE payment order by issuing a payment order, FEDWIRE is not an Article 4A funds-transfer system. See U.C.C. § 4A-105 official comment 3, § 4A-107 official comment 2. CHIPS, which merely transmits a sender's payment order, on the other hand, is an Article 4A funds-transfer system. See U.C.C. § 4A-105 official comment 3. It is irrelevant under the Article 4A definition that CHIPS also settles for the payment orders that it transmits. *Id.*

⁷⁴ U.C.C. § 4A-501(a).

⁷⁵ The exceptions are: U.C.C. § 4A-202(f) (limitations upon agreements with respect to liability for unauthorized payment orders), § 4A-204(b) (obligation of a receiving bank to refund payment received for an unauthorized and ineffective payment order and an unenforceable payment order not variable by agreement), § 4A-305(f) (limitations upon agreements affecting a receiving bank's liability for late or improper execution and failure to execute a payment order), § 4A-402(f) (a sender's right to excuse of

one of which involves a beneficiary's right to payment by a beneficiary's bank that has accepted a payment order. An agreement limiting a beneficiary's right to payment is unenforceable.⁷⁶

Unless Article 4A provides otherwise, an agreement varying the statutory rights and obligations of the banks participating in a funds-transfer system can be in the form of a funds-transfer system rule.⁷⁷ A few special provisions also authorize funds-transfer system rules to alter specific statutory rights and obligations of originators and beneficiaries that are not system-participants.⁷⁸ Two types of special rules, for example, can nullify the right of a nonparticipating beneficiary to payment by a beneficiary's bank that has accepted a payment order.⁷⁹ A nonparticipant that otherwise would not be bound by a funds-transfer system rule, moreover, ordinarily can agree to be bound,⁸⁰ and a funds-transfer system generally can require its participating banks to obtain an agreement to be bound by the system's objectively-reasonable rules from a nonparticipant that utilizes the system.⁸¹

As a general proposition, the rights and obligations created by the Model Law also can be varied with the agreement of an affected party.⁸² During its July, 1990, meeting, the UNCITRAL Working

a payment obligation and a refund under the money-back guarantee not variable by agreement), § 4A-404(c) (right of a beneficiary to receive payment and damages from a beneficiary's bank that has accepted a payment order not variable by either an agreement or an ordinary funds-transfer system rule), and § 4A-406(d) (only an originator and a beneficiary can agree to vary their rights with respect to discharge of an obligation of the originator to the beneficiary).

⁷⁶ U.C.C. § 4A-404(c).

⁷⁷ U.C.C. § 4A-501(b).

⁷⁸ See *id.*

⁷⁹ See U.C.C. § 4A-405(d)-(e).

The other instances in which Article 4A authorizes funds-transfer system rules altering the rights and obligations of system-nonparticipants are: U.C.C. § 4A-404(c) (a beneficiary's statutory right to notice of receipt of a payment order by a beneficiary's bank) and § 4A-507(c) (designation of a choice-of-law rule by a funds-transfer system).

A nonparticipant in a system who has not made an enforceable agreement to be bound by a funds-transfer system rule must be given appropriate advance notice of a rule that can affect his or her rights for the rule to be effective with respect to him or her. See U.C.C. § 4A-507(c).

⁸⁰ Article 4A only prohibits agreements varying statutory rules in a few instances. See *supra* note 75 for the Article 4A restrictions upon freedom of contract.

⁸¹ A funds-transfer system rule, for example, could require that participant-banks warrant that all prior senders, all subsequent receiving banks, and the beneficiary have agreed to the applicability of the system's rules. The effect of this warranty would be to allocate losses caused by a failure to obtain the agreement upon a sender or receiving bank that failed to do so and thus to provide an incentive to obtain the agreement. To the extent that Article 4A invalidates agreements varying statutory provisions, a warranty of this nature, however, would be unenforceable. See *supra* note 75 for the Article 4A restrictions upon freedom of contract.

⁸² See U.N. Model Law art. 3. The exceptions are: the requirement that a security procedure be commercially reasonable in order to shift to a purported originator

Group, however, rejected a proposal by the American delegation that would have allowed funds-transfer system rules to supersede conflicting Model Law provisions.⁸³ Funds-transfer system rules consequently remain subject to a general Model Law provision dealing with the effect of an agreement upon the liability of a bank. Agreements between banks can reduce as well as increase the statutory liability of one bank to another. A bank also can agree to increase, but not to decrease, its liability to a nonbank originator.⁸⁴ The Model Law, however, generally leaves a nonbank beneficiary's rights against a beneficiary's bank to other law, including agreements and funds-transfer system rules.⁸⁵ Executing banks alone are prohibited from contractually reducing their liability to a nonbank beneficiary.⁸⁶

As an agreement between the banks participating in a funds-transfer system, funds-transfer system rules per se can not reduce the statutory rights of originators and beneficiaries that are not system-participants.⁸⁷ Nonparticipants that are banks, however, can agree to be bound by funds-transfer system rules reducing their rights.⁸⁸ Whether or not a nonparticipant has agreed to be bound by the rules of a funds-transfer system, a system's rules can increase a nonparticipant's rights.⁸⁹

Throughout the subsequent discussion of the two statutes, the extent to which their provisions can be varied by agreement and by funds-transfer system rules should be borne in mind. Most of the statutory provisions discussed are gap-filling rules that can be superseded by a contrary agreement or by a conflicting funds-transfer system rule.

Insofar as legal finality and its attributes under Article 4A are concerned, the issue of an implementing order by an executing bank

losses from unauthorized orders that comply with the procedure, U.N. Model Law art. 4(3); the money-back guarantee to a sender in the event that a funds transfer is not completed, U.N. Model Law art. 13(2); a receiving bank's minimum liability to a nonbank originator, U.N. Model Law art. 16(7); and an executing bank's liability to a nonbank beneficiary, *id.* With respect to nonbank beneficiaries, see the discussion in *infra* notes 84-86 and accompanying text.

⁸³ U.N. Model Law art. 3 comment 1.

⁸⁴ U.N. Model Law art. 16(7).

⁸⁵ See U.N. Model Law art. 9(1), art. 9 comments 2-3.

⁸⁶ See U.N. Model Law art. 16(6)-(7).

⁸⁷ The Model Law has no counterpart to the Article 4A provisions making certain funds-transfer system rules effective with respect to system-nonparticipants. See *supra* notes 78-81 and accompanying text for discussion of the special Article 4A provisions.

⁸⁸ See U.N. Model Law arts. 3, 16(7). The rights of nonbank originators and nonbank beneficiaries, however, ordinarily can not be decreased by agreement. U.N. Model Law art. 16(7). *But see* U.N. Model Law art. 9(1) (a beneficiary's bank's obligation to pay a beneficiary is subject to the law governing their relationship, including an account agreement).

⁸⁹ See WORKING PAPER 49, *supra* note 14, at art. 16 comment 2.

terminates a sender's unilateral power to stop payment; but acceptance by a beneficiary's bank is required to create sender and receiver finality.⁹⁰ The occurrence of interim irrevocability prior to acceptance by a beneficiary's bank can be precluded by a contrary agreement between a sender and an executive bank, by a contrary funds-transfer system rule,⁹¹ or by an originator's designation of identical execution and payment dates.⁹² Statutory sender and receiver finality, however, ordinarily can not be altered without the agreement of the beneficiary. For a payment order to be canceled without the concurrence of the beneficiary after acceptance by a beneficiary's bank, either a special funds-transfer system rule must exist and settlement must fail or one of four exclusive statutory grounds for cancellation must apply.⁹³

The Model Law terminates a sender's unilateral power to stop payment either upon the date of issue of an implementing order by an executing bank or upon the date that an executing bank was instructed to issue the order, whichever is later.⁹⁴ In other words, an executing bank's failure to execute upon a designated execution date extends the revocability of an order until the date of execution. Premature execution, on the other hand, does not terminate a sender's power of revocation prior to a designated execution date.⁹⁵ If no date for execution is designated, an order remains revocable until executed, but execution should take place upon the business day that an executing bank receives an order.⁹⁶ Statutory irrevocability, however, can be both created earlier and postponed or precluded with the agreement of affected parties.⁹⁷ The same rules concerning the timing of statutory irrevocability and its variation by a contrary agreement apply to acceptance by a beneficiary's bank, which, as under the Uniform Act, creates statutory sender finality.⁹⁸ The Model Law, however, does not provide for statu-

⁹⁰ U.C.C. § 4A-211(c), § 4A-402(c)-(d), § 4A-404(a).

⁹¹ See U.C.C. § 4A-211(c)(1).

⁹² See *infra* notes 315-22 and accompanying text for discussion of this technique.

⁹³ See U.C.C. § 4A-211(c)(2), § 4A-404(a), § 4A-405(d)-(e).

⁹⁴ U.N. Model Law art. 11(1).

⁹⁵ U.N. Model Law art. 11 comment 8.

⁹⁶ See U.N. Model Law arts. 10(1), 11(1). An originator's specification of a deferred payment date, however, can justify an executing bank in coordinating execution with the payment date. U.N. Model Law art. 10(1)(b).

⁹⁷ The Model Law allows creation of contractual irrevocability prior to the imposition of statutory irrevocability. U.N. Model Law art. 11(3). Agreements increasing the revocability of payment orders that are statutorily irrevocable also are permitted with the consent of affected parties. See U.N. Model Law art. 3. The parties adversely affected by a receiving bank's consent to revocation of an order previously accepted by the bank are discussed in *infra* note 179 and accompanying text.

⁹⁸ U.N. Model Law arts. 3, 11(2).

tory receiver finality.⁹⁹

Both statutes create a condition subsequent to any interim irrevocability that occurs prior to acceptance by a beneficiary's bank. For legal finality to exist under either statute, a funds transfer must have been "completed."¹⁰⁰ The common statutory definition of completion requires acceptance of a payment order for the benefit of the beneficiary by the beneficiary's bank. Both the beneficiary and the beneficiary's bank must be designated by the originator.¹⁰¹ Although originators and beneficiaries are free to agree upon a later time of completion by contract, for example when a beneficiary has unconditionally withdrawn the credit for a payment order, it is presently uncommon to do so.

Both statutes also have a statutory definition of "payment" of a beneficiary by an originator that parallels the definition of completion. When a beneficiary's bank becomes indebted to a beneficiary for the amount of a payment order, an originator pays a beneficiary, and, if payment of the same amount of money would have resulted in discharge, the payment discharges any pre-existing obligation for which a transfer was made.¹⁰² Like the statutory definition of completion, the statutory definitions of payment and discharge can be varied by an agreement between an originator and a beneficiary.¹⁰³

5. FINALITY OF THE LEGAL PAYMENT OBLIGATIONS IN A FUNDS TRANSFER UNDER ARTICLE 4A AND THE MODEL LAW

5.1. *Finality of All Senders' Legal Payment Obligations Upon Completion of a Funds Transfer*

Under both statutes, acceptance of a payment order by a receiving bank obligates the sender to pay the receiving bank.¹⁰⁴ If an accepted order designates a later date when payment is due, a sender's payment obligation does not mature until that time.¹⁰⁵ Unless a receiving bank delays its acceptance, payment otherwise is due upon the business day

⁹⁹ See U.N. Model Law arts. 3, 9(1), art. 9 comments 1-3 (Model Law does not deal with the account relationship between a beneficiary and a beneficiary's bank).

¹⁰⁰ See U.C.C. § 4A-402(c)-(d); U.N. Model Law arts. 13(1), 17(1).

¹⁰¹ U.C.C. § 4A-104(a); U.N. Model Law arts. 13(1), 17(1).

¹⁰² U.C.C. § 4A-406(a)-(b); U.N. Model Law art. 17(2).

¹⁰³ See U.C.C. § 4A-406(d); U.N. Model Law arts. 3, 17(2).

¹⁰⁴ U.C.C. § 4A-402(b)-(c); U.N. Model Law art. 4(6).

¹⁰⁵ U.C.C. § 4A-402(b)-(c); U.N. Model Law art. 4(6). Both statutes permit a sender to include an "execution date" designating when an executing bank should execute an order and a "payment date" designating when a beneficiary's bank should pay a beneficiary. U.C.C. § 4A-301(b), § 4A-401; U.N. Model Law art. 2(k),(m).

that an order is received by the bank.¹⁰⁶ Both statutes, however, make a receiving bank's entitlement to receive and retain payment from a sender conditional upon completion of a funds transfer. Their common gap-filling rule defines completion as acceptance of a conforming order by a beneficiary's bank designated by an originator.¹⁰⁷

Under both statutes, the failure of a beneficiary's bank designated by an originator to accept a conforming order excuses the originator's payment obligation and entitles the originator to a refund of any payment that has been made to the originator's bank.¹⁰⁸ The right to refuse future payment and obtain a refund of a prior payment comprise a statutory "money-back guarantee"¹⁰⁹ to an originator that a funds transfer either will be completed¹¹⁰ or legally unenforceable. Subsequent senders in a funds transfer receive the same money-back guarantee from their receiving banks.¹¹¹ A receiving bank's exercise of due care is immaterial. If a funds transfer is not completed for any reason, a careful, as well as a careless, receiving bank must honor its money-back guarantee.¹¹² Completion of a funds transfer in accordance with an originator's instructions, on the other hand, gives legal finality to all senders' payment obligations created by acceptance of their payment orders by a receiving bank. All senders must pay their accepted orders, the money-back guarantee is inoperative, and the beneficiary's bank designated by the originator is obligated to pay the beneficiary in accordance with the originator's instructions.¹¹³

Both statutes invalidate agreements restricting the money-back guarantee,¹¹⁴ but may permit agreements expanding its applicability.¹¹⁵

¹⁰⁶ Omission of a deferred date authorizes an executing bank to execute an order upon the business day of receipt and a beneficiary's bank to pay a beneficiary upon the business day of receipt. U.C.C. § 4A-301(b), § 4A-401; U.N. Model Law art. 10(1).

¹⁰⁷ U.C.C. § 4A-104(a); U.N. Model Law arts. 13(1), 17(1), art. 17 comments 4-6.

¹⁰⁸ U.C.C. § 4A-402(c)-(d); U.N. Model Law art. 13(1).

¹⁰⁹ U.C.C. § 4A-402 official comment 2; U.N. Doc. A/CN.9/328 at 11.

¹¹⁰ In the absence of a contractual definition of completion, both statutes have a common gap-filling rule defining completion as acceptance of a conforming order by a designated beneficiary's bank. See *supra* notes 100 & 101 and accompanying text.

¹¹¹ U.C.C. § 4A-402(c)-(d); U.N. Model Law arts. 13(1), 17(1).

¹¹² See U.C.C. § 4A-402 official comment 2 (originator's bank has a refund obligation to the originator even though an intermediary bank caused a funds transfer to fail); U.N. Model Law art. 13 comments 10-12 (the obligation of each receiving bank to its sender is absolute).

¹¹³ U.C.C. § 4A-402(c)-(d), §4A-404(a); U.N. Model Law arts. 4(6), 9(1), 13(1), 17(1).

¹¹⁴ U.C.C. § 4A-402(f); U.N. Model Law art. 13(1)-(2).

¹¹⁵ See U.C.C. § 4A-402(f); U.N. Model Law art. 3, 13(1)-(2).

U.C.C. § 4A-402(f), for example, provides:

The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) or to receive a refund

Under Article 4A, a funds-transfer system rule can restrict as well as expand the money-back guarantee to a sending bank that is a system-participant but not to other senders.¹¹⁶ Under the Model Law, which treats funds-transfer system rules like other agreements, funds-transfer system rules at most can expand, but not restrict, the money-back guarantee to all senders.¹¹⁷

Funds transfers that have been completed erroneously, for example by a beneficiary's bank accepting an order naming a beneficiary different from that designated by an originator, can involve only partial finality of legal payment obligations. A sender that made the error, any subsequent senders that implemented the error, and a beneficiary's bank that accepted an order containing the error at most are bound.¹¹⁸ Finally, funds transfers that miscarry so badly that no beneficiary's bank accepts an order have no final legal payment obligations. No

under subsection (d) may not be varied by agreement.

This language clearly prohibits contractual alterations of the money-back guarantee in situations in which a right of refund or excuse exists under Article 4A. Question, however, whether contractual creation of a money-back guarantee in an instance in which Article 4A does not create a right of refund or excuse is antithetical to Article 4A policy and covered by the prohibition upon contractual variance.

Although U.N. Model Law art. 13(2) also precludes agreements "varying" the money-back guarantee, the purpose is to make the statutory guarantee "mandatory." See U.N. Model Law art. 13 comment 17. Supplementation of the mandatory guarantee is not necessarily proscribed.

¹¹⁶ See U.C.C. § 4A-501(b), § 4A-501(b) comment 1 ("[U]nless the contrary is stated, funds transfer system rules can override provisions of Article 4A."). U.C.C. § 4A-402(f), which provides that the money-back guarantee may not be varied by agreement, omits reference to variation by a funds-transfer system rule. The prohibition upon variation of the money-back guarantee by agreement, however, would invalidate an agreement by a nonparticipant in a funds-transfer system to be bound by a rule restricting the money-back guarantee.

¹¹⁷ See U.N. Model Law art. 13(1)-(2), which appears to supersede the provisions of art. 16(7) that allow banks contractually to vary their liability to each other but only to increase their liability to nonbank originators and beneficiaries.

¹¹⁸ Compare U.C.C. § 4A-402(c) and § 4A-402(d) (a sender's obligation to pay his or her payment order is excused and any payment that has been made is subject to refund as a result of failure of a designated beneficiary's bank to accept an order conforming to the sender's order), § 4A-404(a) (beneficiary's bank obligated to pay order it accepts) with U.N. Model Law arts. 13(1) and 17(1) as explained by art. 17 comments 4-7 (a receiving bank is obligated by acceptance to refund payment by its sender in the event that a beneficiary's bank designated by an originator does not accept an order conforming to the originator's order).

Under the Article 4A formulation, which does not require that an order accepted by a beneficiary's bank conform to an originator's order, a sender that erroneously changes a beneficiary must pay its receiving bank if the beneficiary's bank accepts an order conforming to that of the sender. The Model Law, on the other hand, excuses all senders in the event that a beneficiary's bank designated by an originator does not accept an order conforming to that of the originator. It is irrelevant under the Model Law that the order accepted by the beneficiary's bank conforms to that of one or more senders.

sender is required to pay his or her order, any sender that has paid is entitled to a refund, and no beneficiary's bank has an obligation to pay a beneficiary.¹¹⁹

5.1.1. *Rationale of the Money-back Guarantee*

The money-back guarantee protects an originator from loss of principal and interest in the event that a funds transfer is not completed.¹²⁰ This protection ordinarily exists even though the lack of completion is caused by the insolvency of a bank.¹²¹ Under both statutes, an originator assumes the risk of insolvency of the bank selected as an originator's bank, which provides the money-back guarantee to an originator.¹²² The first sender that instructed use of a specific intermediary bank also bears the risk of the insolvency of the designated intermediary bank. A sender that requires use of a specific intermediary bank has recourse only to a money-back guarantee from the designated bank.¹²³

The money-back guarantee is a central aspect of Article 4A risk-allocation policy. The damages arising from a wholesale wire transfer that goes awry can be substantial, and a major goal of the drafters of Article 4A was to enable the parties to wholesale wire transfers "to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately."¹²⁴

In order to price funds-transfer services realistically, a bank must be able to calculate its potential damage liability. Under American common law, a receiving bank's breach of its contractual obligations in a funds transfer can give rise to both foreseeable direct and consequential damages. Recoverable direct damages consist of loss of the funds transferred, interest, and the fees for a transfer. Consequential damages consist of all other foreseeable damages caused by breach, including lost

¹¹⁹ See *id.*

¹²⁰ U.C.C. § 4A-402(d); U.N. Model Law art. 13(1) (refund with interest from the date of payment).

¹²¹ See Baxter & Bhala, *supra* note 56, at 1463 (uncommon for a bank to incur liability as a result of the insolvency of another bank).

¹²² See U.C.C. § 4A-402(c)-(d); U.N. Model Law art. 13(1) (money-back guarantee is owed to a receiving bank's sender).

¹²³ U.C.C. § 4A-402(e); U.N. Model Law art. 13(2). The first sender that instructed use of a specific intermediary bank also assumes the risk that the intermediary bank will be prohibited by law from honoring its money-back guarantee. In the event of a legal prohibition, the first sender is restricted to a money-back guarantee from the designated intermediary bank. U.C.C. § 4A-402(e); U.N. Model Law art. 13(2).

¹²⁴ U.C.C. § 4A-102 official comment 2.

profits in a collateral transaction.¹²⁵ Direct damages typically are lost interest and the nominal fees customarily charged for wholesale wire transfers, whereas consequential damages can be immense. In the well-known case of *Evra Corp. v. Swiss Bank Corp.*,¹²⁶ for example, an originator suffered no direct damage but incurred in excess of \$2,000,000 in consequential damages.¹²⁷ If potential liability existed for all foreseeable consequential damages suffered by an originator because of a failed or delayed wholesale wire transfer, a receiving bank could have great difficulty in predicting risks and pricing its services. An originator, moreover, should be the cheapest-cost avoider with respect to his or her own business. The drafters of Article 4A consequently limited the statutory liability of an executing bank to direct damages, the money-back guarantee, and attorney's fees.¹²⁸ With respect to completed funds transfers that merely are delayed, statutory direct damages, moreover, are restricted to lost interest and attorney's fees.¹²⁹ An executing bank that is willing to do so, however, can enter into an express written contract assuming liability for additional damages, including an originator's consequential damages.¹³⁰

Article 4A controls a beneficiary's bank's risks in a different fashion. Acceptance of a payment order by a beneficiary's bank creates liability solely to a beneficiary. No liability exists to any sender, including an originator.¹³¹ This limitation upon the risks assumed by a beneficiary's bank justifies greater liability to a beneficiary. A beneficiary's bank ordinarily must comply with a demand by a beneficiary for payment on or after a payment date. If a demand is refused without a reasonable doubt concerning a beneficiary's right to payment, liability exists for all foreseeable direct and consequential damages to the

¹²⁵ See, e.g., *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 955 (7th Cir. 1981), cert. denied, 459 U.S. 1017 (1982) (no direct damages, consequential damages included lost profits on a ship charter that was canceled because of a delayed funds transfer as well as the expense of arbitration and litigation that failed to set aside the cancellation).

¹²⁶ *Id.*

¹²⁷ *Id.* at 955-59 (no direct damages incurred; consequential damages disallowed due to lack of foreseeability by intermediary bank).

¹²⁸ See U.C.C. § 4A-305(a)-(e), § 4A-402(c)-(d); Baxter & Bhala, *supra* note 56, at 1463 (the money-back guarantee a quid pro quo for the general rule that consequential damages are not recoverable for execution errors).

For reasonable attorney's fees to be recoverable, a demand for compensation must be made and refused before an action is brought. U.C.C. § 4A-305(e).

¹²⁹ U.C.C. § 4A-305(a),(e). For reasonable attorney's fees to be recoverable, a demand for compensation must be made and refused before an action is brought. U.C.C. § 4A-305(e).

¹³⁰ U.C.C. § 4A-305(c),(d). New Regulation J precludes Federal Reserve Banks from agreeing to assume liability for consequential damages. Regulation J § 210.32(a), *supra* note 11, at 40803.

¹³¹ See U.C.C. § 4A-404(a).

beneficiary.¹³²

Under Article 4A, a funds-transfer system rule can limit the recoverable damages of banks participating in the system.¹³³ The statutory damages of nonparticipants, on the other hand, ordinarily cannot be reduced. Neither the money-back guarantee to a nonparticipating sender nor the statutory rights to payment and damages of a nonparticipating beneficiary can be restricted by an agreement or by an ordinary funds-transfer system rule.¹³⁴ Two special types of funds-transfer system rules, however, can reduce the rights of nonparticipating beneficiaries.¹³⁵

With respect to statutory violations that are neither intentional nor reckless, the Model Law also facilitates the prediction of risks and realistic pricing by receiving banks. The money-back guarantee, including compensatory interest upon the amount of a transfer, is the remedy for failure of completion.¹³⁶ Compensatory interest also is the remedy for delay by an executing bank.¹³⁷ A beneficiary's rights against a beneficiary's bank, moreover, are left to other principles of law, including the obligations and restrictions imposed by an account agreement.¹³⁸

The extent to which the statutory damage rules can be displaced by other law of an enacting jurisdiction is of great importance. An Official Comment states that displacement of Article 4A by implication is unwarranted,¹³⁹ and neither Article 4A nor general Uniform Commercial Code provisions contain a statutory authorization for displacement.¹⁴⁰ The Model Law, on the other hand, expressly allows supple-

¹³² *Id.*

¹³³ See U.C.C. § 4A-305(f), § 4A-501(b) (express limitation only upon variation by agreement).

¹³⁴ U.C.C. § 4A-404(c) expressly forbids variation of a beneficiary's rights to payment and damages by either an agreement or an ordinary funds-transfer system rule. Although U.C.C. § 4A-402(f) insulates the money-back guarantee only from variation by agreement, funds-transfer system rules can not vary the rights of system-nonparticipants unless Article 4A so provides or a nonparticipant enforceably agrees to be bound by the rule. See U.C.C. § 4A-501(b). Article 4A, however, does not authorize a funds-transfer system rule to vary the money-back guarantee to a nonparticipating sender and an agreement by a nonparticipating sender to be bound by a restrictive rule would be unenforceable. See U.C.C. § 4A-402(f), § 4A-501(b).

¹³⁵ See *infra* notes 277-90 and accompanying text.

¹³⁶ See U.N. Model Law arts. 13(1), 16(1)-(5).

¹³⁷ See U.N. Model Law art. 16(1)-(6).

¹³⁸ See U.N. Model Law art. 16(6).

¹³⁹ U.C.C. § 4A-102 official comment ("[R]esort to principles of law and equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article."). See also Baxter & Bhala, *The Interrelationship of Article 4A With Other Law*, 45 BUS. LAW. 1485, 1486 (1990) ("When the draftspersons meant for an Article 4A provision to be supplemented or displaced by another body of law, they said so.").

¹⁴⁰ U.C.C. art. 1 provides for supplementation of all substantive UCC articles

mentation by common-law principles in instances in which a bank intentionally or recklessly fails to execute a payment order or executes an order improperly.¹⁴¹

5.1.2. *Loss-allocation Rules Distinguished*

A sender's final legal obligation to pay his or her order arises from completion of a funds transfer.¹⁴² Whether or not a funds transfer has been completed, a loss-allocation rule identifies the persons that bear the risk of loss from an adverse circumstance other than noncompletion. Loss-allocation rules can be created either by contract or by statute. Rather than spreading losses, the statutory loss-allocation rules in Article 4A and the Model Law generally allocate losses to the cheapest-cost avoider.

Under Article 4A, a sending customer and its receiving bank can enter into an express written agreement restricting the bank's authority to accept orders to those that "test" for authenticity and accuracy under a contractual security procedure,¹⁴³ and also either are payable from specified accounts or are payable to persons on a list of approved beneficiaries. Whether or not a funds transfer is completed, a receiving bank that does not comply with this type of agreement bears the risk of loss from an unauthorized payment order.¹⁴⁴ A related Article 4A loss-allocation rule excuses the payment obligation of a sending customer who complies with an agreed security procedure for detection of errors and proves that a receiving bank's compliance would have detected a mistaken designation of beneficiary or an erroneous duplicate order.¹⁴⁵ An Article 4A allocation of loss to a receiving bank, however, can be forfeited by a sending customer's failure to notify the receiving bank seasonably of unauthorized or erroneous orders.

When a receiving bank notifies a sending customer that it has ac-

with common-law principles that are not displaced and allows recovery of consequential and punitive damages that are specifically provided for by undisplaced rules of law. U.C.C. § 1-103, § 1-106.

¹⁴¹ U.N. Model Law art. 16(8).

¹⁴² See *supra* notes 100 & 101 and accompanying text for the concept of completion.

¹⁴³ See U.C.C. § 4A-201 (definition of security procedure). Article 4A "customers" include banks with an account with a bank or from whom a bank has agreed to receive payment orders. U.C.C. § 4A-105(a)(3). Every sender in a funds transfer can have a contractual security procedure with its receiving bank. See Patrikis, *supra* note 32, at 236-38 (hypothetical discussion of a security procedure agreed to by an originator's bank and a beneficiary's bank that was the originator's bank's receiving bank).

¹⁴⁴ U.C.C. § 4A-203(a)(1), § 4A-203 official comment 3.

¹⁴⁵ U.C.C. § 4A-205. In the case of a mistake that increases the amount payable to the beneficiary, an originator, however, remains obligated to pay the amount that he or she intended. U.C.C. § 4A-205(a)(ii)(preamble), § 4A-205(a)(3).

cepted an order or debited an account with respect to an order, a sending customer has an Article 4A duty of ordinary care to notify the bank of discoverable improprieties.¹⁴⁶ At a minimum, breach of this duty can limit a customer's entitlement to interest upon a refund.¹⁴⁷ If a receiving bank is liable for a loss solely because it failed to comply with an agreed security procedure for detection of errors, breach of the duty also can limit a customer's recovery of principal.¹⁴⁸ A customer, moreover, has an independent Article 4A duty to object to a receiving bank's receipt of payment for an order within one year after receiving notification of the payment.¹⁴⁹

The Article 4A policy of allocating losses to a sending customer who fails to notify a receiving bank of improprieties in timely fashion can affect even a dilatory sender's right to the money-bank guarantee. A sender that procrastinates in claiming a refund under the guarantee forfeits entitlement to interest upon the refund for the period of unreasonable delay.¹⁵⁰ If an entire year goes by after a sender was notified of a debit to his or her account with respect to a misdirected order, the right to a refund of principal also is lost.¹⁵¹ But, in view of the large amounts involved in wholesale wire transfers, senders ordinarily will discover incomplete transfers in ample time to recover principal.

"Authentication" is the Model Law analogue of an Article 4A contractual security procedure.¹⁵² If a sending customer and a receiving bank have agreed that the bank will accept only orders that comply with a commercially-reasonable authentication, the customer is not bound by the bank's acceptance of an unauthorized order that fails to

¹⁴⁶ U.C.C. § 4A-204(a) (reasonable time for notice can not exceed 90 days), § 4A-205(b) (reasonable time for notice can not exceed 90 days), § 4A-304 (reasonable time for notice can not exceed 90 days), § 4A-505 (notice must be given within one year).

In what may become a standard provision in sender-receiving bank agreements, the Federal Reserve Board's new Regulation J defines a reasonable time to give notice under U.C.C. § 4A-204(a) and § 4A-304 as 30 calendar days after a sender receives notice either that a payment order has been accepted or executed or that the sender's account has been debited with respect to a payment order. Reg. J, *supra* note 11, 55 Fed. Reg. at p. 40802 (Section 210.28(c)).

¹⁴⁷ U.C.C. § 4A-204(a).

¹⁴⁸ U.C.C. § 4A-205(b).

¹⁴⁹ U.C.C. § 4A-505.

¹⁵⁰ U.C.C. § 4A-304, § 4A-402(d).

¹⁵¹ U.C.C. § 4A-505, § 4A-505 official comment.

¹⁵² Compare U.N. Model Law art. 2(j)(definition of authentication) with U.C.C. § 4A-201 (definition of security procedure).

Both an Article 4A "security procedure" and a Model Law "authentication" must be created by an agreement between a sender and a receiving bank. *See id.* A testing system unilaterally adopted by a receiving bank is neither an Article 4A security procedure nor a Model Law authentication. *See French, Unauthorized and Erroneous Payment Orders*, 45 BUS. LAW. 1425, 1429-30 (1990) (discussion of Article 4A security procedure concept).

“test” under the authentication.¹⁵³ Customers that can prove lack of responsibility for breach of a commercially reasonable authentication procedure also are not bound by the bank’s acceptance of unauthorized orders that do test.¹⁵⁴

Article 4A security procedures include agreed procedures for detection of errors in payment orders, which are the subject of special Article 4A loss-allocation rules.¹⁵⁵ The Model Law excludes procedures for the detection of error unrelated to identification of a sender from its definition of “authentication.”¹⁵⁶ Nevertheless, it has special loss-allocation rules regarding agreed procedures for the detection of errors.¹⁵⁷ Other Model Law loss-allocation rules have no Article 4A counterparts. For example, if a funds transfer is delayed by misdirection of a payment order, under the Model Law the bank that receives the misdirected order is a receiving bank and is liable for interest during the interval between receipt of payment and notification of the error to an identified originator.¹⁵⁸ Under Article 4A, only the bank to which a payment order is addressed is a receiving bank. Other banks have no duties with respect to a misdirected order.¹⁵⁹

The Model Law, on the other hand, has no statutory counterpart of the Article 4A duty of a customer to give a receiving bank timely notice of discoverable improprieties following notice of either debit of an account or acceptance of an order.¹⁶⁰ The Model Law ordinarily leaves the existence of a customer’s duty to report improprieties to freedom of contract. However, nonbank originators, and perhaps nonbank beneficiaries as well, seem immune from any contractual duty to report improprieties that could reduce an originator’s or beneficiary’s bank’s liability to them.¹⁶¹

¹⁵³ See U.N. Model Law art. 4(2). The test for the commercial reasonableness of an authentication is objective. A mere agreement that an authentication is commercially reasonable is not dispositive. U.N. Model Law art. 4(3).

¹⁵⁴ U.N. Model Law art. 4(4).

¹⁵⁵ U.C.C. § 4A-201, § 4A-205.

¹⁵⁶ See U.N. Model Law art. 2(j).

If an algorithm used to identify a sender incorporates the terms of a payment order, the authentication, however, also would test for errors. Any error in the content of a payment order would cause the authentication to fail. A/CN.9/344/CORR. 1, Comment 122 (1991) [hereinafter *UNCITRAL TWENTY-SECOND SESSION REPORT*].

¹⁵⁷ U.N. Model Law art. 4(5).

¹⁵⁸ See U.N. Model Law arts. 7(3)-(4), 9(2), 16(3)-(4).

¹⁵⁹ See U.C.C. § 4A-103(a)(3)-(4) (definitions of beneficiary’s bank and receiving bank), § 4A-302, § 4A-404 (obligations of receiving banks).

¹⁶⁰ See *supra* notes 146-51 and accompanying text for discussion of the Article 4A statutory duty.

¹⁶¹ See U.N. Model Law art. 16(7). With respect to nonbank beneficiaries, the extent to which their art. 16(7) protection can be limited by art. 16(6)’s deference to an account agreement with a beneficiary’s bank is an open question.

5.1.3. *Interim Irrevocability of a Payment Order Distinguished*

A final legal obligation of a sender to pay his or her order is created by the completion of a funds transfer and extinguishment of the money-back guarantee.¹⁶² Prior to completion of a funds transfer, interim irrevocability terminates a sender's unilateral power to stop payment.¹⁶³ Unless an originator has instructed that execution take place upon a later date, under both statutes the issue by an originator's bank of an implementing order terminates an originator's unilateral power to stop payment as a matter of law.¹⁶⁴ If an execution date has been designated, either the commencement of that date or the date of actual execution by the originator's bank, whichever is later, is the terminating event.¹⁶⁵ The Model Law applies the same principles to termination of an executing bank's unilateral power to stop payment of its own payment order, and also allows a special irrevocability agreement between a sender and an executing bank to terminate a sender's unilateral power to stop payment.¹⁶⁶ Article 4A, however, neither recognizes contractual irrevocability nor allows an originator's designation of a later execution date to preserve an executing bank's unilateral power to stop payment. Notwithstanding designation of a later execution date, premature execution of a payment order by an executing bank's receiving bank terminates the executing bank's unilateral power to stop payment.¹⁶⁷

If a funds transfer ultimately is completed, interim irrevocability is superseded by a sender's final legal obligation to make payment.¹⁶⁸ If a funds transfer ultimately miscarries, interim irrevocability is superseded by a sender's entitlement to an excuse and a refund under the money-back guarantee.¹⁶⁹

¹⁶² U.C.C. § 4A-402(c)-(d); see U.N. Model Law arts. 13(1), 17(1).

¹⁶³ With respect to unilateral termination of a payment order by a sender, see U.C.C. § 4A-211(c)(1); U.N. Model Law art. 11(1),(3).

Both statutes also limit termination of payment orders by operation of law. Under Article 4A, a payment order is not revoked by either the death or the legal incapacity of a sender unless the receiving bank has both actual knowledge of the death or adjudication of incompetency and a reasonable opportunity to act upon this knowledge prior to acceptance. U.C.C. § 4A-211(g). Under the Model Law, neither the death, nor the bankruptcy, nor the incapacity of any sender, including an originator, affects the continuing validity of a previously-issued payment order. U.N. Model Law art. 11(8).

¹⁶⁴ See U.C.C. § 4A-209(d), § 4A-211(c)(1), § 4A-301(b); U.N. Model Law arts. 2(k)-(l), 11(1).

¹⁶⁵ See *id.*

¹⁶⁶ U.N. Model Law art. 11(1),(3).

¹⁶⁷ See U.C.C. § 4A-209(d), § 4A-211(c)(1).

¹⁶⁸ See U.C.C. § 4A-402(c)-(d); U.N. Model Law arts. 13(1), 17(1).

¹⁶⁹ U.C.C. § 4A-402(c)-(d); U.N. Model Law art. 13(1).

a) A Sender's Unilateral Inability to Stop Payment of a Payment Order Following Issue of an Implementing Order by an Executing Bank

In a paper-based check transaction, American law gives an issuer of a check limited unilateral power to stop payment.¹⁷⁰ In order to be effective, a stop payment order must be received in a time and manner that allows a bank upon which a check has been drawn a reasonable opportunity to avoid paying or otherwise becoming obligated upon the check.¹⁷¹ An effective stop payment order increases the negotiating leverage of an issuer by throwing the burden of litigation upon the holder of a check. Unless an issuer has a legal defense to the obligation to pay, stopping payment of a check, however, creates legal liability to a holder.¹⁷²

Article 4A provisions referring to "cancellation" and Model Law provisions referring to "revocation" deal with a sender's unilateral power to stop payment of an issued payment order.¹⁷³ Effective cancellation or revocation of an unaccepted payment order precludes subsequent acceptance. Effective cancellation or revocation of a previously-accepted payment order nullifies the acceptance and all rights and obligations derived from it.¹⁷⁴ Effective cancellation or revocation, however, affects the rights and obligations derived from a payment order alone. The liability of an originator to a beneficiary for stopping payment is governed by other principles of law.

The Article 4A provisions dealing with cancellation of payment orders ordinarily can be varied both by agreement with an affected party and by funds-transfer system rules.¹⁷⁵ System rules that conflict, however, with the Article 4A limitations upon cancellation of a payment order that has been accepted by a beneficiary's bank are ineffective.¹⁷⁶ It is also questionable under Article 4A whether agreements or funds-transfer system rules can make an unaccepted payment order ir-

¹⁷⁰ U.C.C. § 4-403.

¹⁷¹ U.C.C. § 4-403(a).

¹⁷² See U.C.C. § 4-403(c), § 4-403 comment 7.

¹⁷³ See U.C.C. § 4A-211; U.N. Model Law art. 11. The Article 4A provisions also apply to "amendment" of issued payment orders. Amendment is conceptualized as a two-step process involving cancellation of an initial order and its replacement with a new order. U.C.C. § 4A-211(e). Although the Model Law provisions do not literally apply to amendment of issued orders, U.N. Model Law art. 11 comment 3, the Model Law limitations upon revocation reasonably could be applied to amendment by analogy. See U.N. Model Law art. 11.

¹⁷⁴ U.C.C. § 4A-211(e). These Article 4A provisions also are reasonable implications of Model Law revocation. See U.N. Model Law art. 11.

¹⁷⁵ See U.C.C. § 4A-211, § 4A-501, § 4A-501 official comment 1.

¹⁷⁶ U.C.C. § 4A-211(h).

revocable.¹⁷⁷ Under the Model Law, on the other hand, an agreement between a sender and a receiving bank can make an unaccepted order irrevocable,¹⁷⁸ and can also make an order that has been accepted by a receiving bank revocable. A beneficiary's bank, however, also must obtain a beneficiary's consent in order to avoid liability to the beneficiary for agreeing to revocation of a payment order that the bank previously has accepted.¹⁷⁹ The following discussion of the unilateral power to stop payment assumes that there is no agreement with an affected party and no funds-transfer system rule altering the statutory provisions.

Under both statutes, a unilateral stop payment order must be issued by the sender of the payment order involved, and, unless a receiving bank chooses to waive the requirement, it must comply with an applicable Article 4A security procedure or Model Law authentication procedure.¹⁸⁰ An originator's stop payment order must be issued to an originator's bank, which, if it is not also the beneficiary's bank, in turn must issue an order to stop payment to its receiving bank, and so on, until the sender of a payment order to the beneficiary's bank is reached. That sender alone has standing to issue a stop payment order to the beneficiary's bank.¹⁸¹

If a receiving bank reasonably can avoid acceptance following receipt of a unilateral stop payment order, both statutes require compliance with the stop payment order.¹⁸² A receiving bank that receives a timely order to stop payment and nevertheless accepts a payment order is obligated by its acceptance but is not entitled to payment from its sender.¹⁸³ With respect to a stop order that is received after a payment order has been accepted, Article 4A distinguishes between a prior acceptance by an executing bank and a prior acceptance by a beneficiary's bank.

¹⁷⁷ See U.C.C. § 4A-211(b)(notice of cancellation that is received in a time and manner that permits a receiving bank to cancel prior to acceptance is effective).

¹⁷⁸ U.N. Model Law art. 11(3).

¹⁷⁹ See U.N. Model Law arts. 3, 7(2) (acceptance obligates an executing bank to the sender of the accepted payment order who consequently can agree to vary the statutory obligation imposed by acceptance); arts. 3 & 17(1) (acceptance creates indebtedness of a beneficiary's bank to a beneficiary, who consequently must agree to variation of that indebtedness).

¹⁸⁰ U.C.C. § 4A-211(a); see U.N. Model Law art. 11(1)-(2), (4).

The Model Law term for a security procedure is an "authentication." See *supra* notes 152-57 and accompanying text.

¹⁸¹ See U.C.C. § 4A-404 official comment 3. (an originator can cancel a payment order issued to a beneficiary's bank directly only in the case of a book transfer in which the same bank is both the originator's bank and the beneficiary's bank).

¹⁸² U.C.C. § 4A-211(b); see U.N. Model Law art. 11(1)-(2).

¹⁸³ See *Mellon Bank, N.A. v. Securities Settlement Corp.*, 710 F. Supp. 991 (D.N.J. 1989) (intermediary bank that failed to implement originator's bank's timely stop order not entitled to reimbursement from originator's bank).

Unless an originator has designated a later execution or payment date,¹⁸⁴ the Article 4A unilateral right to stop payment terminates upon the acceptance of a payment order by an originator's bank.¹⁸⁵ If a receiving bank nevertheless accedes to a request to cancel an accepted order, unless otherwise agreed a cancelling sender is liable for any resulting loss and expenses, including reasonable attorney's fees, incurred by the bank.¹⁸⁶

Under Article 4A, for cancellation to be effective after an executing bank has accepted by issuing an implementing order, either the executing bank must consent or a funds-transfer system rule must dispense with the bank's consent. The payment order that has been issued by the executing bank also must be canceled.¹⁸⁷ For cancellation to be effective after acceptance by a beneficiary's bank, Article 4A requires the beneficiary's bank to consent, otherwise a funds-transfer system rule must dispense with the bank's consent. At least one of four exclusive statutory justifications for cancellation also must exist.¹⁸⁸ In the absence of a statutory justification or a beneficiary's consent to cancellation, a beneficiary can recover from a beneficiary's bank loss caused by cancellation of a previously-accepted payment order.¹⁸⁹

An originator can extend the duration of his or her Article 4A unilateral power to stop payment by instructing an originator's bank not to accept before a designated date. An originator's bank that also is an executing bank is subject to a designated execution date,¹⁹⁰ and an originator's bank that also is a beneficiary's bank is subject to a designated payment date.¹⁹¹ Notwithstanding premature acceptance by an originator's bank, an originator's Article 4A unilateral power to stop payment continues until the date upon which an originator's bank was instructed to accept. If an originator seasonably stops payment after an

¹⁸⁴ See *infra* notes 190-98 and accompanying text for discussion of the effect of designation of identical execution and payment dates on the Article 4A unilateral right to stop payment.

¹⁸⁵ See U.C.C. § 4A-211(c).

¹⁸⁶ U.C.C. § 4A-211(f). A cancelling sender's obligation to indemnify a receiving bank is not affected by the ineffectiveness of an attempted cancellation. *Id.*

¹⁸⁷ U.C.C. § 4A-211(c), § 4A-211(c)(1).

¹⁸⁸ U.C.C. § 4A-211(c), § 4A-211(c)(2).

¹⁸⁹ See U.C.C. § 4A-211(c)(preamble), § 4A-211(c)(2)(h). "Except as provided in subsection (c)(2), cancellation or amendment after acceptance by the beneficiary's bank is not possible unless parties affected by the order agree." U.C.C. § 4A-211 official comment 4.

Although a beneficiary's bank technically also could be liable to an originator that did not consent to cancellation, an originator ordinarily would give consent by initiation of a request for cancellation of an order that has been accepted by a beneficiary's bank.

¹⁹⁰ U.C.C. § 4A-301(b).

¹⁹¹ U.C.C. § 4A-401.

originator's bank's premature acceptance, the originator need not pay his or her order. The originator's bank nevertheless is obligated legally upon its acceptance by completion of the funds transfer and must attempt to recover the payment from the beneficiary.¹⁹² To the extent of an originator's indebtedness, however, a good faith beneficiary can retain the payment.¹⁹³ In order to avoid loss in this situation, an originator's bank must succeed in recovering upon the beneficiary's rights against the originator to which it is subrogated by operation of law.¹⁹⁴ In view of their significance, deferred execution and payment dates are not implied. A receiving bank can accept a payment order that does not designate a date for acceptance only on the business day of receipt.¹⁹⁵

With the exception of a premature acceptance by an originator's bank, Article 4A does not nullify an acceptance by a receiving bank that occurs prior to an execution or a payment date designated by an originator.¹⁹⁶ All executing banks, nevertheless, are obligated to issue an order that conforms to their sender's order and thus to include any execution and payment dates designated by the sender.¹⁹⁷ Unless a subsequent executing bank erroneously omits an execution or payment date, by designating identical execution and payment dates an originator can therefore extend the Article 4A unilateral power to stop payment until the designated payment date.¹⁹⁸

The Model Law terminates a sender's unilateral power to stop payment as a matter of law upon acceptance by a receiving bank or the commencement of the business day upon which a receiving bank has been instructed to accept, whichever occurs later.¹⁹⁹ Contractual irrevocability can be created earlier,²⁰⁰ and statutory irrevocability can be va-

¹⁹² U.C.C. § 4A-209(d).

¹⁹³ See *id.* (an originator's bank can recover from a beneficiary only to the extent allowed by the law of mistake and restitution). If a beneficiary in good faith received payment as satisfaction of a debt owed by an originator, the law of mistake and restitution allows the beneficiary to keep the money. U.C.C. § 4A-209 official comment 9; *Bank Worms v. Bank America International*, 726 F. Supp. 940 (S.D.N.Y. 1989) *aff'd*, 928 F.2d 538 (2d Cir. 1991) (originator's bank that ignored originator's timely cancellation not entitled to recover payment from beneficiary to whom originator was indebted).

¹⁹⁴ U.C.C. § 4A-209 official comment 9 (subrogation to a beneficiary's claim against an originator is an aspect of the law of mistake and restitution).

¹⁹⁵ U.C.C. § 4A-301(b), § 4A-401.

¹⁹⁶ See U.C.C. § 4A-209(d), § 4A-211.

¹⁹⁷ U.C.C. § 4A-302(a)(1).

¹⁹⁸ Erroneous disregard of an originator's execution or payment dates by a receiving bank other than the originator's bank ordinarily terminates the sending bank's power to stop payment. See *infra* notes 324-25 and accompanying text.

¹⁹⁹ U.N. Model Law arts. 11(1)-(2). See *supra* notes 94-99 and accompanying text for discussion of this statutory test for revocability.

²⁰⁰ U.N. Model Law art. 11(3).

ried with the agreement of the affected parties.²⁰¹ A sender need not settle for a seasonably revoked order and can recover any payment that has been made.²⁰² Whenever an originator effectively has revoked its payment order, in order to avoid loss an originator's bank that unjustifiably failed to comply with the revocation must recover reimbursement for its liability upon its own payment order from the beneficiary.²⁰³ To the extent of the originator's indebtedness, a good faith beneficiary, however, can retain the payment, and the originator's bank must recover upon the beneficiary's rights against the originator in order to avoid loss.²⁰⁴

The Model Law leaves to the agreement of the parties the entitlement to indemnity of a receiving bank that complies with a request for revocation of an accepted payment order.²⁰⁵ An execution date can be designated for an executing bank and a payment date can be designated for a beneficiary's bank.²⁰⁶ The Model Law, moreover, preserves the unilateral power to stop payment of an originator who has not agreed to earlier contractual irrevocability until the date on which the originator's bank was instructed to accept, notwithstanding premature acceptance by the bank.²⁰⁷ Thus, by instructing all receiving banks to accept on the same day, an originator also can preserve the unilateral power to stop payment under the Model Law until the designated payment date.

Although recognized by both statutes, the unilateral power to stop payment of an unaccepted payment order has scant significance with respect to wholesale wire transfers, which ordinarily are completed on the day of initiation. On-line electronic transmission can be concluded in minutes if not seconds.²⁰⁸ With respect to wholesale wire transfers, the unilateral power to stop payment must be exercisable after acceptance by a beneficiary's bank in order to be effective. Both Article 4A and the Model Law, however, terminate the unilateral power to stop payment upon acceptance by an originator's bank unless a funds-transfer system allows notice of a future transfer to be transmitted and an

²⁰¹ See U.N. Model Law arts. 3, 11. As discussed in *supra* note 179 and accompanying text, an executing bank's sender is adversely affected by revocation at the request of an originator of an order previously accepted by the executing bank and a beneficiary is adversely affected by revocation at the request of an originator of an order previously accepted by the beneficiary's bank.

²⁰² U.N. Model Law art. 11(5)-(6).

²⁰³ The Model Law incorporates by reference whatever subrogation rights an originator's bank may have with respect to an originator's claims against a beneficiary. U.N. Model Law art. 11(7).

²⁰⁴ See *supra* notes 190-94 and accompanying text.

²⁰⁵ See U.N. Model Law art. 11.

²⁰⁶ U.N. Model Law art. 2(k), (m).

²⁰⁷ See U.N. Model Law art. 11(1), (2).

²⁰⁸ See FEDWIRE REPORT, *supra* note 2, at 10.

originator has instructed all receiving banks to act upon the same future date.

With respect to payment orders that have been accepted by a beneficiary's bank, Article 4A recognizes lesser finality than the Model Law in dispensing with a beneficiary's consent to cancellation in four instances, provided that a beneficiary's bank consents or a funds-transfer system rule makes that bank's consent unnecessary.²⁰⁹ The Article 4A provision rendering "ineffective" funds-transfer system rules that "conflict" with the four statutory justifications for cancellation of a payment order that has been accepted by a beneficiary's bank, however, should invalidate only rules creating additional justifications for cancellation. Rules reducing the instances in which cancellation is possible without the consent of a beneficiary are consistent with Article 4A policy.²¹⁰

b) The Unilateral Inability of an Originator's Bank That is an Executing Bank to Revoke its Acceptance

An originator's bank that is an executing bank ordinarily will be unable unilaterally to revoke an acceptance that terminated an originator's unilateral power to stop payment. Although the Article 4A statement that "acceptance of a payment order precludes a later rejection. . . ."²¹¹ may not be dispositive, whenever an originator's bank issues a payment order to an intermediary executing bank²¹² that accepts by issuing its own payment order, as it usually will,²¹³ that acceptance will end the originator's bank's unilateral power to stop payment, just as an originator's unilateral power to stop payment is ended by an originator's bank's acceptance. This also is true with respect to the intermediary executing banks that participate in a funds transfer.²¹⁴ An originator's bank's specification of an execution date, however, preserves its unilateral power to stop payment only under the Model Law. Premature acceptance by an intermediary executing bank terminates an

²⁰⁹ U.C.C. § 4A-211(c) (preamble), § 4A-211(c)(2).

²¹⁰ See U.C.C. § 4A-211(h), § 4A-211 official comments 5, 8 (a funds-transfer system rule can "constrain" a receiving bank from agreeing to cancellation; the policy of Article 4A is to "severely limit" cancellation of payment orders that have been accepted by a beneficiary's bank).

²¹¹ U.C.C. § 4A-210(d).

²¹² Acceptance by a beneficiary's bank that is an originator's bank's receiving bank completes a funds transfer and creates final payment obligations. For interim irrevocability to be involved, an originator's bank's payment order must have been accepted by an intermediary executing bank.

²¹³ Acceptance by execution is anticipated by both statutes and under Article 4A it is the only way that an executing bank can accept. See U.C.C. § 4A-209(a); U.N. Model Law art. 6(2)(d).

²¹⁴ See *supra* notes 185-86, and *infra* notes 324-25 and accompanying text.

originator's bank's unilateral power to stop payment under the Uniform Act.²¹⁵

Acceptance can occur notwithstanding a substantial variance between the terms of a payment order and an executing bank's responsive payment order. Acceptance by an executing bank merely requires the issue of an order "intended" to carry out an order that has been received.²¹⁶ Under both statutes, serious errors by an executing bank — even inadvertent changes in the beneficiary, the beneficiary's bank, and the amount— do not preclude acceptance.²¹⁷ Issue of a materially non-conforming order, however, simultaneously creates and breaches²¹⁸ the obligation of an executing bank to issue a conforming order.²¹⁹ Under both statutes, the components of the interim irrevocability of a payment order— the unilateral inability of any sender, including an executing bank, to stop payment of an accepted payment order, and the broad statutory definition of acceptance by an executing bank— are gap-filling rules that ordinarily are variable both by agreement with an affected party and by funds-transfer system rules.²²⁰

5.2. Finality of a Beneficiary's Bank's Legal Obligation to Pay a Beneficiary Upon its Acceptance of a Payment Order

Both statutes have a broad definition of acceptance by a beneficiary's bank that includes constructive acceptance. As a general proposition, acceptance occurs as a matter of law either upon the availability of settlement and a beneficiary's bank's failure to make a timely rejection of a payment order, or, regardless of the availability of settlement, as a result of conduct by a beneficiary's bank that could cause a beneficiary reasonably to believe that he or she can utilize the credit for a payment order.²²¹ For example, both a beneficiary's bank's placing funds at the disposal of a beneficiary²²² and giving unconditional notice

²¹⁵ See *supra* notes 196-98 and *infra* notes 324-25 and accompanying text.

²¹⁶ U.C.C. § 4A-301(a); U.N. Model Law art. 6(2)(d).

²¹⁷ See *id.*; U.C.C. § 4A-301 official comment 1; U.N. Model Law art. 6 comment 14.

²¹⁸ U.N. Model Law art. 6 comment 14.

²¹⁹ See U.C.C. § 4A-302(a); U.N. Model Law art. 7(2).

²²⁰ See U.C.C. § 4A-501, § 4A-501 official comment 1; U.N. Model Law arts. 3, 16(7) (under the Model Law only an executing bank's liability to a nonbank originator and a nonbank beneficiary can not be reduced). Nonparticipants in a funds-transfer system ordinarily must agree to be bound by a system rule for the rule to affect their rights. See *supra* notes 77-89 and accompanying text.

²²¹ See U.C.C. § 4A-209(b); U.N. Model Law art. 8.

²²² U.C.C. § 4A-209(b)(1)(i), § 4A-405(a)(i),(iii); U.N. Model Law art. 8(1)(d)-(f). Under both statutes, this type of acceptance includes application of credit for the order to a debt of the beneficiary. U.C.C. § 4A-209(b)(1)(i), § 4A-405(a)(ii); U.N. Model Law art. 8(1)(g).

of the crediting of a beneficiary's account²²³ constitute constructive acceptance.

With respect to the availability of settlement, Article 4A differs from the Model Law in ordinarily conclusively deeming constructive acceptance to occur if final settlement from a bank has been received through a Federal Reserve Bank or a funds-transfer system and consequently involves no significant credit risk.²²⁴ Even mistaken payment of the wrong person by a beneficiary's bank that has received final settlement from a bank through a Federal Reserve Bank or a funds-transfer system does not prevent constructive acceptance.²²⁵ The Model Law, on the other hand, allows a beneficiary's bank the option of rejecting a payment order notwithstanding the method of settlement utilized.²²⁶ Even final credit upon the books of a central bank does not preclude rejection.²²⁷

The conduct that constitutes acceptance by a beneficiary's bank can be varied by contract,²²⁸ and, with respect to senders that are banks participating in the system, by funds-transfer system rules.²²⁹ On the other hand, once acceptance by a beneficiary's bank has occurred, it generally can not be reversed.²³⁰ Article 4A, nevertheless, provides greater assurance than the Model Law that a beneficiary's bank that has accepted an order in fact will pay a beneficiary promptly.

Under Article 4A, a beneficiary's bank is obligated to pay a beneficiary on the payment date of an accepted order.²³¹ An originator's designation of a payment date is controlling as long as the designated date is not prior to the business day on which a beneficiary's bank receives an order.²³² The payment date otherwise is the business day on which a payment order is received.²³³ If an accepted payment order

²²³ U.C.C. § 4A-209(b)(1)(ii); U.N. Model Law art. 8(1)(e).

²²⁴ U.C.C. § 4A-209(b)(2), § 4A-403(a). If a beneficiary does not have an open account that lawfully can be credited, Article 4A, however, does not impose constructive acceptance. U.C.C. § 4A-209(b)(2), § 4A-209(c).

²²⁵ See U.C.C. § 4A-209 official comment 6.

²²⁶ U.N. Model Law arts. 5, 8(1)(a), 8(2).

²²⁷ U.N. Model Law arts. 5(b)(iii), 8(1)(a)(ii), 8(2).

²²⁸ The Model Law, for example, expressly allows a beneficiary's bank to contract that an order will be accepted upon receipt. U.N. Model Law art. 8(1)(b). Under U.C.C. Article 4A this type of agreement would supersede the statutory definition of acceptance. See U.C.C. § 4A-209(b), § 4A-501(a).

²²⁹ See U.C.C. § 4-209 official comment 3.

²³⁰ Compare U.C.C. § 4A-211(c)(preamble) and § 4A-211(c)(2) with U.N. Model Law arts. 3 and 11(2). For discussion of the U.C.C. Article 4A exceptions to the finality of acceptance by a beneficiary's bank, see *infra* notes 256-76 and accompanying text.

²³¹ U.C.C. § 4A-404(a).

²³² U.C.C. § 4A-401.

²³³ *Id.*

either instructs payment to an account of a beneficiary or expressly requires notice to a beneficiary, a beneficiary's bank also has an Article 4A obligation to notify a beneficiary of receipt of the order before midnight of the business day following the payment date.²³⁴ Breach of the obligation to give notice makes a beneficiary's bank liable for interest from the date that notice should have been given to the date that the beneficiary learns of the bank's receipt of the order.²³⁵ Unjustified failure to pay a beneficiary upon demand on or after a payment date is far more serious. In the absence of a reasonable doubt concerning a beneficiary's right to payment, a beneficiary's bank is liable for all foreseeable direct and consequential damages caused by the unjustified refusal of a demand for payment.²³⁶

A beneficiary's Article 4A right to notice of receipt of a payment order can be varied both by agreement with a beneficiary and by funds-transfer rules of which a beneficiary has notice before initiation of a funds transfer.²³⁷ Neither an agreement nor an ordinary funds-transfer rule, on the other hand, can vary a beneficiary's Article 4A rights to receive payment and to recover all foreseeable damages for unjustified refusal of a demand for payment.²³⁸

Unless an originator has specified a later payment date, the Model Law likewise recognizes that acceptance of a payment order obligates a beneficiary's bank to pay a beneficiary on the business day of receipt.²³⁹ When payment is due, an identified beneficiary who does not maintain an account at the bank is also to be notified that the bank is holding funds for his or her benefit.²⁴⁰ The significance of these obligations, however, is left to other law governing the relationship between a beneficiary's bank and a beneficiary, including their account agreement.²⁴¹ Failure of a beneficiary's bank to pay a beneficiary or to notify a beneficiary of the availability of payment does not create statutory damage liability.²⁴²

²³⁴ U.C.C. § 4A-404(b).

²³⁵ *Id.* If a demand for interest is made and refused before an action is brought, reasonable attorney's fees also are recoverable. *Id.*

²³⁶ U.C.C. § 4A-404(a).

²³⁷ U.C.C. § 4A-404(c).

²³⁸ *Id.* Two special types of funds-transfer system rules, however, can negate a beneficiary's rights to payment and to recover damages. See *infra* notes 277-90 and accompanying text.

²³⁹ U.N. Model Law arts. 9(1), 10(1)(a). U.N. Model Law art. 2(m) defines a payment date as a date specified in a payment order when funds are to be placed at the disposal of a beneficiary.

²⁴⁰ U.N. Model Law art. 9(5).

²⁴¹ See U.N. Model Law art. 16(6).

²⁴² See *id.*

6. EXCEPTIONS TO THE FINALITY OF LEGAL PAYMENT OBLIGATIONS UNDER ARTICLE 4A AND THE MODEL LAW

6.1. *Acceptance of an Order by a Beneficiary's Bank That Conforms to the Order of Some, But Not All, Senders*

6.1.1. *The General Rule — A Conforming Acceptance by a Beneficiary's Bank Designated by an Originator Finalizes All Senders' Legal Payment Obligations*

Both statutes terminate the money-back guarantee upon acceptance of a conforming order by a beneficiary's bank designated by an originator.²⁴³ A conforming order has the same beneficiary and the same beneficiary's bank as an originator's order. A discrepancy with respect to either element excuses an originator from paying and entitles an originator to a refund of any payment that has been made.²⁴⁴ A discrepancy with respect to amount, on the other hand, is not necessarily material. If a designated beneficiary's bank accepts an order containing an erroneous increase in the amount of an originator's order, the additional funds do not prevent literal compliance with the originator's instructions. The originator must pay his or her order and the receiving bank that made the error has the burden of recovering the excess payment from the beneficiary.²⁴⁵ In the case of an erroneous reduction in the amount of an originator's order, the statutes differ.

Article 4A brings the money-back guarantee into play with respect to an uncorrected deficiency; whereas the Model Law does not.²⁴⁶ If a supplemental order correcting a deficiency is not issued and accepted by a designated beneficiary's bank, Article 4A obligates an originator and subsequent sending banks to pay only the amount of the order accepted by the beneficiary's bank.²⁴⁷ The Model Law, on the other hand, obli-

²⁴³ U.C.C. § 4A-402(c)-(d); U.N. Model Law arts. 13(1), 17(1).

²⁴⁴ *See id.*

²⁴⁵ U.C.C. § 4A-303(a), § 4A-402(c)-(d); *see* U.N. Model Law arts. 13(1), 15, 17(1).

If the beneficiary is entitled to retain the payment under principles of mistake and restitution, the receiving bank that made the error will be required to assert and to recover upon the beneficiary's rights against the originator in order to avoid loss. *See supra* notes 190-94 and accompanying text.

²⁴⁶ *Compare* U.C.C. § 4A-303(b) with U.N. Model law arts. 13(1) and 17(1), which do not activate the money-back guarantee with respect to partially-incomplete transfers. *See also* U.N. Model Law art. 17(3), which states that a transfer is to be deemed complete notwithstanding the deduction of charges by one or more receiving banks from the amount of the originator's order. Any right of a beneficiary to recover deducted charges from an originator, however, is preserved. *Id.*

²⁴⁷ U.C.C. § 4A-303(b).

gates an executing bank that caused a deficiency to correct it and also obligates all other executing banks to assist in the correction.²⁴⁸ In addition to liability for unpaid principal to the receiving bank that accepts its order,²⁴⁹ an executing bank that causes a deficiency is liable to a beneficiary for compensatory interest.²⁵⁰

6.1.2. Acceptance by a Beneficiary's Bank of an Order Conforming to the Order of Senders Other than an Originator

If an order accepted by a beneficiary's bank does not conform to an originator's order but does conform to the order issued by one or more other senders, a greater difference exists between the statutes. The type of error that invariably creates a material nonconformity under both statutes—a change in either the beneficiary or the beneficiary's bank designated by an originator—typically is made by a sending bank in issuing a payment order. A beneficiary's bank merely accepts a payment order that is issued to it.

Assume, for example, that an originator's bank made a material error and an intermediary bank issued an order containing the error to the beneficiary's bank, which accepted it. In this situation, the order accepted by the beneficiary's bank would be the order of the intermediary bank that conformed to the order of the originator's bank. Because the order of the originator would be materially different, the originator would be entitled to an excuse and a refund under the money-back guarantee. Both the originator's bank and the intermediary bank, however, should be required to pay their orders. This would compel the originator's bank, the bank responsible for the error, to look to the beneficiary in order to avoid loss.²⁵¹ Excuse of the originator, but not the two sending banks, as a result of the originator's bank's error would, in effect, substitute a funds transfer involving the error for the originator's excused funds transfer. The substitute funds transfer, moreover, would be complete and all senders' legal payment obligations would have finality; whereas the funds transfer initiated by the originator would be incomplete and the originator's payment obligation would be excused by the money-back guarantee.

Article 4A adopts a substitute-funds-transfer-with-finality analysis in the situation described above, but the Model Law does not. Under

²⁴⁸ U.N. Model Law arts. 12, 14.

²⁴⁹ U.N. Model Law art. 4(6).

²⁵⁰ U.N. Model Law art. 16(5).

²⁵¹ If the law of mistake and restitution allows a beneficiary to retain a payment, the originator's bank would be dependent upon the beneficiary's rights against the originator for recovery. See *supra* notes 190-94 and accompanying text.

Article 4A, even though payment by an originator is excused by the money-back guarantee, every sending bank whose order conforms to the order accepted by a beneficiary's bank must pay its order.²⁵² Under the Model Law, on the other hand, failure of a designated beneficiary's bank to accept an order conforming to an originator's order unreasonably excuses the payment obligations of all sending banks.²⁵³ A beneficiary's bank that is not responsible for a material error in the order that it accepts ought to be able to enforce its sender's order after paying the beneficiary in good faith.²⁵⁴ The Model Law, however, rejects this position, and its rejection is not subject to a contrary agreement.²⁵⁵

6.2. *Cancellation of a Payment Order After its Acceptance by a Designated Beneficiary's Bank*

An important Article 4A provision identifies four situations in which a conforming payment order that has been accepted by a designated beneficiary's bank can be cancelled without a beneficiary's consent.²⁵⁶ Cancellation nullifies a beneficiary's bank's acceptance and all rights and obligations based upon it.²⁵⁷ To the extent that a beneficiary's bank's acceptance of a conforming order completed a funds transfer, cancellation of the accepted order triggers the money-back guarantee, releasing all senders from a legal obligation to pay their orders and entitling them to a refund of any payment that has been made.²⁵⁸ Cancellation also reinstates an obligation of an originator to a beneficiary that had been discharged by the initial completion of a funds transfer.²⁵⁹ Cancellation of an order previously accepted by a beneficiary's bank requires either the bank's consent or a funds-transfer system rule authorizing cancellation regardless of the bank's consent, plus a statutory justification for cancellation.²⁶⁰ The four exclusive stat-

²⁵² See U.C.C. § 4A-303(c), § 4A-402(c)-(d). See also U.C.C. § 4A-402 official comment 2.

²⁵³ U.N. Model Law arts. 13(1), 17(1).

²⁵⁴ If a beneficiary is entitled to retain a payment under the law of mistake and restitution, a beneficiary's bank is dependent upon subrogation to a beneficiary's rights against an originator in order to avoid loss. See *supra* notes 190-94 and accompanying text.

²⁵⁵ U.N. Model Law art. 13(1)-(2).

²⁵⁶ U.C.C. § 4A-211(c)(2).

²⁵⁷ U.C.C. § 4A-211(c).

²⁵⁸ U.C.C. § 4A-402(c)-(d).

²⁵⁹ U.C.C. § 4A-406(a)-(b).

²⁶⁰ U.C.C. § 4A-211(c)(preamble), §4A-211(c)(2). The provision refers to "amendment" as well as to "cancellation" of an order that has been accepted by a beneficiary's bank. U.C.C. art. 4A, however, treats amendment as a derivative of cancellation. Amendment is a two-step process consisting of cancellation of an initial order and issue of a replacement order. U.C.C. § 4A-211(e).

utory justifications are lack of authorization for an accepted order by a purported originator and the following three types of mistake by a sender: issue of a duplicate of a previously-issued order; issue of an order designating a beneficiary who is not entitled to receive payment from an originator; and issue of an order requiring payment of a greater amount than a beneficiary is entitled to receive from an originator.²⁶¹

An Official Comment describes this special provision as a “severe limitation” upon cancellation of an order that has been accepted by a beneficiary’s bank.²⁶² Conflicting funds-transfer system rules are ineffective,²⁶³ and the willingness of a beneficiary’s bank to disregard the statute is immaterial.²⁶⁴ Consent by a beneficiary is necessary to preclude a beneficiary’s bank’s damage liability to the beneficiary for disregard of the statutory limitations.²⁶⁵

Although the Model Law does not allow cancellation of an order that has been accepted by a beneficiary’s bank,²⁶⁶ cancellation can be warranted. Whether or not the beneficiary was involved in the fraudulent scheme,²⁶⁷ a purported originator, for example, should be able to forestall swindlers by obtaining cancellation of an unauthorized order that initiated a fraudulent funds transfer. A remedy also should be available to prevent a windfall to a beneficiary from a duplicate order. The other instances in which Article 4A allows cancellation of orders that have been accepted by a beneficiary’s bank, however, could be abused by an originator. For example, the article is too open-ended to allow cancellation of orders that mistakenly provide for payment “to a beneficiary not entitled to receive payment from the originator” or “in an amount greater than the amount the beneficiary was entitled to re-

²⁶¹ U.C.C. § 4A-211(c)(2). Because a beneficiary may be involved in the fraudulent use of an unauthorized order, any order that does not bind a purported originator under principles of agency can justify revocation of a beneficiary bank’s acceptance. The elaborate U.C.C. Article 4A provisions otherwise making certain unauthorized payment orders effective against a customer of a receiving bank do not apply. *See* U.C.C. § 4A-202(a)-(b), § 4A-211(c)(2), § 4A-211(c)(2) official comment 4, case 1.

²⁶² U.C.C. § 4A-211 official comment 8.

²⁶³ U.C.C. § 4A-211(h).

²⁶⁴ *See* U.C.C. § 4A-211(c)(2).

²⁶⁵ *See* U.C.C. § 4A-211 official comments 4, 8 (cancellation of an acceptance by a beneficiary’s bank affects the rights of both an originator and a beneficiary). An originator’s consent, however, is implicit in his or her request for cancellation.

²⁶⁶ *See supra* notes 199-201 and accompanying text.

²⁶⁷ Several reported cases in the United States have involved use of unauthorized payment orders to pay persons who innocently had contracted to sell valuable property to the schemers. *See, e.g.,* Bradford Trust Co. v. Texas American Bank-Houston, 790 F.2d 407 (5th Cir. 1986) (two con artists used unauthorized payment order to pay innocent seller of rare coins and gold bullion).

ceive from the originator."²⁶⁸

The illustrations in the Official Comment involve an originator who mistakenly designated Y as beneficiary when he or she meant X, and an originator who mistakenly instructed payment of \$1,000,000 when he or she meant \$10,000.²⁶⁹ If an originator decided that goods which he or she had contracted to purchase from a beneficiary were overpriced, would this belief also justify cancellation of an accepted order upon the ground that the originator mistakenly believed that the beneficiary was entitled to greater payment? The examples in the Official Comments suggest not.²⁷⁰ Under Article 4A, "entitled" means "legally entitled." "Legal entitlement," however, often is unclear. An originator's legal rationalization for a change of mind should not justify cancellation of an order that has been accepted by a beneficiary's bank.

The importance of the overbreadth in the statutory justifications for cancellation is affected by the frequency with which an originator is likely to be able to obtain cancellation upon improper grounds. Although Article 4A allows cancellation of an accepted order after payment of a beneficiary,²⁷¹ it is unlikely that a beneficiary's bank would readily assume the burden of recovering payment from a beneficiary or that a funds-transfer system rule would require a beneficiary's bank to do so. Cancellation is most likely in the interval between acceptance by a beneficiary's bank and payment of a beneficiary. In the absence of a designated payment date, the payment date of an order, however, is deemed to be the business day of receipt by a beneficiary's bank,²⁷² and only the sender who issued the order to the bank has standing to request cancellation.²⁷³ Unless a beneficiary's bank also is an originator's bank, the time that it can take to process an originator's request for cancellation through the executing banks participating in a funds transfer decreases the likelihood that a request can be made by a beneficiary's bank's sender before payment of a beneficiary.

There are additional reasons for believing that cancellation by an originator will not be routine. A beneficiary's bank may have no way of knowing whether or not an originator in fact has a statutory basis for cancellation and ordinarily will be reluctant to antagonize a beneficiary that is its customer either by denying funds or by demanding their return.²⁷⁴ For the same reasons, a funds-transfer system rule is unlikely

²⁶⁸ U.C.C. § 4A-211(c)(2)(ii)-(iii).

²⁶⁹ U.C.C. § 4A-211 official comment 4, cases 3-4.

²⁷⁰ *See id.*

²⁷¹ U.C.C. § 4A-211(c)(2)(last sentence).

²⁷² U.C.C. § 4A-401.

²⁷³ U.C.C. § 4A-211(a).

²⁷⁴ U.C.C. § 4A-211 comment 5.

to dispense with a beneficiary's bank's consent.

Cancellation of duplicate orders mistakenly issued by an executing bank is more likely to be feasible. The issue of a duplicate order by an executing bank can be more satisfactorily and promptly established than an originator's legal rights.²⁷⁵ An executing bank that issues a duplicate order also will be closer to a beneficiary's bank in the chain of participants in a funds transfer than an originator.

The statutory justifications for cancellation involving a beneficiary's lack of legal entitlement to payment are vague. However, the general inability of originators to invoke them and beneficiaries' banks' general unwillingness to accede to requests made by originators in timely fashion diminish the significance of this problem. The instances in which Article 4A allows cancellation by an originator nevertheless should be restricted. The statutory text, for example, gives insufficient protection to beneficiaries in funds transfers in which the same bank is both an originator's bank and a beneficiary's bank and consequently is more likely both to receive a seasonable stop payment order from an originator and to be willing to comply with the order. A preferable approach would be to limit the instances in which an originator can cancel an order that has been accepted by a beneficiary's bank to unauthorized orders and duplicate orders.²⁷⁶

6.3. Agreements and Funds-Transfer System Rules Limiting a Beneficiary's Statutory Right to Payment of an Order Accepted by a Beneficiary's Bank

Under Article 4A, a beneficiary's right to payment of an order that has been accepted by a beneficiary's bank can be varied by two special types of funds-transfer system rules.²⁷⁷ One type of special rule can make a payment to a beneficiary provisional upon a beneficiary bank's receipt of settlement for an accepted order.²⁷⁸ In order to be effective, the rule must require that both an originator and a beneficiary have notice before a funds transfer is initiated that payment by

²⁷⁵ An originator's claim to have issued a duplicate order, on the other hand, would place the originator's legal rights at issue. The underlying transaction could have entitled the beneficiary to two identical payments.

²⁷⁶ If senders are given a reasonable time to check for duplicate orders prior to imposition of finality, an unauthorized order should be the sole exception. *See infra* notes 328-30 and accompanying text.

Restriction could be accomplished by a funds-transfer system rule as well as a statutory amendment. *See supra* notes 209-10 and accompanying text.

²⁷⁷ *See* U.C.C. § 4A-404(c), § 4A-405(d)-(e), § 4A-501(a).

A beneficiary's right to payment, however, can not be varied by either an agreement or an ordinary funds-transfer system rule. *Id.*

²⁷⁸ U.C.C. § 4A-405(d).

the beneficiary's bank will be provisional. A beneficiary, a beneficiary's bank, and an originator's bank also must agree to be bound by the rule.²⁷⁹ If this type of rule is effective and a beneficiary's bank does not receive settlement, the beneficiary's bank's acceptance is deemed nullified and the beneficiary must refund any payment that has been received.²⁸⁰

The second type of special rule can be adopted by a funds-transfer system that nets obligations multilaterally among system-participants who also have agreed to share losses arising from a participant's inability to settle its net obligations.²⁸¹ In the event that the loss-sharing agreement fails to cover the defaults of system-participants, the special rule can nullify the acceptance, and all rights and obligations arising from the acceptance, of a beneficiary's bank that does not receive full settlement.²⁸²

Nullification of a beneficiary's bank's acceptance by either of these special funds-transfer system rules nullifies the legal finality of senders' payment obligations that had been created by that acceptance.²⁸³ Any initial discharge of an originator's debt to a beneficiary also is nullified.²⁸⁴

Each of the special funds-transfer system rule exceptions to the finality of legal payment obligations accommodates a particular American payment system. The "provisional payment" exception conforms to the understanding that payment is provisional in Automated Clearing House (ACH) batch transfers,²⁸⁵ whereas the "netting and loss-sharing" exception reflects the rules of the New York City CHIPS funds-transfer system.²⁸⁶ The "provisional payment" exception, however, is overbroad. It unnecessarily covers individually-processed wholesale wire transfers²⁸⁷ as well as ACH batch transfers,²⁸⁸ which typically

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ U.C.C. § 4A-405(e). Netting involves an agreement by banks participating in a funds-transfer system to settle payments among themselves on a net basis. Nelson, *Settlement Obligations and Bank Insolvency*, 45 BUS. LAW. 1473, 1479 n.16 (1990).

²⁸² U.C.C. § 4A-405(e).

²⁸³ See U.C.C. § 4A-405(d)-(e) (§ 4A-405(e) states that nullification triggers all senders' money-back guarantees, whereas § 4A-405(d) inexplicably does not).

²⁸⁴ See *id.* (both provisions cancel any payment from an originator to a beneficiary).

²⁸⁵ U.C.C. § 4A-405 official comment 3. Multiple ACH payment instructions are combined in a single magnetic tape or comparable electronic device. See U.C.C. § 4A-107 official comment 2.

²⁸⁶ U.C.C. § 4A-405 official comment 4. CHIPS has netted participants' payment obligations for some time. The CHIPS loss-sharing rule became effective in 1990. Nelson, *supra* note 281, at 1478.

²⁸⁷ For discussion of the characteristics of wholesale wire transfers, see *supra* notes 3-5 and accompanying text.

involve consumer transactions.²⁸⁹ In order to protect both sender and receiver finality, wholesale wire transfers should be excluded from the “provisional payment” exception by either an amendment or a funds-transfer system rule. The “netting and loss-sharing” exception, on the other hand, is a hypothetical doomsday rule that never in fact should nullify sender and receiver finality. In the absence of a financial disaster, the CHIPS loss-sharing agreement should prove adequate.²⁹⁰

The comparable Model Law provisions allow a beneficiary to agree to modification of the right to payment of an order that has been accepted by a beneficiary’s bank.²⁹¹ The Model Law, on the other hand, does not authorize funds-transfer system rules to impair finality with respect to nonparticipants in a funds transfer system that have not made an enforceable agreement to be bound by the rules.²⁹²

The most troublesome exceptions to the legal finality of payment obligations in both statutes are the two instances in which Article 4A allows an originator to obtain cancellation of a payment order that has been accepted by a beneficiary’s bank by claiming that a beneficiary was not legally entitled to payment. Although it will be practically difficult for an originator to abuse these exceptions, they negate all finality, even good-money-settlement finality, and invite needless second-guessing of an originator’s decision to make a wholesale wire transfer for possibly as long as a year.²⁹³ Originators should be precluded from utilizing both vague exceptions either by a statutory amendment or a funds-transfer system rule.²⁹⁴ The extension to wholesale wire transfers of funds-transfer system rules that make payment to a beneficiary conditional upon a beneficiary’s bank’s receipt of final payment also is objectionable, but less important. Unless settlement fails, sender finality, for example, is not affected.²⁹⁵

²⁸⁸ See U.C.C. § 4A-405(d).

²⁸⁹ U.C.C. art. 4A, *supra* note 3, prefatory note at 477-78. See D. Baker & R. Brandel, *THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS* 3-10 (1988) (ACH funds transfers are neither as fast nor as secure as individually-processed FEDWIRE and CHIPS funds transfers).

²⁹⁰ Patrikis, *supra* note 32, at 253.

²⁹¹ See U.N. Model Law arts. 3, 9(1), 16(6).

²⁹² See *id.*; U.N. Model Law art. 3 comment 1.

²⁹³ There is no express statute of limitations with respect to assertion of the exceptions. A customer’s U.C.C. art. 4A duties to report discoverable improprieties within a reasonable time and to object to debit of an account within one year after the customer’s receipt of notice reasonably identifying the order would seem applicable. See *supra* notes 146-49 and accompanying text.

²⁹⁴ See *supra* notes 266-76 and accompanying text.

²⁹⁵ See *supra* notes 278-80 and accompanying text.

7. ANOTHER VIEW: JAPANESE APPROACHES TO FINALITY

7.1. *The Present Japanese Legal Context*

As befits its highly-developed economy, Japan has three domestic electronic funds-transfer systems for yen-denominated transfers — the BOJ-NET, Gaitame-Yen, and Zengin systems. BOJ-NET is managed by The Bank of Japan (BOJ), the Japanese central bank; whereas the Gaitame-Yen and Zengin systems are managed by the Tokyo Bankers' Association.²⁹⁶

There presently is no specialized Japanese legislation governing wholesale wire transfers. Disputes are resolved on the basis of general civil-law principles, contracts to the extent that they exist, and funds-transfer system rules that were not necessarily developed with dispute resolution in mind.²⁹⁷ Moreover, a noteworthy BOJ-NET rule allows postponement of the finality of wholesale wire transfers.

7.2. *BOJ-NET "New Transfer Orders in the Opposite Direction"*

BOJ-NET became operational as a funds transfer system in October, 1988. BOJ-NET provides two types of funds transfer service in which BOJ-NET functions merely as a funds-transfer system directly linking an originator's bank and a beneficiary's bank and does not issue its own payment order. There are no intermediary banks in BOJ-NET funds transfers.²⁹⁸ One BOJ-NET service enables private financial institutions to settle both individual and aggregate credits and debits through entries to their BOJ accounts. This service permits both a credit transfer to any BOJ account holder, which is initiated by a payor, and a debit transfer between offices of a sender, which is initiated by a payee.²⁹⁹ The second type of service, which is known as

²⁹⁶ BANK OF JAPAN REPORT NO. 1, JAPANESE TRANSFER SYSTEMS IN THE ERA OF FINANCIAL DEREGULATION AND GLOBALIZATION at 18-22 (July 1989) [hereinafter BOJ REPORT No. 1].

In addition to the domestic Japanese electronic funds transfer systems for yen-denominated transfers, the Tokyo branch of Chase Manhattan Bank operates a Tokyo Dollar Clearing System in which the dollar-denominated obligations of participating banks are netted in Tokyo and then settled in New York through CHIPS transfers. See Toyama, *Problems of Risk in International Electronic Fund Transfer Systems*, 2 FINANCIAL SERVICES YEARBOOK 129, 138-40 (1989).

²⁹⁷ See BANK FOR INTERNATIONAL SETTLEMENTS, LARGE-VALUE FUNDS TRANSFER SYSTEMS IN THE GROUP OF TEN COUNTRIES May, 1990 at 65 [hereinafter cited as LARGE-VALUE FUNDS TRANSFERS] ("The legal framework for BOJ-NET is provided through a private contract between the Bank of Japan (operator) and the participants. The actual operation is managed in accordance with regulations and operating manuals drafted by the Bank of Japan.").

²⁹⁸ See *id.* at 67-68.

²⁹⁹ BOJ-NET, *supra* note 21, at 5-6, 10-11.

“funds transfer with customer information,” is limited to credit transfers between BOJ accounts initiated by on-line banks, and presently has a minimum transferable amount of Yen 300,000,000.³⁰⁰ In addition to identifying an originator’s bank, a beneficiary’s bank, and an amount, a transfer order with customer information names both the customer of the originator’s bank who requested the transfer and the beneficiary, also identifying the beneficiary’s account by type and number.³⁰¹

With respect to both BOJ-NET funds-transfer services, one of the three authorized hours for settlement upon either BOJ-NET’s business day of receipt or BOJ-NET’s next business day also can be, and typically is, selected by an originator’s bank.³⁰² A beneficiary’s bank, however, must agree in advance to receive a designated-time transfer.³⁰³ Both services are subject to the prohibition upon daylight overdrafts in BOJ accounts.³⁰⁴ Deferred payment is not possible. Settlement must take place on a date and hour designated by an originator’s bank. If neither a date nor an hour for settlement are designated, BOJ-NET settles in conjunction with notifying a beneficiary’s bank of an order.³⁰⁵ Because both types of service typically are utilized on an on-line basis, a beneficiary’s bank ordinarily receives notice of a transfer at approximately the time that the notice is sent.³⁰⁶

BOJ-NET operating procedure permits cancellation of notice of an executory transfer order prior to a designated time for settlement by means of a “new transfer order in the opposite direction.”³⁰⁷ A beneficiary’s bank that has agreed to accept a designated-time settlement has no choice and must comply with a timely request for a new transfer order in the opposite direction by an originator’s bank. A beneficiary’s consent likewise is irrelevant. A settlement between a beneficiary’s bank and a beneficiary consequently would not affect an originator’s bank’s privilege to require a new transfer order in the opposite direction. The requirement that an originator’s bank obtain a beneficiary’s bank’s advance consent to a transfer with a designated-time for settlement ensures notice to a beneficiary’s bank of the transfers in which a benefi-

³⁰⁰ *Id.* at 12-13.

³⁰¹ *Id.* at 12, 50.

³⁰² *Id.* at 10-11. BOJ-NET limits the hours for settlement that can be designated to 9:00, 13:00, and 15:00. *Id.*

³⁰³ Originator’s and beneficiary’s banks are expected to agree upon either immediate settlement or settlement at a designated time. *Id.* Immediate settlement is the default choice.

³⁰⁴ *See id.* at 7.

³⁰⁵ *Id.* at 10-11.

³⁰⁶ *See id.* at 10, 12.

³⁰⁷ *Id.* at 12.

ciary should not be given unconditional credit prior to the time designated for settlement by an originator's bank.

BOJ-NET policy with respect to a new transfer order in the opposite direction requires a beneficiary's bank to cancel an executory transfer order upon an originator's bank's request prior to a designated time for settlement. The reason for the request is irrelevant. Because an originator's bank can be expected to act in accordance with an originator's wishes, the new transfer order in the opposite direction procedure effectively allows an originator to retain a unilateral power to cancel an executory transfer order until a designated time for settlement. A beneficiary that wishes to obtain earlier finality must bargain with an originator for a transfer order that does not designate a time for settlement and will be settled immediately by BOJ-NET.

The Zengin System, a Japanese domestic funds-transfer system operated by the Tokyo Bankers Association,³⁰⁸ has a different finality policy. In the Zengin System, there also are no intermediary banks in a funds transfer. Like BOJ-NET, the Zengin System is a funds-transfer system that communicates directly between an originator's and a beneficiary's bank without issuing its own payment order. A beneficiary's bank credits a beneficiary's account on the business day that a payment instruction is received but extends credit to an originator's bank, which does not settle until the next business day. Settlement is effected by calculating each participating bank's bilateral debit and credit position with respect to every other participating bank, netting, and settling the balances through entries to BOJ reserve accounts.³⁰⁹ If an originator's bank should be unable to settle, BOJ would provide settlement finality by paying the beneficiary's bank. BOJ would be reimbursed by liquidation of the collateral that the originator's bank is required to have deposited for that purpose, and, to the extent that the collateral should prove insufficient, by contributions from other participating banks under a loss-sharing arrangement.³¹⁰

Zengin System transfers can be revoked notwithstanding receipt of a payment instruction by a beneficiary's bank.³¹¹ At an originator's request, an originator's bank can send a "revoke request message." If a beneficiary has not yet received final credit, a beneficiary's bank must respond with an "acceptance and funds return" message. A beneficiary who has received final credit, however, must consent for revocation to

³⁰⁸ BOJ REPORT NO. 1, *supra* note 296, at 18.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 18-19.

³¹¹ LARGE-VALUE FUNDS TRANSFERS, *supra* note 297, at 72.

take place.³¹²

Like a BOJ-NET new transfer order in the opposite direction, prior to a beneficiary's receipt of final credit to his or her account, the Zengin System's revoke request procedure precludes sender finality. Because a beneficiary's consent to revocation is required after a beneficiary's bank has granted a beneficiary final credit,³¹³ the revoke request procedure, however, does not inhibit the granting of final credit to a beneficiary. By giving an originator's bank an unqualified right of revocation, the BOJ-NET transfer order in the other direction procedure, on the other hand, does deter a beneficiary's bank from granting a beneficiary final credit until the time designated for settlement by an originator's bank.³¹⁴

The finality policy of Article 4A and the Model Law, particularly the latter, is more comparable to the finality policy of BOJ-NET than to the finality policy of the Zengin System. Specification of identical execution and payment dates can be utilized under Article 4A and the Model Law to achieve the equivalent of a BOJ-NET designated day for settlement.³¹⁵ If an originator's bank also is a beneficiary's bank, which is an atypical situation in the United States,³¹⁶ an originator's unilateral power to order a beneficiary's bank to stop payment is preserved explicitly by a designated payment date. Prior settlement between a beneficiary's bank and a beneficiary is irrelevant.³¹⁷ An originator's bank that is an executing bank is required to comply with a designated execution date rather than a payment date.³¹⁸ But both statutes allow an executing bank to be guided by a designated payment

³¹² See *id.*

³¹³ Although Zengin System revoke request messages can be sent even after calculation of the interbank settlement for a transfer, an originator's bank loses the power to send a unilateral stop payment order prior to calculation of the interbank settlement when a beneficiary receives unconditional credit for a Zengin transfer order.

³¹⁴ Because a beneficiary's bank must comply with a request for a new transfer order in the opposite direction that is made prior to a designated time for settlement, the suggestion in the BOJ-NET rules that new transfer orders in the opposite direction should be confined to correction of mistakes does not limit an originator's bank's power to send a unilateral stop payment order.

³¹⁵ Although U.C.C. Article 4A and the U.N. Model Law refer to an "execution date" and a "payment date" in the sense of the day upon which a receiving bank is to act, (see U.C.C. § 4A-301(b), §4A-401; U.N. Model Law art. 2(k), (m)), and the BOJ-NET rule also allows designation of one of three possible hours for settlement, see *supra* note 302 and accompanying text, a funds-transfer system rule could authorize designation of an hour for transfer under the two statutes. See U.C.C. § 4A-501(b); U.N. Model Law art. 16(7).

³¹⁶ Patrikis, *supra* note 32, at 227.

³¹⁷ See *supra* notes 192-94, 199-204 and accompanying text.

³¹⁸ U.C.C. § 4A-301(b); U.N. Model Law art. 10(1)(a).

date if an execution date is not also designated.³¹⁹ An executing bank, moreover, is obligated to issue an order that conforms to the order being executed³²⁰ so that an order issued by an originator's bank that is an executing bank should contain the execution and payment dates that were designated by an originator,³²¹ as should the orders issued by any subsequent intermediary executing banks.³²² Unless an error is made by an executing bank, a beneficiary's bank consequently should be instructed by its sending bank to comply with the payment date designated by an originator and should not accept the payment order that it receives prior to that date. Designating the same date as both the execution date for all executing banks and the payment date for a beneficiary's bank accordingly permits an originator to preserve the unilateral power to stop payment until a designated payment date.

Premature acceptance by an executing bank or a beneficiary's bank does not alter an originator's unilateral power to stop payment under the Model Law. In the absence of contractual irrevocability, the Model Law preserves the power to revoke until a designated execution or payment date even though acceptance occurs earlier.³²³ Under Article 4A, premature acceptance by any receiving bank other than an originator's bank, on the other hand, terminates an originator's unilateral power to stop payment.³²⁴ A funds-transfer system rule can negate the significance of premature acceptance by an executing bank, but not by a beneficiary's bank.³²⁵ Use of a BOJ-NET designated-time settlement or designation of identical Uniform Act and Model Law execution and payment dates in order to preserve an originator's unilateral power to stop payment until settlement essentially replaces both sender finality and receiver finality with good-money settlement finality.³²⁶ BOJ-NET and the Model Law recognize no exceptions to the finality of a good-money-settlement. Article 4A, however, allows cancellation of an acceptance by a beneficiary's bank in the four situations that have been

³¹⁹ See U.C.C. § 4A-301(b); U.N. Model Law art. 10(1)(b).

³²⁰ U.C.C. § 4A-302(a)(1); U.N. Model Law art. 7(2).

³²¹ See *id.*

³²² *Id.*

³²³ U.N. Model Law art. 11(1)-(2).

³²⁴ See U.C.C. § 4A-209(d), § 4A-209(d) official comment 9, which make ineffective only premature acceptance by an originator's bank.

³²⁵ See U.C.C. § 4A-209(d), § 4A-211(c)(2), § 4A-211(h), § 4A-501(b) (unless U.C.C. Article 4A provides otherwise, a funds-transfer system rule can supersede the statute with respect to the rights and obligations of banks participating in the system and also can indirectly affect a system-nonparticipant; funds-transfer system rules, however, are prohibited from increasing the instances in which orders that have been accepted by a beneficiary's bank can be cancelled).

³²⁶ See *supra* notes 35-37 and accompanying text for discussion of the good-money settlement concept.

previously discussed, notwithstanding a prior good-money settlement.³²⁷

The BOJ-NET approach is a credible alternative to three of these Article 4A exceptions to the finality of an acceptance by a beneficiary's bank — the existence of a duplicate order, a beneficiary's lack of entitlement to any payment, and overpayment of a beneficiary.³²⁸ In lieu of these statutory exceptions, BOJ-NET allows an originator a maximum of two business days³²⁹ to check for transmission errors and for problems in the transaction that gave rise to a transfer. Delaying acceptance by a beneficiary's bank, on the other hand, should not affect a purported originator's ability to obtain cancellation of an unauthorized order — the fourth Article 4A exception to finality.³³⁰ Notwithstanding the exercise of due care, a purported originator may not discover an unauthorized order within two business days of its receipt by a beneficiary's bank.

8. CONCLUSION

As has been discussed, if a deferred payment date has not been fixed and a beneficiary's bank designated by an originator has accepted a conforming order, both Article 4A and the Model Law impose sender finality, but only Article 4A imposes substantial receiver finality.³³¹ An order accepted by a beneficiary's bank designated by an originator, moreover, is conforming if it names the beneficiary designated by an originator. A deviation from the amount of an originator's payment order does not necessarily preclude finality.³³² Article 4A also reasonably extends both sender and receiver finality to situations in which a designated beneficiary's bank accepts an order conforming to that of senders other than an originator. Even though an originator is excused from liability by the money-back guarantee, subsequent senders whose orders conform to the order accepted by a beneficiary's bank should be bound.³³³

Under both statutes, designation of identical execution and payment dates by an originator can preserve an originator's unilateral

³²⁷ See *supra* notes 256-76 and accompanying text.

³²⁸ See U.C.C. § 4A-211(c)(2).

³²⁹ The day designated for settlement must be either the BOJ-NET business day upon which a transfer order is sent or BOJ-NET's next business day. See *supra* notes 302-03 and accompanying text.

³³⁰ U.C.C. § 4A-211(c)(2).

³³¹ See *supra* notes 104-13, 231-42 and accompanying text.

³³² An erroneous reduction in the amount of an originator's payment order that is not corrected, however, can result in pro tanto reduction of an originator's liability. See *supra* notes 243-50 and accompanying text.

³³³ See *supra* notes 251-55 and accompanying text.

power to stop payment until the payment date.³³⁴ In the absence of a contrary agreement, identical instructions concerning execution and payment and contractual irrevocability to the extent that it is effective,³³⁵ both statutes, however, terminate the unilateral power to stop payment upon acceptance by an originator's bank.³³⁶

Both statutes also differentiate between the time at which a sender loses the power to issue a unilateral stop payment order and the time at which a sender's legal payment obligation becomes final. If interim irrevocability exists, it occurs first and terminates when a sender's legal payment obligation either becomes final or is excused by the money-back guarantee.³³⁷ Both statutes base interim irrevocability upon issue of an implementing order by an originator's bank that is an executing bank, but the Model Law also allows a special agreement between a sender and an executing bank to create interim irrevocability.³³⁸ Although both indicia of interim irrevocability are objective circumstances, it ordinarily will be easier for an originator who has not agreed to the irrevocability of his or her payment order³³⁹ to ascertain whether an originator's bank has properly executed an order than whether an intermediary executing bank has agreed to irrevocability with its sender. Both statutes also base the legal finality of all senders' payment obligations upon the objective circumstances that constitute acceptance by a beneficiary's bank.³⁴⁰ Prior American and United Kingdom judicial decisions, on the other hand, applied conflicting, nonuniform tests concerning the relationship between interim irrevocability and the legal finality of senders' payment obligations, and also concerning the events that created interim irrevocability and sender finality.³⁴¹

Neither statute requires either settlement finality or a good-money-settlement for legal finality. Article 4A, however, negates all initial statutory finality with respect to a beneficiary's bank that is a participant in a funds-transfer system that nets obligations multilaterally and has a loss-sharing agreement that fails to achieve systemic settle-

³³⁴ See *supra* notes 315-25 and accompanying text.

³³⁵ Interim contractual irrevocability is recognized only by the Model Law. See *supra* notes 166-67 and accompanying text.

³³⁶ U.C.C. § 4A-211(c); U.N. Model Law art. 11(1)-(2).

³³⁷ See *supra* notes 162-69 and accompanying text.

³³⁸ See *supra* notes 164-67 and accompanying text.

³³⁹ An agreement that a payment order is irrevocable is meaningful only under the Model Law. See *id.*

³⁴⁰ See *supra* notes 221-27 and accompanying text.

³⁴¹ See Geva, *The Evolving Law of Payments by Wire—An Outsider's View of Draft UCC Article 4A*, 14 CAN. BUS. L.J. 186, 188-93, 226 (1988) (draft Article 4A settles a "major uncertainty").

ment.³⁴² Both statutes also allow a funds-transfer system rule to alter the statutory definition of acceptance to make receipt of a good-money settlement a prerequisite to acceptance by a beneficiary's bank.³⁴³ With respect to funds-transfer systems that allow the transmission of an executory order for a transfer upon a future business day,³⁴⁴ BOJ-NET's experience with its new transfer order in the opposite direction procedure validates a funds-transfer system rule that, except with respect to unauthorized orders, allows originators to limit future transfers to good-money-settlement finality.³⁴⁵

The legal rules governing wholesale wire transfers should be as precise and predictable as possible, but finality is not a prerequisite of clarity. As long as the receiving banks and the beneficiary involved have adequate notice of the choice that has been made and can take precautions to avoid loss, an unambiguous lack of finality for a relatively short period is arguably preferable to Article 4A's statutory "finality", subject as it is to unwise statutory exceptions. Because a funds-transfer system rule that limits the statutory justifications for cancelling an order that has been accepted by a beneficiary's bank is consistent with Article 4A policy,³⁴⁶ this type of rule could be adopted under the present Official Text of Article 4A in order to cure the overbroad statutory exceptions.

Model Law finality policy also should be reconsidered. In leaving a beneficiary's rights vis-à-vis a beneficiary's bank to other law,³⁴⁷ the Model Law goes beyond a rejection of receiver finality prior to a beneficiary's bank's receipt of settlement.³⁴⁸ Even a beneficiary's bank that both has accepted a payment order and has received settlement is not subject to sanctions under the Model Law for failing to pay a beneficiary!³⁴⁹ A beneficiary's bank's acceptance, however, terminates both

³⁴² U.C.C. § 4A-405(e).

³⁴³ See U.C.C. § 4A-209 official comment 3; U.N. Model Law arts. 3, 6(2), 8(1), 16(7).

³⁴⁴ BOJ-NET's two-business day policy is less common than requiring same-day transmission and settlement. It can be destabilizing for large transfers to remain provisional for an extended period. Until finality exists, the participants in a large transfer can be adversely affected by financial difficulties at both a participating and a nonparticipating financial institution. 1986 Annual Report, *supra* note 8, at 29. FEDWIRE, the American electronic funds-transfer system operated by the Federal Reserve System, for example, differs from BOJ-NET in requiring same-day transmission and settlement. See FEDWIRE REPORT, *supra* note 2, at 10.

³⁴⁵ The sole exception to finality should be an unauthorized payment order. See *supra* notes 328-30 and accompanying text.

³⁴⁶ See *supra* notes 209-10 and accompanying text.

³⁴⁷ See *supra* notes 239-42 and accompanying text.

³⁴⁸ Receiver finality exists prior to settlement. See *supra* notes 33-37 and accompanying text.

³⁴⁹ See U.N. Model Law arts. 9(1), 16(6).

the money-back guarantee and any unilateral power to stop payment that has been preserved, and, in the absence of a special agreement, also discharges a debt of an originator for which a transfer was made.³⁵⁰ The Model Law thus permits creation of a situation in which an originator can not revoke a transfer of funds, and, indeed, may not wish to do so as his or her debt has been deemed paid. A beneficiary, however, may not have received unconditional credit and may not be entitled to require it. Subject to any privileges of setoff that exist under other law, the Model Law should impose liability for interest upon a beneficiary's bank that has received settlement for an accepted order yet failed to give a beneficiary unconditional credit upon the payment date designated by an originator. If no payment date has been designated or a beneficiary's bank did not receive an order until after a designated date, liability for interest should begin upon either the business day upon which settlement is received or the business day of acceptance, whichever occurs last.³⁵¹ Beneficiaries' banks otherwise would have an incentive to delay making unconditional credit available to a beneficiary in order to earn interest upon transferred funds and the prompt and certain payment that electronic funds transfers make possible could be jeopardized. In view of the importance of wholesale wire transfers to commercial and financial transactions, this delay should be neither encouraged nor tolerated.

³⁵⁰ See U.N. Model Law arts. 8(1)(a), 11(2), 13(1), 17(1)-(2).

A beneficiary's bank can reject an unaccepted order notwithstanding receipt of settlement. U.N. Model Law art. 8(1)(a),(2). In order to preclude constructive acceptance, notice of rejection, however, must be given upon the date of receipt of an order or the payment date designated by an originator, whichever is later. *Id.*

³⁵¹ Unlike U.C.C. Article 4A, which ordinarily conclusively deems receipt of final settlement from a bank through a Federal Reserve Bank or a funds-transfer system to give rise to acceptance, the Model Law does not equate receipt of settlement with acceptance. The Model Law allows a beneficiary's bank to reject any unaccepted order. See *supra* notes 224-27 and accompanying text.