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Joseph H. Sommer

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WHERE IS A BANK ACCOUNT?

JOSEPH H. SOMMER*

* Counsel, Federal Reserve Bank of New York, 33 Liberty Street, New York, N.Y. 10045. Telephone: (212) 720-8982; e-mail: joseph.sommer@ny.frb.org. A.B., Brown University; Ph.D., Columbia University; J.D., Yale University. The author would like to thank Annette Crowley, Joyce Hansen, Geoffrey Miller, Mark Ramseyer, and discussants at the University of Pennsylvania for their comments and suggestions, without thereby implicating them in any errors. He would also like to thank the Institute for Monetary and Economic Studies of the Bank of Japan for providing a visiting scholarship that enabled him to complete this work. The views expressed in this Article do not necessarily reflect the views of the Bank of Japan, the Federal Reserve Bank of New York, or any component of the Federal Reserve System. This Article is dedicated to the memory of Max Sommer.

INTRODUCTION

International law seems to generate as much scholarship as case law. This is certainly true for the international law of banking, at least since 1980.[1] So why another article in international banking law? This Article is foundational. It is not grounded in international law, but rather in the foundation of banking law: the law of money. The commentary of the last fifteen years has sought to answer the question, "Where is money?" before tackling the prior question, "What is money?" The first question is intractable without answering the second, and there has been very little recent scholarship on the legal nature of money. This Article seeks to bridge the gap between the law of money and the law of international banking.

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1. Appendix A contains an extensive bibliography of the United States law review literature. The most compendious reviews of the recent law are in Richard Herring & Friedrich Kübler, *The Allocation of Risk in Cross-Border Deposit Transactions*, 89 NW. U. L. REV. 942 (1995), and in EDMUND M.A. KWAW, GREY AREAS IN EUROCURRENCY DEPOSITS AND PLACEMENTS: THE NEED FOR AN INTERNATIONAL LEGAL REGIME (1994). The historical development of this field of law can be found in Jefferson B. Fordham, *Branch Banks as Separate Entities*, 31 COLUM. L. REV. 975 (1931), and in Patrick Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL'Y INT'L BUS. 903 (1979). Two other law review articles are particularly noteworthy: Peter S. Smedresman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 733 (1989), and Margaret E. Tahyar, Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594 (1986).

Before discussing the foundational problems of money, a few words about the case law are in order. The international banking cases focus on two primary areas: attachment and expropriation. Courts have long understood attachment and have treated the cases predictably. A litigant would go to a United States court, seeking to attach a foreign bank account. The defendant bank would argue—successfully—that a United States court had no business attaching a foreign account.[2] Courts and lawyers generally understood the rationale for this result. If United States courts started attaching foreign bank accounts, the court of the foreign country in which the account was located might ignore the attachment and force the foreign bank to pay the original depositor anyway. This is double liability, which is generally understood to be poor policy.[3]

The expropriation cases are inherently more episodic and far more poorly understood. In the aftermath of war, revolution, or domestic crisis, a government would expropriate or freeze a bank deposit in a foreign bank, often a branch of a United States bank. Aggrieved depositors would sue the bank in the United States, often in the court located in the domicile of the head office of the bank. The bank would argue that the United States court had no business enforcing repayment of foreign deposits. In the old days, the plaintiff would lose.[4] These old foreign expropriation cases differed from the attachment cases in only one respect: Nobody could justify the result.[5]

Since around 1970, courts have noticed this lack of rationale in expropriation cases.[6] Although plaintiffs continue to lose in attachment cases, the expropriation cases have changed. Since 1975, many foreign depositors in expropriation cases have won, although some have lost on nearly identical facts.[7] The prospect of judicial relief has brought on more plaintiffs and more cases. These cases, in turn, have engendered an extraordinary volume of both statutory activity[8] and

2. *See infra* note 250.

3. See *infra* Part II.A.2 for a discussion of the problems associated with double liability.

4. *See* Herring & Kübler, *supra* note 1, at 957-68.

5. *See* Tahyar, *supra* note 1, at 614-15.

6. *See, e.g.*, Digitrex, Inc. v. Johnson, 491 F. Supp. 66, 69 (S.D.N.Y. 1980) (mem.).

7. *Compare* Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 651 (2d Cir. 1984) *with* Perez v. Chase Manhattan Bank, N.A., 463 N.E.2d 5, 11 (N.Y. 1984). In both cases, Cuban nationals brought suit against the American bank after the Cuban government had purported to expropriate their deposits. These factually indistinguishable cases were decided the same week—the bank won in the New York Court of Appeals but lost in the Second Circuit.

8. *See, e.g.*, 12 U.S.C. § 633 (1994) (limiting banks' liability on foreign accounts).

scholarly commentary.[9] The commentary has tried to explain the case law; the statutes have tried to reverse the judicial trend toward providing relief. Neither effort has been successful. The courts have ignored the statutes,[10] and the commentary has been too profuse for an obscure corner of commercial law.[11] The result: complex statutes, complex case law, and complex commentary. In these foreign branch expropriation cases, courts and commentators have had a hard time understanding where the money is, or who should get it.

Where is the money? This is a hard question. Bank money is ethereal—an electronic blip. Legally, bank money is an intangible chose of action. "The situs of intangible property is about as intangible a concept as is known to the law."[12] It is difficult enough to understand precisely *what* bank money is, much less *where* it is. And even if we understand where bank money is located, why should its location decide cases? Where is the money and why should we care? A coherent answer to these questions will resolve many of the problems of international banking law.

Being foundational, this Article gets back to basics. Part I is as basic as possible: What is money, and where is it? These very basic questions require a triple analysis: doctrinal, economic, and social. Legal doctrine sets the basic ground rules that transform various kinds of communications into bank liabilities—the legal stuff of bank money. This Part explains these legal ground rules through both instrumental and social analyses. The social analysis of business law set forth in this Article is unconventional, but necessary. Nothing can be a medium of exchange without an underlying social consensus that the medium of exchange is acceptable. (If this statement seems esoteric, try passing foreign currency at a newsstand.) The law of money must maintain this social consensus, as well as further the usual instrumental goals of business law. To understand the appropriate legal doctrine for money, we must understand the need for social coherence, as well as the instrumental goals benefitting the counterparties alone.

Part I concludes that money calls for an unusual kind of law: unusually precise and clear. Bank money is based on communications that both create and draw from a shared social consensus. Because there are no external referents for bank communications, almost all

9. *See supra* note 1 and Appendix A.

10. *See, e.g., infra* note 150 and accompanying text.

11. *See* Appendix A.

12. Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714 (5th Cir. 1968).

possible outcomes must flow from the communications themselves. The social consensus that we call money is delicate, and it will unravel without tremendous clarity and predictability. This need for clarity applies just as much to the rules for localizing bank liabilities as it applies to the other ground rules of payment law. Part I does not provide a rule for locating bank money (this comes later). However, Part I argues that the location of bank money has no meaning but as the outcome of a conflict-of-law analysis.

Part II discusses the need for locating bank money—that is, the need for a conflicts law of international banking. This Part is inserted for logical completeness; it contains nothing new and may be skipped by readers who do not need persuading. The flow of the argument resumes in Part III, which builds on the theoretical treatment of Part I. Part III discusses what may be the key problem in international banking case law: the contrast between the highly formalistic (even nominalistic[13]) substantive law of money and the conflicts law of money. Although modern United States conflicts law is steeped in legal realism, Part III shows, through analysis of two cases, that a realistic conflicts law simply cannot coexist with a nominalistic substantive payment law. Part III concludes with a discussion of nominalistic law, but does not itself develop any nominalistic conflicts rules.

Part IV contains the surprise. These nominalistic conflicts rules need not be developed. They already exist, independent of the case law and ignored by the commentary. The recent revisions to the Uniform Commercial Code (U.C.C.) now contain a detailed and satisfactory treatment of the commercial law of international banking. The "bankers'" sections of the U.C.C.—Articles 4, 4A, 5, and 8—all contain very similar rules precisely locating bank liabilities.[14] Most of these rules were not consciously generated as "nominalistic conflicts rules";

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13. Although it is a significant term of art in the law of money, the word "nominalism" is not used here in its technical legal sense. Instead, this term is used in its philosophical sense—ascribing reality to symbols. *See* A.D. Woozley, *Universals*, *in* 8 THE ENCYCLOPEDIA OF PHILOSOPHY 194, 203-04 (Paul Edwards ed., 1967) ("On a realist view certain objects are *called* 'tables' because they *are* tables . . . . On an extreme nominalist view they *are* tables only because they are *called* 'tables,' and no answer at all can be given to the question why certain objects are (or are to be) called 'tables' and others not.").

In the law of money, "nominalism" refers to courts' insistence on awarding judgment in nominal money terms. *See* F.A. MANN, THE LEGAL ASPECTS OF MONEY 271-310 (5th ed. 1992) (discussing "nominalism" in the law of money). Monetary nominalism ignores the changes in purchasing power of a currency that occur between the time of agreement and the time of judgment. If a currency has collapsed completely, a nominalistic judgment is worthless.

14. *See* U.C.C. art. 4 (1995) (Bank Deposits and Collections); *id.* art. 4A (Funds Transfers); *id.* art. 5 (Letters of Credit); *id.* art. 8 (Investment Securities).

they were the practical responses of banking lawyers to the recent indeterminacy of the case law.

These new U.C.C. rules satisfy a felt need. They do not, however, satisfy an articulated need. The U.C.C. conflicts rules do not articulate their own rationale, and previous scholarly commentary has not yet provided one. Parts I-IV will not only clarify the content of the U.C.C. rules, but more importantly, will provide a clear idea of *why* the conflicts laws of international banking are what they are. International banking law has been littered with the bleached bones of statutes and doctrines without widely understood rationales. Statutes are too often ignored or distinguished away by judges, especially when they are discontinuous with preexisting law.[15] This Article seeks to spare the new U.C.C. sections the same fate as past statutes.

I. THE MEANING OF LOCALIZED LIABILITIES

This Part establishes the analytic framework developed throughout the rest of this Article. Subpart A discusses the legal meaning of a bank liability, regardless of its location. This discussion is a formalistic recapitulation of accepted law and contains no surprises for banking specialists.

The fun begins with subpart B, which asserts that these bank liabilities are money. Although this assertion seems innocent to most of us who have successfully written a check, it is inconsistent with the U.C.C. The U.C.C. views only currency as money, and bank liabilities as a mere right to currency. In other words, payment law does not recognize our payment system! The U.C.C., however, is not an ostrich, pretending that a real problem does not exist. Instead, it is trying to prevent a very real problem: an infinite regress. If bank liabilities—debts—are money, then the monetary payment of a debt is satisfied by the monetary payment of a debt.

Fortunately, this infinite regress can be broken by what amounts to a leap of faith: an epistemological emphasis on the social construction of money. To phrase these words more succinctly, money *is* what payment systems *do*. The legitimacy of money, therefore, arises from our acceptance of the underlying payment system rules. These rules are nothing more than the homely law of bank liabilities and the law governing the transfer of these liabilities. As long as we collectively accept these rules, the infinite regress is not a real problem. If we do not collectively accept these rules, even currency is worthless.

15. *See infra* note 150.

The rules governing bank money operate on nothing but communications: Money is (carefully regulated) talk. Subpart C shows that the location of electronic bank monies can have no existence outside these communications. Bank money exists when we say it exists, and it exists where we say it exists. Therefore, the location of bank money can only have significance as a conflict-of-law rule.

A. *What Are Liabilities?*

First things first: What is a bank liability, putting problems of location aside? This question has a hornbook answer: A bank liability is a license to sue and collect. If I have a deposit with a bank, I have a right to judgment against the bank for the value of the deposit, if the appropriate conditions are met. If I am the beneficiary of a letter of credit, I have a right to judgment if I can timely present conforming documents.[16] If I possess a bank's certified check, I have a right to judgment if I present the check, and it is dishonored.[17] In other words, a bank liability is nothing more than the right to go to court and obtain a judgment against the bank for damages. It is not a property right to specific bank assets; rather, it is a contract right to a judgment for money.[18]

An especially important kind of bank liability is a liability for a "predeterminate"[19] sum created by a communication. This is not the only kind of bank liability. For example, a bank may commit a tort: a noncommunicative event that does not lead to predeterminate damages. But the liabilities of interest in this Article result from communications and are denominated precisely, in terms of a monetary unit of account. A checking account liability is a good example.

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16. *See* U.C.C. §§ 5-108, 5-111 (1995).

17. *See id.* § 3-411.

18. *See, e.g.*, Citizens Bank v. Strumpf, 116 S. Ct. 286, 290 (1995) (holding that a bank's temporary refusal to pay its debt to a debtor upon demand was not an exercise of a set-off right and that such "administrative hold" did not violate stay provisions); Libyan Arab Foreign Bank v. Bankers Trust Co., [1988] 1 Lloyd's Rep. 259, 271 (Q.B. 1987) (*LAFB*) ("It is elementary, or hornbook law to use an American expression, that the customer does not own any money in a bank."). The hornbooks concur with the cases. *See, e.g.*, 1 ANN GRAHAM, BANKING LAW § 9.03 (1997) (describing the contract between banks and depositors); KWAW, *supra* note 1, at 86 (outlining the mechanics of eurocurrency deposits); 5A MICHIE ON BANKS AND BANKING 1-22 (1994) (discussing the relationship between banks and depositors).

19. This Article must coin the word "predeterminate" to capture the idea that the damages a court would award in the event of breach are precisely known by both parties in advance of a judgment. A sum can be predeterminate without being predetermined, as with a variable interest rate note.

The communication creating this license to sue could be that of a depositor, tendering a check over the window and receiving a passbook entry. The communication need not be tangible, like a passbook or check, for even keystrokes on an automated teller machine (ATM) count as communications. Nor is a direct communication between the customer and the bank necessary. For example, a customer's employer may wire the customer's pay to her bank. The bank's resulting liability to the customer is the same, although the communicative event did not directly involve the customer. Similarly, a communicative event creating (or at least transferring) a bank liability need not involve any bank action. Transfer of a bank-issued negotiable instrument creates a bank liability to the transferee without any intervention by the bank.

Predeterminate liabilities may be denominated in any accepted units of account: dollars, drachmas, or the like. The only constraints are that the unit of account be recognized as some kind of money, and that the liability be for a predeterminate quantity. These predeterminate liabilities represent a license to execute a judgment against the bank's general assets, perhaps triggered by some formal requirement such as dishonor and protest. Only the details of the licenses differ. The licenses to sue and collect on time deposits, demand deposits, letters of credit, and foreign currency obligations are all triggered by somewhat different circumstances and convey somewhat different consequences. But their basic formal legal structure is the same.[20]

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20. U.C.C. Revised Article 8 securities entitlements must be excluded from this list of liabilities. *See* U.C.C. §§ 8-501 to -511 (1995). Although similar to conventional bank liabilities, they differ in two key ways. First, the Article 8 customer has the right to compel delivery of certificated securities, *id.* § 8-508, with execution as a backstop remedy. Second, the bank (or other securities intermediary) is obligated to keep a fungible bulk of specific securities on its books, rather than general assets. *Id.* § 8-504; *accord* Charles W. Mooney, Jr., *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 CARDOZO L. REV. 305, 403-05 (1990) (examining issues concerning property rights in modern securities markets and suggesting reforms of current legal regimes); James Steven Rogers, *Negotiability, Property, and Identity*, 12 CARDOZO L. REV. 471, 484-501 (1990) (exploring the implications of fungibility by examining the rules of property applied to fungible non-negotiable property such as goods). These different legal characteristics do not prevent Article 8 securities entitlements (or even securities) from being used as money, and such "warehouse receipt" money (i.e., commodity money, with the commodity evidenced by title documents) has been used in the past. *See* BLACK'S LAW DICTIONARY 1584 (6th ed. 1990). However, it is a less effective form of money. Different issues are, in effect, different monies. The fungible bulk requirement prevents liquidity transformation and bank creation of money, and the unit of account is limited to a single issue of securities.

Of course, this legal formalism is not the living law. Indeed, it appears almost devoid of business reality. Nobody would ever deal with a bank if bank liabilities were only extinguished by formal execution of judgment. Instead, when a bank is confronted with a valid license to sue and collect on this kind of liability (e.g., one of its certified checks), it almost invariably "settles" the claim at one hundred percent, as soon as the claim is made. But it is only these *payment* liabilities—communicative and predeterminate—that are special.[21] Banks are as litigious about their ordinary liabilities as anybody else.

In other words, a bank confronted with a payment liability does not resist: It "pays." A bank that does not pay its liabilities when payment is expected will soon be out of the business of banking. Banks will even pay liabilities that are not formally due, if their customers expect them to do so. A check drawn on a NOW account, for example, is technically a time draft that does not obligate a bank to pay on demand. However, this time-draft characteristic exists only because of regulatory constraints,[22] and banks pay these instruments on demand, because banks and their customers view a NOW draft as a payment instrument.

"Payment" is the connection between the extremely formalistic law of predeterminate, communicative bank liabilities and banking practice. The connection between bank liabilities and payment requires close examination.

21. Before the recent revisions, the U.C.C. assumed that banks' reputational incentives were enough to preserve the reliability of the payment system. Generally, this is true, but a bank may occasionally insist on its formal right to legal process, without regard to the reputational consequences. Before the revisions, the U.C.C. merely assessed damages—ordered payment—for banks that refused to pay voluntarily. (Checks were an exception. Banks that refused to pay checks without good reason could be assessed consequential damages. *See* U.C.C. § 4-402 (Pre-Amendment (1990)).) The new U.C.C. has considerably expanded the additional liability of banks who do not fulfill their clear obligations. *See* U.C.C. § 3-411 (1995) (allowing consequential damages for a failure to pay on certified or cashier's checks); *id.* § 4A-305 (allowing consequential damages and fee-shifting under some circumstances); *id.* § 5-111(e) (imposing mandatory fee-shifting).

22. As a matter of law, demand deposits cannot pay interest. 12 C.F.R. § 217.3 (1997). This could be construed as a prohibition on interest-bearing transaction accounts. After all, demand deposits are the only legally enforceable way to run a reliable payment system. However, demand deposits are not necessary, if the paying bank is willing—as a matter of business course—to waive its right to insist on advance notice of withdrawal. Thus the NOW account, an interest-bearing time deposit that banks choose to pay on demand. *Cf.* 12 C.F.R. § 204.2(e)(2) (adding NOW accounts to the definition of "transaction accounts" subject to reserve requirements).

B. Liabilities, Payments, and Money

1. Liabilities and Payments.—Although this Article's definition of bank liabilities is standard, its definition of payment is not. "Payment" is clearly—and wrongly—treated in law as something requiring the tender of currency, or at least the satisfaction of a right to receive currency.[23] This law is clearly inconsistent with market practice. The honor of a check seldom involves dollar bills; commercial wire transfers almost never do.

This Article takes a different approach, one more consistent with practice. For our purpose, "payment" is the result of extinguishing a bank liability.[24] Because the bank liabilities are seldom extinguished by the execution of a judgment, a payment is best viewed as a settlement of the customer's right to collect a judgment from the bank on the liability. This definition is not strained: It is what banks do. It concentrates more on the mechanism than the purpose of a payment system, but it is the mechanism of payment that involves the law of bank liabilities.

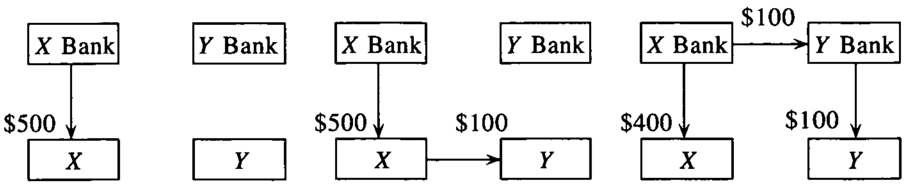
Consider a payment by check. *X* pays *Y* by delivering *Y* a check drawn on *X*'s bank. *Y* deposits the check in *Y*'s bank. After a collection process, *Y* is paid. The collection process uses credit transfers among several banks to transform *X*'s bank's liability to *X* into *Y*'s bank's liability to *Y*. A wire transfer leads to the same result, although *X* initiates the payment order with its bank, rather than delivers the payment order to *Y*. Such a wire transfer is illustrated in Figure 1. *X* discharges its debt to *Y* by ordering its bank to transform *X*'s bank's debt to *X* into *X*'s bank's debt to *Y*'s bank. *X*'s bank complies. *Y*'s bank is in turn instructed to credit *Y*'s account, based on the debt owed by *X*'s bank to *Y*'s bank. This discharges the original obligation between *X* and *Y*, replacing it with *Y*'s bank's debt to *Y*. *X*'s license to judgment against its bank is therefore novated by the payment mechanism into *Y*'s license to judgment against its bank. In the process of novation, the initial liability of *X*'s bank to *X* is extinguished.[25] The banks' net balance sheets are unaffected by this process, but in the end, a bank debt to *X* has been transformed into a bank debt to *Y*.

23. *See infra* note 28. The one notable exception to this rule in American law is U.C.C. § 4A-406(b) (1995), discussed below. *See infra* notes 26, 44 and accompanying text.

24. Currency is a special case. *See infra* text accompanying notes 28-30.

25. *X* and *Y* can share the same bank, in which case the process consists of a single bank's book-entry, in a so-called "on-us" transaction.

FIGURE 1



1. *X* has a $500 account with its bank.

2. *X* contracts a $100 debt to *Y*.

3. *X* pays *Y* through bank credits, leaving *X* with a $400 account and *Y* with $100 payment.

A bank payment, therefore, is a shifting of bank liabilities through a highly stereotyped communications process. Indeed, we can view most of the commercial law of checks or wire transfers as regulation of the speed, reliability, and integrity of this process.

The *purpose* of the payment system is admittedly not the shifting and extinction of bank liabilities, but rather discharging money-denominated obligations among end-parties. But the payment system *functions* by the extinction and novation of bank liabilities. Most payment law takes the purpose of payment systems for granted, concentrating instead on the communications that extinguish and novate bank liabilities. For example, Article 4A of the U.C.C.—governing wire transfers—has many sections dealing with data security, obligations among intermediaries, and the like. It contains only one section defining when and how a wire transfer discharges the underlying obligation among the parties.[26]

Payment is therefore a circular process. Payments function by shifting liabilities—novating the payor's license to judgment against its bank to a payee's license to judgment against its bank for a predeterminate measure of damages. The business of banking is a constant trade of licenses to judgment, licenses almost never exercised in court. We call these traded licenses to judgment against banks "money." It is time to examine the connection between the bank-intermediated payment system and money.

2. *Payments and Money: Breaking the Circle.*—This Article has defined a payment as the result of extinguishing a bank liability. This definition has led to a complementary relationship between payments and money. Payments are the mechanics of money; money is the purpose of payments. Money *is* what payments *do.* Understanding money

26. *See* U.C.C. § 4A-406(b).

requires understanding the corresponding payment system. But the converse is also true: Payment systems cannot be understood without understanding money.

This statement should be surprising. The discussion to this point has established a hierarchy, with the technical act of payment subordinated to its higher-order purpose: money. Generally, lower-level conceptualizations do not refer to the upper level, and can be explained without them. For example, physics can be understood without reference to chemistry; economics can be understood without reference to social theory. It is only the upper-level conceptualization that *needs* the lower level. However, the mechanics of the payment system cannot be understood without reference to money, which is, in turn, the product of the payment system. The mechanics of payment, without reference to its monetary purpose, involves an infinite regress, which can only be broken with the concept of money.

This is apparent in bank-intermediated payments. As discussed above, a bank payment is a novation of a right to sue a bank and collect a judgment. If this right is exercised (as opposed to being transferred to someone else), a suit is brought, a judgment is obtained against a bank, and the judgment is subsequently executed. In execution, the sheriff seizes and sells bank assets for a payment large enough to satisfy the judgment. Because the goods are sold for money, the payee is in precisely the same position as where the process began—the holder of a right to sue another bank for judgment. The payee can never get anything real. Bank money is a right to sue for the value of assets measured by a unit of account that is operationally the right to sue for the value of assets measured by a unit of account that is operationally . . . . If we examine the mechanics of the payment system too closely, it evanesces.[27]

To break this circle, we could treat bank money as a claim to "real" money—gold or currency money such as dollar bills. This approach, which can be called "currency fundamentalism," seems better than an endless chain of licenses to collect money judgments—licenses that can never result in ultimate satisfaction. It is also the

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27. Perhaps only Hayek has taken note of this issue. *See* F.A. HAYEK, DENATIONALISATION OF MONEY: THE ARGUMENT REFINED 43 (2d ed. 1978). In his free-banking proposal, Hayek argues that execution, although brought against general assets, should be translated into the quantity of some other bank's money that would buy a specified commodity basket. *Id.* at 19. He does not explore the circularity of this argument, but he makes it to avoid the problems of currency fundamentalism that are particularly salient in commodity-based monies. (With the exception of gold, few commodities are used as money, and a tender of the commodities backing money would not be a tender of money.)

approach of the U.C.C. and the leading legal commentators.[28] But this approach also fails. Currency is itself ineffable. There are two approaches to paper currency; both are circular.

With the first approach, currency is viewed as a liability of the government to the holder, with the liability transferred upon change in possession. In such a case, currency is no more than a state-issued bank note. It remains an extinction and novation of an intermediary's liability, just like bank money.[29] But by invoking bank money as a right to currency, we have the same problem, once more removed. At law, a redemption of currency cannot even compel the sheriff's auction underpinning a bank liability. Redemption of currency can only compel more currency.[30]

It is also possible to view currency as a repository of intrinsic value: the intrinsic value supplied by government fiat and social convention. This neatly breaks the circularity of money. A transfer of intrinsic value does not involve an infinite regress. The transfer is over when it is made. However, this answer raises another question: What makes the value of currency intrinsic? The beginning of this paragraph answered this question: government fiat and social convention. However, the answer, although correct, is unsatisfactory on

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28. *See* U.C.C. § 1-201(24) ("'Money' means a medium of exchange authorized or adopted by a domestic or foreign government...."); *id.* § 3-104(a) ("'[N]egotiable instrument' means an unconditional promise or order to pay a fixed amount of money."); *id.* § 4A-103(a)(1) ("'Payment order' means an instruction ... to pay ... money."). The two most influential English-language legal treatises on money both support this approach, although Nussbaum does so reluctantly. *See* MANN, *supra* note 13, at 3-30 (exploring the abstract concept of money, including requirements under the law, monetary theories, and the intrinsic nature of money, from a fundamentalistic perspective); ARTHUR NUSSBAUM, MONEY IN THE LAW: NATIONAL AND INTERNATIONAL 11 (rev. ed. 1950) (defining the concept of money by examining fundamental functions of money). Kwaw opposes this view and develops an alternative for wire transfers. *See* KWAW, *supra* note 1, at 181-216 (finding fundamentalism to be outdated and arguing for a redefinition of the concept of payment and place of repayment); *accord* Herman Oliphant, *The Theory of Money in the Law of Commercial Instruments*, 29 YALE L.J. 606, 608-19 (1920) (expressing dissatisfaction with fundamentalism).

The U.C.C. is ambivalently fundamentalist, because it defines money as including "a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations." U.C.C. § 1-201(24). This clause was intended to accommodate special drawing rights (SDRs) and European Currency Units (ECUs), neither of which was represented by a currency at the time U.C.C. section 1-201(24) was drafted. Each was merely a unit of account on the banks' books. However, the ambivalence only exists in the international arena. Currency fundamentalism is the national dogma.

29. *See* Rogers, *supra* note 20, at 507-08.

30. *Compare* 12 U.S.C. § 411 (1994) (mandating that Federal Reserve notes "shall be redeemed in lawful money on demand") *with* 31 U.S.C. § 5103 (making Federal Reserve notes legal tender).

both prongs. As discussed below, governmental fiat does not supply much intrinsic value to money. Social convention—although a potent source of intrinsic value[31]—is itself a circular concept.

Social convention can be an extremely strong source of intrinsic value. Money can cohere strongly through shared consensus that a particular medium of exchange is a "real" medium of exchange. However, this consensus cannot be limited to the two parties to the exchange; it must be shared by society, or at least a large group within society:

> The abstraction of the process of [money] exchange from specific real exchanges, and its embodiment in a distinctive form, can happen only if exchange has become something other than a private process between two individuals which is confined to individual actions. This new and broader character of exchange is established when the value of exchange given by one party has no direct value for the other party, but is merely a claim upon other definite values; a claim whose realization depends upon the economic community as a whole or upon the government as its representative. When barter is replaced by money transactions a third factor is introduced between the two parties: the community as a whole, which provides a real value corresponding to money. . . . This is the core of truth in the theory that money is only a claim upon society. Money appears, so to speak, as a bill of exchange from which the name of the drawee is lacking, or alternatively, which is guaranteed rather than accepted. It has been argued against this theory that metallic money involves credit, that credit creates a liability, whereas metallic money payment liquidates any liability; but this argument overlooks the fact that the liquidation of the individual's liability may still involve an obligation for the community.[32]

In other words, the social consensus underpinning money is circular. A value is shared by society only because a value is shared by society. To be sure, the shared social consensus underpinning money is not infinitely plastic. Snowflakes will never serve as money in any society. But even technologically satisfactory media are not money unless we

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31. If the intrinsic value of money is created by social consensus, money must have a social utility separate from individuals' utilities. *See* Benjamin Klein, *The Competitive Supply of Money*, 6 MONEY, CREDIT & BANKING 423, 446 & n.33 (1974). The utility of a medium of exchange *must* be interpersonal, to anyone but a numismatist. Money is therefore like love: ill-suited to methodological individualism.

32. GEORG SIMMEL, THE PHILOSOPHY OF MONEY 177 (Tom Bottomore & David Frisby trans., Routledge & Kegan Paul 1978) (2d ed. 1907).

undergo the difficult social process that makes them so.[33] Simmel has correctly observed that even gold is constructed as money through social convention alone.[34] And social convention is nothing if not circular.

Can we escape this circularity? If money is not an endless string of sheriff's auctions or redemptions of currency at a central bank, money must have intrinsic value to be an acceptable medium of exchange. A shared social consensus works, to be sure, but such a consensus is just as endless as the auctions or redemptions. Little wonder that many lawyers—and some economists—have turned to legal tender law,[35] which they frequently, and perhaps unfairly, identify with Knapp's "chartalism."[36] Legal tender advocates seek to avoid

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33. VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY 24 (1994); *cf. id.* at 13-18 (discussing the difficulties of the creation of the United States money supply from a monetary, not commercial law, perspective); JAMES WILLARD HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970, at 30-73 (1973) (offering a technical and detailed historical treatment of the functions of law and money).

34. *See* SIMMEL, *supra* note 32, at 178 ("Viewed from the sociological perspective, there is no doubt that metallic money is also a promise and that it differs from the cheque only with respect to the size of the group which vouches for its being accepted."); *see also* S. HERBERT FRANKEL, MONEY: TWO PHILOSOPHIES 35 n.21 (1977) (examining a credit theory of money).

35. *See infra* notes 38-46, 190-195 and accompanying text.

36. It is easy to identify the primacy of legal tender with Knapp:

> The matter stands thus: all obligations expressed simply in money refer in the last resort to valuta [i.e., money accepted by the State in payments] because judicial decision is final and the State as fountain of law only compels obligations to be performed in the money in which it itself (by its Treasury) makes payments.

GEORG FRIEDRICH KNAPP, THE STATE THEORY OF MONEY 158 (H.M. Lucas & James Bonar trans., reprint Augustus M. Kelley 1973) (4th ed. 1924). Although this statement is clear enough, Knapp's chartalism was probably not founded in legal tender. He explicitly rejected legal tender law as the essence of state money, *id.* at 95, and instead viewed "valuta" as his touchstone. *Id.* at 105. (As we can see from the above quotation, his deduction of legal tender from valuta was obscure.) Knapp's definition of "Chartality" was that of money as a physical symbol, enforced by law. *Id.* at 32. He was quite willing to generalize the definition to any communicative event; he called this "Giro payment" in honor of the giro system of book-entry funds transfer. *Id.* at 153. Knapp, however, thought that the giro system—although a payment system—did not involve money unless the state treated it as valuta. *Id.* at 147-57.

Knapp's position on the necessary involvement of the state is logically suspect (he never distinguished giralism from chartalism), but is not without empirical merit. Today, few things will pass as money unless they bear the imprimatur of the state, either directly (e.g., state bank notes or central bank credit) or indirectly (i.e., through state supervision of banks). But this is not inherent in the nature of money. Only two hundred years ago, Alexander Hamilton viewed the First Bank of the United States as a more trustworthy source of money than a government, because it was private. *See Bank of the United States: Proceedings on the Grant of the First Charter, in 1791*, Comm. of the Whole House, H.R., 1st Cong., 3d Sess. (1790) (letter of Secretary of the Treasury, Alexander Hamilton), *reprinted in* M. ST. CLAIR CLARKE & D.A. HALL, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 15, 27 (reprint Augustus M. Kelley 1967) (1832). Even today, the money's circularity by pointing to the positive command of the state as a unique and discrete source for money.[37]

This position may or may not be logically coherent. We need not resolve this question; it is empirically untenable. Legal tender "is neither necessary nor sufficient for the supply of monetary confidence and may not even be important."[38] A currency can thrive without a legal tender rule, if the social consensus exists. For example, Federal Reserve and national bank notes did not become legal tender until 1933,[39] although they had been the premier United States currency since the Civil War era.[40] Conversely, legal tender laws have been historically unsuccessful in assuring the acceptability of money. The expression "not worth a continental" derives from the old currency issued by the United States under the Articles of Confederation. This currency was backed by a legal tender law as oppressive as it was ineffective. The legal tender law protecting greenbacks did not prevent them from diverging against gold.[41]

Finally, courts do not take legal tender laws very seriously in the rare cases they are confronted with them. They refuse to enforce legal tender rules when enforcement is impractical, view bad-faith

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dollar is often preferred to the local currency abroad, despite the complete lack of legal sanction.

37. *See* JOHN MAYNARD KEYNES, *A Treatise on Money*, *in* 5 THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES 6 (1971). Keynes advocated chartalist money because he believed that "it is of the essence of a debt to be enforceable in terms of something other than itself." *Id.* at 6. Knapp himself seemed to view the circularity of payments as a kind of vulgar superstition, curable by a correct chartalist understanding. *See* KNAPP, *supra* note 36, at 46-55. (Knapp's chartalism oscillated between legal tender and the ideas expressed in this Article. *See generally* KNAPP, *supra* note 36.) Nussbaum, a lawyer, was more aware of the problem, and explicitly embraced chartalism to break the logical circle inherent in a payment-based definition. *See* NUSSBAUM, *supra* note 28, at 12. However, Nussbaum also inconsistently believed that money is a social construct. *See id.* at 5-10. Mann's embrace of chartalism seems less sophisticated than Nussbaum's, as it was rooted in the "undeniable monopoly of the modern State over currency." MANN, *supra* note 13, at 23. This argument fails both analytically and empirically, however. The monopoly of the modern state over currency is due to the state's power in forging social consensus, rather than to the force of its law. (The two are admittedly related, as is discussed below. *See infra* notes 38-41 and accompanying text.) On the empirical side, the state's monopoly of currency is being threatened with various forms of e-money. *See* Appendix B.

38. Klein, *supra* note 31, at 448 (footnote omitted).

39. *See* H.R.J. Res. 192, 73d Cong. (1933).

40. Federal Reserve notes supplanted national bank notes as premier currency at the end of World War I. MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES: 1867-1960, at 190, 210, 217 (1963).

41. *See* HURST, *supra* note 33, at 40-45; *see also* NUSSBAUM, *supra* note 28, at 55 ("[W]here gold (or silver) coins . . . have definitely disappeared from circulation, they should no longer be considered as money."); Oliphant, *supra* note 28, at 609-10 (expressing a similar attitude toward legal tender).

legal tenders as void, and deem good-faith non-legal tenders to be binding.[42] Courts do not use legal tender rules to promote the acceptability of money; they use them to resolve disputes concerning whether an underlying debt obligation is discharged by payment.[43] In the course of doing so, they view almost any commercially accepted medium of exchange as discharging the debt obligation.[44]

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42. *Compare* Nemser v. New York City Transit Auth., 530 N.Y.S.2d 493, 495 (Sup. Ct. 1988) (holding that a bus company's refusal to take dollar bills, despite their legal tender status, does not violate federal legal tender law) *with* Suffolk Bank v. Lincoln Bank, 23 F. Cas. 346, 348 (C.C.D. Me. 1821) (No. 13,590) (holding that a bank's attempt to pay $3000 in small coins was in bad faith and subject to punitive damages) *and* U.C.C. § 4A-406(b) (1995) (making a wire transfer an effective legal tender, unless the beneficiary notifies the originator of its refusal of the payment within a reasonable time, does not touch the money, *and* would have suffered an avoidable loss if the originator had complied with the contract). See *infra* notes 190-195 and accompanying text for other examples of such phenomena. *See also* Joslin v. United States, 666 F.2d 1306, 1307 (10th Cir. 1981) (per curiam) (stating that the legal tender status of silver dollars is irrelevant to tax computation when the taxpayer receives fee income in silver dollars of high numismatic value); U.C.C. § 2-511(2) (stating that tender of a check is sufficient when made in the course of ordinary business unless the seller demands legal tender and gives reasonable time for the buyer to procure it); HURST, *supra* note 33, at 41 & n.41 (stating that payment in currency that is not legal tender is performance unless the person to whom performance is due specifically objects); NUSSBAUM, *supra* note 28, at 51 ("Courts have therefore shown an inclination to hold tender of refusable money good 'unless specifically objected to' and such objection is required to be very explicit." (footnote omitted)). Nussbaum discusses an English legal tender case, *Moss v. Hancock*, [1899] 2 Q.B. 111, whose "sound result" was reached by "a tortuous and questionable argument" because of legal tender status. NUSSBAUM, *supra* note 28, at 55. A good doctrinal attempt to reconcile the English case law of tender may be found in Michael Brindle & Raymond Cox, *Introduction* to LAW OF BANK PAYMENTS 1, 1-6 (Michael Brindle & Raymond Cox eds., 1996).

43. Compare Oliphant, *supra* note 28, at 609:

> The effects of this [legal tender] attribute are that, if such money is tendered by a debtor in strict compliance with all the numerous and exacting requirements of a proper tender and the tender is refused, interest as an element of damages ceases to accumulate, the creditor may not thereafter in an action to collect the debt recover his costs, parties secondarily liable are discharged and securities on property are lost.

Id.

44. *See* HURST, *supra* note 33, at 43. Such cases have frequently arisen in English law, in a very standard pattern, as discussed by Kwaw. *See* KWAW, *supra* note 1, at 193-201. Shipowners often sought to evade their charter obligations by claiming that wire transfers, not being cash, were not timely payments when the transfers were accepted by the shipowners' banks. The cases have arrived at the correct result: A wire transfer is a currency-equivalent, when available to the shipowner at the shipowner's bank. *See* Mardorf Peach & Co. v. Attica Sea Carriers Corp. of Liberia, *The Laconia*, [1976] 2 W.L.R. 668, 678 (C.A.), *appeal allowed*, [1977] App. Cas. 850; Afovos Shipping Corp. S.A. v. R. Pagnan & F. LLI, *The Afovos*, [1980] 2 Lloyd's Rep. 469, 476 (Q.B.); Tenax S.S. Co. v. The Brimnes (Owners), *The Brimnes*, [1973] 1 All E.R. 769, 796 (Q.B. 1972), *aff'd sub nom.* Tenax S.S. Co. v. Owners of the Motor Vessel Brimnes, [1974] 3 All E.R. 88 (C.A.); Zim Israel Navigation Co. v. Effy Shipping Corp., *The Effy*, [1972] 1 Lloyd's Rep. 18, 34 (Q.B. 1971); *cf.* U.C.C. § 4A-406(b) (codifying the same).

Payment systems remain circular, notwithstanding legal tender. This is technologically inherent to most payment systems, because they refer to rights that never quite involve a transfer of something with intrinsic value. But even without this technological limitation, payment systems are circular because money—the purpose of all payment systems—is a social, not a technological phenomenon. There is nothing that grants intrinsic value to money, except others' perceptions of that intrinsic value. A legal tender rule may be able to contribute to that perception, but it cannot compel it.

This Article is not a philosophical essay on money; it is an attempt by a working bank lawyer to cope with recent case law. It discusses social construction only because the law of money cannot be understood without appreciating that money is a social construct aided, but not established, by law. This subpart has raised two basic points, which will be further developed in the next subpart.

First, money and payment systems are inextricably interrelated: social teleology and instrumental functionality. Neither makes sense without the other. Because money cannot be viewed independently of the payment system that implements it, each payment system is its own money. This implies that checks are different money than coins, although one employing the same unit of account. If this statement strains intuition, try buying a house with coins, or finding a soda machine that accepts checks. In other words, money *is* what a payment system *does*.

The second point is a corollary of the first. State-issued currency is not fundamental to money, notwithstanding any legal tender law.[45] Furthermore, legal tender law is slighted by courts whenever it is inconvenient, which is most of the time it is an issue in litigation.[46] Bank money—electronic communications—is no less or more "real" than dollar bills or gold coin. Although bank money and currency may be substitutable over a certain range of value, neither is concep-

45. A reader might spot a syllogism here. Major premise: state-issued paper currency is not fundamental to money. Minor premise: banks deposits are money. Conclusion: paper currency need not be issued by the state. This is not a true syllogism. Not only is the conclusion unjustified by the premises, it is probably false as well. *See* Appendix B (arguing that only paper currency, of all forms of money, must be state-issued). However, there is no reason why we must necessarily use paper money, and there is no reason it should be the only "true" money in the contemplation of the law.

46. *See infra* notes 190-195 and accompanying text.

tually nor legally reducible to the other. They are different payment systems with different legal rules.[47]

3. Money and the Law of Bank Liabilities.—We return to the law of bank liabilities. Now we understand the following: (1) Money is what a payment medium does; (2) money must be understood in part as a shared social convention; and (3) our money supply consists mostly of predeterminate bank liabilities that are created by communications and not necessarily referable to currency. We are now in a better position to understand why the law of bank liabilities insists on determinate and transparent rules.

The social nature of money is one powerful reason for the determinacy and transparency of payment law. As discussed above, money is an act of social consensus, with no deeper grounding than the consensus. It is an act of faith,[48] "a social convention which owes its very existence to the mutual acceptance of what from one point of view is a fiction."[49] If the nature of money is too closely questioned, the consensus may unravel. Walter Bagehot was discussing banks, but could have been discussing money, in the following excerpt:

> Queen Victoria is loyally obeyed—without doubt, and without reasoning—by millions of human beings. If those millions began to argue, it would not be easy to persuade them to obey Queen Victoria, or anything else. Effectual arguments to convince the people who need convincing are wanting. Just so, an immense system of credit, founded on the Bank of England as its pivot and its basis, now exists. The

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47. It is important to note that, even though bank money and currency are different payment systems, and therefore different monies, they may still employ a common unit of account (e.g., the dollar). People adapt well to competing monies employing the same unit of account, but appear to reject competing units of account spontaneously, perhaps because competing units of account place unnecessary demands on limited rationality, or destabilize the social consensus of money. Just try passing yen on the streets of Omaha. You will break no law, but you will command no goods. (This rule has exceptions: banks, tourist spots, political borders, and debauched local units of account.) *See* LAWRENCE H. WHITE, COMPETITION AND CURRENCY: ESSAYS ON FREE BANKING AND MONEY 64 (1989) (commenting upon the "natural tendency of money users in a region to converge on a common monetary unit"); *id.* at 72 ("[M]oney is a social convention that takes time to develop."); *id.* at 100-01 ("Gold and silver emerged spontaneously as nearly universal monies because of strong *private* incentives."); *id.* at 133-34 (discussing the convergence of the use of a single metal as the general medium of exchange); Klein, *supra* note 31, at 441-42 (describing a model of monetary arrangements in which multiple monies are convertible into a single dominant money).

48. *See* FRANKEL, *supra* note 34, at 14 (discussing attitudes toward money in relation to "moral ideology"); SIMMEL, *supra* note 32, at 178-79 (comparing trust in money to "religious faith").

49. FRIEDMAN & SCHWARTZ, *supra* note 40, at 696.

> English people, and foreigners too, trust it implicitly. Every banker knows that if he has to *prove* that he is worthy of credit, however good may be his arguments, in fact his credit is gone: but what we have requires no proof. The whole rests on an instinctive confidence generated by use and years.[50]

Money—as a social phenomenon—works best when the validity of the underlying rules is beyond question, the transparency near-perfect, the infinite regress ignored. It is tempting to quip: Money is a miracle, its operations a mystery, and we had better not question too closely its authority.[51] Or another quip: Money is like the cartoon characters who run over a cliff—they never fall until they look down.

If a law regarding a money is sufficiently contested, it will no longer be the law of a money, because whatever the money was will have ceased being a medium of exchange. The law of money, because it is determinate and transparent, allows no questioning in the courts. A well-ordered law of money is very seldom litigated.[52] Law has traditionally been a powerful engine in preserving (or destabilizing) shared social reality; money is just another sphere in which it does so.[53] A good commercial law of payments (and a good administrative law of banking) helps us keep the faith that underlies money.

The reasons for transparency and certainty of law are not only social; they are also rational. Transparency and certainty are required both at the technological level of a payment system and at the social

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50. WALTER BAGEHOT, LOMBARD STREET: A DESCRIPTION OF THE MONEY MARKET 33 (reprint 1962) (1873).

51. A more extended quotation: "There are three forces, only three, on this earth that can overcome and capture once and for all the conscience of these feeble, undisciplined creatures, so as to give them happiness. These forces are miracle, mystery, and authority." FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 307 (Andrew H. MacAndrew trans., Bantam Books 1970) (1880) (internal quotation marks omitted).

52. "Money constitutes the most vital part of the substructure of the entire legal system, but when its stability is taken for granted, monetary questions rarely come before the courts and no analysis of underlying legal theories becomes necessary." Phanor J. Eder, *Legal Theories of Money*, 20 CORNELL L.Q. 52, 52 (1935).

53. *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995). Professor Lessig developed several mechanisms through which law regulates social meaning. In his framework, social meanings can be created or destabilized by tying the meanings to other social meanings, "ambiguating" preexisting social meanings, or inhibiting or inducing behavior associated with the formation or destruction of a particular social meaning. *Id.* at 1009-14. In Professor Lessig's framework, the law of money is a sort of negative ambiguation. *Id.* at 1010. The law of money, being determinate and transparent, deprives the users of money of alternative social meanings. It therefore helps ensure that the social practice of money remains unquestioned, at least in the courts. *Cf.* Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (stating that law kills competing social meanings).

level of money. There are at least two rational reasons why the law of money must be transparent and certain.

The first rational reason for certain and transparent rules is that bank money is nothing but a license to sue a bank and collect a judgment. The only "ultimate" value of this license is its ability to get a judgment against a bank executed. Generally, a cause of action is the worst possible kind of asset, but the law of bank payment ensures that it is one of the best. Banks (almost) always settle on a payment claim, because they know precisely what the court will say and that their counterparty knows the same. Banks, therefore, have nothing to gain from fighting; they prefer preserving their reputation to paying litigation costs.[54] The stability of money is predicated on the unquestionable validity and transparency of the underlying legal rules, and the evidentiary simplicity of the facts upon which these rules operate. Trillions of dollars change hands every day because of a shared perception of the probable outcome of litigation.

A second rational reason for certain and transparent rules is that they need not be questioned by the users of the system. As long as the internal rules remain unquestioned—because of their undoubted validity—they need not really be known, if the users can avail themselves of simple external rules. This is nothing but the notion of a "black box." We do not have to know anything about electronics to use a television set. We do not have to know civil engineering to drive a car across a bridge. We do not need to know about interbank collections to cut a check. As long as the underlying system operates reliably, and the rules for external *use* of the system are separable from the internal *operating* rules, a user of the payment system does not have to know the operating details of the system at all.[55] In such a case, the users' rules appear as an emergent trait, built on the substratum of the operating rules and formally reducible to them, but conceptually independent.

Payment law exists on two levels (apart from the social level): a relatively simple users' level and an often complex operating level. To keep the users' level simple, it must be kept as separate as possible from the operating level. To keep the levels separate, the operating level must be extremely reliable, from a user's perspective. If the op-

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54. So strong is the incentive to pay that only recently has the U.C.C. thought it worthwhile to sanction those few banks that do not play by the rules. *See supra* note 21.

55. *Cf.* HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL 13 (1969) ("A bridge, under its usual conditions of service, behaves simply as a relatively smooth level surface on which vehicles can move. Only when it has been overloaded do we learn the physical properties of the materials from which it is built.").

erating level were not extremely reliable, users could not take it for granted, and they would therefore have to know about the operations. In other words, the legal underpinning of bank money—the law of bank liabilities—must be extraordinarily reliable because of the limited rationality of users. We cannot afford to have payment lawyers counsel every payment transaction. We cannot even afford to counsel one payment transaction in a thousand. The users' rules for payments must be simple, and the operating rules must be extraordinarily reliable. We must have astounding confidence in the legal rules regarding the creation and discharge of bank liabilities.[56]

The confidence we must have in the legal underpinnings of money creates a paradox: The legal basis of bank money is almost never tested. The users' rules, such as the ramified law of checks, however, are frequently tested in court, and the vast majority of these check cases involve fraud and forgery, which occur at the users' level.[57] Far fewer disputes involve the operational rules (e.g., a bank suing a bank on a collection case). The users' rules for wire transfer are simpler than those for checks, and litigation is correspondingly sparser; such litigation mainly involves the law of mistakes by banks and their customers.[58] The difference between the volumes of check and wire transfer litigation can be explained by the clearer users' rules of wire transfers, and the smaller chance of operational error in the

56. This argument does not apply to bank assets, which are not the basis of money. The law governing bank assets often tolerates considerable delay and uncertainty. Consider, for example, the difficulty a bank has in foreclosing on a mortgage, and contrast it to the ease with which the mortgagee paid the proceeds of the mortgage to the previous owner. Assets can be tangible things, unlike the communications with legal consequences that we call bank liabilities. The house securing a mortgage is not solely a social construct.

57. *See generally* Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181 (1996) (examining the fraud and forgery law of consumer payment systems, including the law of checks).

58. *See, e.g.*, General Elec. Capital Corp. v. Central Bank, 49 F.3d 280, 285 (7th Cir. 1995) (holding that a beneficiary bank was liable to a creditor when the bank mistakenly placed a wire transfer in an escrow account); Bank of Am. Nat'l Trust & Sav. Ass'n v. Sanati, 14 Cal. Rptr. 2d 615, 621 (Ct. App. 1992) (holding that a bank was entitled to seek restitution for the unjust enrichment resulting from a mistaken transfer); Banque Worms v. BankAmerica Int'l, 570 N.E.2d 189, 198 (N.Y. 1991) (holding that the "discharge for value" rule applied to a mistaken wire transfer). Only one case under U.C.C. Article 4A has involved any issue more fundamental than erroneous instructions. *See* Sheerbonnet, Ltd. v. American Express Bank, Ltd., 905 F. Supp. 127 (S.D.N.Y.) (mem.) (dealing with a tort action against an intermediary bank in connection with a wire transfer to a frozen account of an insolvent bank), *amended by* 951 F. Supp. 403 (S.D.N.Y. 1995), *modified*, 1996 WL 221829 (S.D.N.Y. 1996). The *Sheerbonnet* court had to go outside Article 4A to address the issue. *See id.* at 130 (looking instead at the plaintiff's common-law grounds for relief and finding them cognizable).

wire transfer business. And almost no disputes ever involve the bedrock facts: how a bank obligation can be created or extinguished.

Very seldom do cases emerge that test the nature of the bank liabilities underpinning the payment system. Such cases only emerge in three contexts: insolvency law, consumer law, and international law. The insolvency cases tend to test when and how a bank liability is established.[59] The consumer cases are similar, although they usually involve simpler questions, such as whether the books and records of a bank are trumped by evidence of appropriate communications between the bank and its counterparties.[60] The international law of banking—particularly the private international law of banking—raises similar questions, and also raises questions about the localization of bank liabilities. It is these cases that have become far more common over the last fifteen years.[61]

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59. *See* Koreag, Controle et Revision S.A. v. Refco F/X Assocs. (*In re* Koreag), 961 F.2d 341, 356 (2d Cir. 1992) (discussing whether an interbank foreign exchange payment subject to U.C.C. § 2-702(2) has a right to reclamation); FDIC v. Holders of Yellow Certificates, No. 85 Civ. 8164 (VLB), slip op. at 13-17 (S.D.N.Y. March 4, 1987) (mem.) (holding, in a very rare case where a bank denied liability, that communications between depositors and a bank established such liability); Cable & Wireless, Ltd. v. Yokohama Specie Bank, Ltd., 79 N.Y.S.2d 597, 604 (Sup. Ct. 1948) (discussing precisely which acts transferred liability to the books of a United States branch of a Japanese bank placed in liquidation by the New York Superintendent of Banking because of World War II), *modified mem. sub nom.* Cable & Wireless, Ltd. v. Lyon, 103 N.Y.S.2d 1016 (App. Div. 1951), *aff'd*, 107 N.E.2d 75 (N.Y. 1952).

60. The abstract answer to this question is certain: "yes." *See In re* Ruskay, 5 F.2d 143, 147 (2d Cir. 1925) (finding that the issuance of a deposit slip by a bank constituted an admission by the bank that a creditor-debtor relationship had been created). In nonconsumer cases, banks only deny the existence of a liability if the liability is purportedly created by a person claiming to be an agent acting without apparent authority. This fact pattern is not uncommon in letter-of-credit cases, but it is extraordinarily rare otherwise. *See* Masek Distrib., Inc. v. First State Bank & Trust Co., 908 F. Supp. 856, 858 (D. Kan. 1995) (mem.) (considering a case where a seller sued to enforce a letter of credit allegedly requested by a buyer and issued by a loan officer for a bank); FDIC v. Records, 34 F. Supp. 600, 602 (W.D. Mo. 1940) (holding that a clerk who embezzled and did not record cash deposits created liability). Consumer cases involve the books and records of a bank *versus* other evidence, such as deposit slips. *See* Barbaro v. Citibank, N.A., 474 N.Y.S.2d 251, 252 (Civ. Ct. 1984) (holding that a deposit slip is prima facie evidence that a bank received the sum stated thereon); Jiang v. First Nat'l City Bank, 317 N.Y.S.2d 635, 637 (Civ. Ct. 1970) (holding that a customer is not chargeable with knowledge of a transaction appearing on a teller's copy of a deposit slip); Lancelotti v. Bank of N.Y., 463 N.Y.S.2d 995, 997 (J. Ct. 1983) (finding that a bank's deposit slip is prima facie evidence of a transaction recited therein). Perhaps the most common recent line of such cases involves unauthorized withdrawals from ATMs. *See, e.g.*, Porter v. Citibank, N.A., 472 N.Y.S.2d 582, 583 (Civ. Ct. 1984) (finding that the word of a plaintiff beat a bank's records); Judd v. Citibank, 435 N.Y.S.2d 210, 212 (Civ. Ct. 1980) (concluding that a holder of an electronic fund transfer account had produced sufficient credible evidence to show that withdrawals from "cash machines" were erroneously charged to her account).

61. *See, e.g.*, *infra* note 85 and accompanying text.

C. *Localized Liabilities*

To recapitulate the previous two subsections: A bank liability is a license to sue and collect judgment, and payments are largely a trade in these licenses. The rules governing this trade in licenses must be clear, both to assure the smooth technical function of the payment system, and to assure that bank liabilities are the social stuff of money. Where does localization of liabilities fit into this picture? The following discussion advances a logical—not a legal—answer to the question.

If a liability is a license to a judgment, localization of a liability must somehow mean localization of this license. Because a liability is a communication with legal consequences, localization of the liability must be either localization of the communication or localization of the contents of the communication.

The first alternative can be excluded: Communications cannot be localized in a legally satisfactory fashion. Therefore, localization of a bank liability cannot mean localization of the communication creating the liability. The difficulty of "locating" a communication is not a necessary consequence of the physics of telecommunications. It is fairly easy to locate a magnetic domain on a computer disk, or at least to locate a computer disk. The problems are not in the physics; rather, they are in the usage of communications.

There are several reasons that support this characterization of the problem. First, a telecommunication, unlike negotiable paper, is neither spatially unique nor temporally persistent. A message comes into a wire room and leaves nothing but a record of the message in its wake. The record of this message reifies nothing; it is only evidence of the communication that established the legal right. There is nothing necessarily unique about this record; a teletransmission may result in a message written into electronic memory and stored in magnetic and paper media. None of these multiple records is better than any other; photocopies of the paper media may evidence the communication no worse than the first printout.[62] The "original" is evanescent, the same transmission can be received (or originated) in several wire rooms, and all records have useful evidentiary value. Therefore, the location of a communication does not have the same indisputably unique location as a piece of commercial paper. Ten good checks for $1000 are

62. As of this writing, there has been talk about the creation of electronic "originals," via a date-stamped double dual-key technology. Such technology, whether or not practicable, has not yet been put into commercial use.

worth $10,000; ten true printouts of a wire transfer may evidence anywhere from one to ten communications.

Second, the interaction between human decisionmaking and automated information-processing is often complex and indirect. The physical location of the communications hardware or of the stored records bears no necessary relationship to the transaction communicated through the hardware and evidenced by the records. Equipped with little more than a telephone, a screen, and a taste for late local hours, a person living in Istanbul can easily trade United States government securities "in" the New York market. A Malaysian bank can easily issue a letter of credit to a San Francisco beneficiary, financing an exportation of Malaysian teak. A New York loan syndicate can underwrite a loan whose proceeds are to be used exclusively in Costa Rica. (If this latter example sounds too easy, perhaps the loan negotiations were conducted in Miami.) Very quickly, the hypotheticals multiply. Without noncommunicative physical action, geography becomes blurry. Bank money is nothing but communicative.

If communications cannot be meaningfully localized through their mode of transmission, they can only be localized through their content. The medium is not the message; only the message is the message. Article 4A of the U.C.C. is very clear—the medium of communications is irrelevant:

> Most payments covered by Article 4A are commonly referred to as wire transfers and usually involve some kind of electronic transmission, but the applicability of Article 4A does not depend upon the means used to transmit the instruction of the sender. Transmission may be by letter or other written communication, oral communication or electronic communication.[63]

The content of a payment communication is pure legal consequence: There is no other reason for such communications. If only the content is relevant to location, only the legal consequences of the communication can be localized.

We now have a conclusion. *If a geographically localized liability has any meaning at all, it must mean localization of the law or court governing the liability.* If it is at all meaningful to talk about an account kept in, say, Ruritania, this account must be governed by Ruritanian law, heard by a Ruritanian court, or both. Otherwise, a bank liability can have no legally meaningful location at all.

To recapitulate the steps of this logical argument:

63. U.C.C. § 4A-104 cmt. 6 (1995).

1. We *define* a bank liability, in essence, as a license to sue a bank and obtain a judgment. These liabilities are created by appropriate communications invested with legal effect.

2. We *assume* that there is some sense in which a bank liability can be meaningfully said to be localized, even in a global bank.[64]

3. Although communications create bank liabilities, it is operationally meaningless to localize a telecommunication. This statement is *empirical*, based on the evanescence and multiplicity of contemporary telecommunications technologies, and the increasing irrelevance of specific locations to communicative aspects of modern transactions.

4. Therefore, if the location of a license to a judgment is assumed to be meaningful, but cannot refer to the communications that established the license, it must refer to something else.

5. The only "something else" imaginable is the identity of the sovereign that will define or enforce the license. This statement relies on the *legal identification* of sovereignty with territory.[65] It also relies on the author's inability to imagine anything else that can be said to "localize" a license to a judgment, apart from the location of a physical license (i.e., negotiable paper) or the identity of the sovereign who will define or enforce the license.

6. Therefore, if it means anything to say that bank liabilities are localized, it means that the "location" of a bank liability is the outcome of a conflict-of-law analysis. This conclusion inverts the more usual legal assumption that the outcome of a conflict-of-law analysis is predicated on finding the location of a liability: the "account situs."[66]

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64. For a discussion of this assumption, see *infra* Part III.

65. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. c (1987) ("The territorial principle is by far the most common basis for the exercise of [the state's] jurisdiction to prescribe.").

66. *See, e.g.*, Libyan Arab Foreign Bank v. Bankers Trust Co., [1988] 1 Lloyd's Rep. 259, 270 (Q.B. 1987) (*LAFB*) ("As a general rule the contract between a bank and its customer is governed by the law of the place where the account is kept, in the absence of agreement to the contrary."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 195 cmt. b (explaining that in a choice-of-law analysis, it is important to know where the contract requires repayment to be made).

For criticism of this usual legal assumption, see Tahyar, *supra* note 1, at 610, which calls for the view that a sovereign can assert physical power over intangible property a "pretense." *See also* Herring & Kübler, *supra* note 1, at 983-86 (arguing that the situs of intangibles cannot be determined by traditional rules of territoriality without falling into a tautology); P.J. Rogerson, *The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary and Misleading*, 49 CAMBRIDGE L.J. 441, 453-54 (1990) (arguing that, as an intangible, a debt has

QED. A further conclusion is possible, albeit more tentatively, that the law governing a bank liability resides only in the content of the communication that established the liability. This takes two more steps.

> 7. The "locale" of the law governing a bank liability cannot be determined by the communicative media that produced the liability. (This statement is true only for non-paper communications, which possess a definite location at any particular time.) This *empirical* statement must be accepted if the third statement is accepted: The "location" of a telecommunication has no operational significance.
>
> 8. Therefore, unless an extracommunicative fact is considered, the law governing a bank liability resides in the *content* of the telecommunication that established the liability.[67]

In other words, the location of a liability is a choice of law (and/or forum). The law (and/or forum) is chosen by the symbolic content of a communication, or perhaps the status of the parties. It is meaningless to say that a deposit account is "located" in Ruritania but governed by New York law with New York jurisdiction. Accounts governed by New York law/forum are New York accounts, even if the relevant documents were drafted in Ruritania by Ruritanian nationals in the Ruritanian language, promising payment in Ruritanian doubloons.[68]

We now believe that the bank liability—the money—is "in" Ruritania because the relevant communication of the parties said so. Our task, therefore, is not physically locating the money, but rather assigning legal meaning to the location of a bank liability. Parts III and IV below perform this task. Part II is an intermezzo—impeding the progress of the plot, but tidying up the loose ends. So far, this

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no situs that could serve as a basis for choice of law and that choice of law for intangibles need not be determined by the same rules governing tangible property).

67. About the only plausible extracommunicative status would be the parties' domiciles. However, Rogerson points out correctly that a debtor (or for that matter, creditor) may have multiple residences and dispersed assets. Rogerson, *supra* note 66, at 455. Domicile is therefore difficult to determine for many commercial parties. Domiciliary status might still be useful for consumers, who can only be in one place at one time, and who tend to be geographically localized over reasonable periods of time. Consumer choice-of-law rules can therefore look very different than commercial choice-of-law rules. Because this Article is not concerned with consumer law, domicile is not further discussed.

68. It is important to note that this Article is not yet advancing a legal argument. It does not yet suggest whether a New York account situs implies *both* New York law *and* a New York forum, or merely implies one of the two. Nor does it suggest, for example, that a contract drafted in Ruritania can or should result in a New York situs. These are all legal points that are contestable on their legal merits. At this stage, this discussion is grounded in legal epistemology, not legal doctrine. It only asserts that if the location of an account has any meaning to a lawyer, that meaning must relate to conflict of laws.

Article has only argued that the location of a liability must sound in conflict of law. It has not yet argued that a bank liability needs a location, that conflict-of-law rules are worth devising.

II. WHY DO WE LOCALIZE LIABILITIES?

Readers who already see the need for a conflicts law of bank accounts should simply go to the next Part. This Part is for those troubled because this Article has not yet made an explicit case for why a conflicts law of banking *should* exist. This Part makes two arguments. It first argues the main point—that some kind of conflicts law of international banking is needed. It then argues against possible objections to this main point—that the traditional alternatives to conflicts law (e.g., party autonomy, arbitration, and harmonization) somehow displace the need for conflicts law.

A. *Why Conflicts Law in Banking?*

This subpart raises four arguments for a conflicts law of banking. It first elaborates on the earlier discussion of the certainty demanded in payment law. It then discusses the role of conflicts law in three specific roles: attachments of bank accounts, sovereign risk, and preservation of legal diversity.

1. *Payments Law Demands Certainty.*—We have already discussed the first reason banking law needs a well-defined law of conflicts. Any successful payment medium must be undisputable. Coin would make a poor payment medium, for example, if the value of each coin transferred were the subject of dispute.[69] A modern payment system demands an extraordinary degree of *legal* certainty, because a bank payment is nothing but a transfer of a license to a judgment.[70] A legal claim would seem to be the worst possible asset, and most practical lawyers would likely counsel their clients to go far to find a substitute. Yet, bank credit—a mere legal claim—is the most reliable of assets. People transfer these particular assets freely, and rely on the validity of these transfers enough to treat them as money.

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69. Indeed, coin supplanted bullion as a medium of exchange precisely because its value was less disputed than that of bullion. *See* WHITE, *supra* note 47, at 178 ("Coined metal enjoys greater acceptability than uncoined metal (for example, gold dust) due to the lower cost of determining its true bullion content."). *But see* ALBERT FEAVEARYEAR, THE POUND STERLING (2d ed. 1963) (recounting the long and sorry history of debased and clipped coinage).

70. *See supra* notes 24-25 and accompanying text.

If the legal consequences of the communications underpinning bank liabilities become uncertain, payment litigation will develop. Receipt of value in an uncertain medium is not receipt of money. Enough uncertainty will destroy confidence in the ability of bank communications to effect payment and therefore destroy the bank-mediated payment system. This argument, although difficult to deny, is vulnerable to a sensible objection: A little bit of uncertainty is no big deal. Most people happily accept dollar bills, although some of them might be counterfeit. Checks sometimes bounce. Would uncertain conflicts law engender enough uncertainty to make a difference? On a day-to-day basis, the answer is "no." Payment laws usually do not conflict. The average large-value payment complies with the law of all affected countries, at least when all parties are solvent.[71] This was true before the payment harmonization movement,[72] and is even more true now.

But although legal uncertainty in conflicts law is no factor in the average payment, it is likely to be an important factor in the average *litigated* payment, especially in litigation involving the operating rules of the system. Most of the operating rules are clean and engender very little litigation. The conflicts law of banking is confused and leads to a grossly disproportionate share of payments litigation, especially litigation concerning the operating rules.

Legal uncertainty causes two kinds of problems. In individual cases, legal uncertainty of the parties may lead to "systemic" or "contagion" risk. Judicial legal uncertainty also creates doctrinal mischief that may spill over into general payment law. Each of these two problems warrants separate discussion.

International bank insolvency law best illustrates the effect of legal uncertainty on systemic risk, although the same reasoning applies to conflicts uncertainty. Several medium-sized banks have become insolvent in the last twenty years. The contrast between the first and most recent of these insolvencies is striking. Herstatt Bank became insolvent in 1974,[73] Barings Bank in 1995.[74] Both insolvencies

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71. *See* Herring & Kübler, *supra* note 1, at 985 ("In most countries, the parties in an international banking transaction are free to determine by explicit agreement which national law should govern their relationship. But since bank deposits are mostly routine transactions, it is not surprising that an express choice of law clause can rarely be found.").

72. *See infra* notes 118-119 and accompanying text.

73. For an account of the Herstatt insolvency, see Kurt H. Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt & Company*, 52 N.Y.U. L. REV. 1, 1-11 (1977).

74. For an account of the Barings insolvency, see generally Sheila C. Bair, *Lessons from the Barings Collapse*, 64 FORDHAM L. REV. 1 (1995).

surprised sophisticated market participants, creating the necessary precondition for market disruption.[75] But, although both insolvencies surprised the market, the results of these insolvencies were spectacularly different: Herstatt was an earthquake, Barings barely a tremor.

Herstatt was a medium-sized bank in Germany that actively speculated in the interbank foreign-exchange market. Because of its feckless dealings in a volatile market, it lost its capital and thereafter its license. The German banking authorities chose not to bail it out. This led to a global insolvency proceeding involving creditors worldwide, even money-center banks.[76] Because the Herstatt insolvency trapped sophisticated counterparties, the banking system was caught in fear and uncertainty:

> Because of the direct linkages of banks through . . . markets and because of the intangible but very real indirect linkage of bank confidence throughout the system, problems in one bank can spread in a domino fashion throughout the system. A crisis in one bank—whether that crisis arises from international or domestic problems and whether that bank is large or small—can lead to a chain reaction of deposit withdrawals, exclusion from exchange markets, or interest rate and exchange rate discrimination which affects institutions throughout the international banking system.[77]

Hundreds of millions of dollars were immobilized for months, as banks sorted out their unresolved legal questions. This immobilization affected more than just the estate and Herstatt's immediate counterparties. Especially in the early stages of the insolvency, parties withheld payment from each other and cut back their lines of credit, for fear that they would not receive payments from third parties who might be exposed to Herstatt. If this fear ("contagion" or "systemic" risk) propagates sufficiently, the entire payment system is in danger of collapse. Legal uncertainty can engender enough fear to dry the li-

75. Surprise is a necessary but not sufficient condition for market disruption. Anticipated insolvencies create no serious problems to the interbank market, because sophisticated participants can protect themselves in advance. For example, BCCI (the Bank of Credit & Commerce International) had few bank creditors. *See* Peter Truell, *Luxembourg Court Rejects Plan to Settle Claims Related to BCCI*, ASIAN WALL ST. J., Oct. 28, 1993, at 2, *available in* 1993 WL-WSJA 2006307 ("The defunct rogue bank has some 250,000 creditors, most of whom are small depositors in Europe and the Middle East.").

76. *See* Nadelmann, *supra* note 73, at 1-11.

77. JOAN EDELMAN SPERO, THE FAILURE OF THE FRANKLIN NATIONAL BANK: CHALLENGE TO THE INTERNATIONAL BANKING SYSTEM 181 (1980) (pointing out that the international banking system is inherently fragile because it lacks the safeguards to control "crises of confidence").

quidity fueling the payment system. Fortunately, contagion risk did not quite materialize in the Herstatt case, although matters were tense for a while.[78]

The Barings insolvency was equally unexpected, and equally affected sophisticated bank counterparties. But this insolvency created remarkably little fuss or panic, largely due to the successful payment harmonization movement and the shrewd crisis management at the clearing houses.[79] When Barings became insolvent, most of its counterparties knew the size of their exposure to Barings and knew that contracts limiting these exposures would be enforceable. There was no fear, for example, that a bank could not exercise its setoff rights, netting two enormous offsetting debts into one manageable position. Barings's counterparties felt confident in their legal position and knew that they could net their exposures into manageable numbers. They also felt confident that their still-solvent counterparties were able to net their exposures into manageable numbers as well. Because all survivors felt confident in their positions and their counterparties' positions, the payments stream flowed without interruption, without even the need for central-bank intervention. Just as importantly, the eventual purchaser of Barings did not have to worry about a huge volume of unresolved payment liabilities and concomitant litigation.[80]

Barings and Herstatt show that legal certainty engenders confidence, protecting the payment system in times of stress. The Barings situation was smooth because, inter alia, the harmonization movement engendered enough transnational confidence in the law. A working international law of bank liabilities is necessary in times of crisis. But harmonization—by definition—does not work in sovereign-risk cases, when a country changes the law. Legal uncertainty remains in sovereign risk cases, which are not amenable to the harmonization movement.

Sovereign risk has not yet had a Herstatt situation, where the inability of one party to settle endangered all parties. Nevertheless, a Herstatt-type immobilization of liabilities is conceivable. A major international bank could become the subject of a purported worldwide liability freeze imposed by a major country. Counterparties would

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78. *See* Nadelmann, *supra* note 73, at 3-11.

79. Most of the Barings literature has concentrated on derivatives. *See, e.g.*, Bair, *supra* note 74, at 5 (discussing unsupervised "significant derivatives trading" as the source of the Barings collapse).

80. The author based this account of the Barings insolvency on his conversations with bankers.

doubt the legal enforceability of such a freeze, payments would be frozen, and the freeze litigated.[81] If the target of the freeze had major worldwide payment obligations,[82] contagion risk might result.

Damage can take forms other than contagion risk. A court with no understanding of conflicts law can inadvertently subvert the basic doctrinal structure of payment law. The key case here is *Wells Fargo Asia Ltd. v. Citibank, N.A.*[83] Because the facts of *Wells Fargo* have been described elsewhere,[84] they only need a sketchy description here. *Wells Fargo* involved an interbank deposit that appeared to have been frozen by the Philippine government. The first dispositive district court opinion held that Philippine law governed and was favorable to the plaintiff bank.[85] Upon remand, the same court held that United States law really governed but that such law was still favorable to the plaintiff bank.[86] Although there was no United States contractual liability, the defendant bank had committed a tort overseas: the tort of not exerting sufficient effort to have the foreign restrictions lifted.[87]

The appellate court affirmed on a different ground.[88] The district court had found on remand that the debt was "repayable" in New York (i.e., that the payment transmission chain from Manila ended in

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81. Such litigation has, in fact, occurred. *See* Libyan Arab Foreign Bank v. Bankers Trust Co., [1988] 1 Lloyd's Rep. 259 (Q.B. 1987) (*LAFB*) (considering a New York bank's refusal to honor a Libyan bank's request to transfer funds on the day President Reagan froze all Libyan assets in the United States); *see also* Smedresman & Lowenfeld, *supra* note 1, at 753-54 (discussing Libyan Arab Foreign Bank's application for summary judgment on the ground that the United States' freeze did not constitute a defense against Bankers Trust Co.'s obligation to meet a payment demand).

82. In *LAFB*, Bankers Trust Co. did not have such obligations. *See* Smedresman & Lowenfeld, *supra* note 1, at 751-61 (discussing the surrounding facts of the Libyan case).

83. 660 F. Supp. 946 (S.D.N.Y. 1987) (mem.), *mot. for summ. j. denied*, 612 F. Supp. 351 (S.D.N.Y. 1985), *remanded without opinion*, 847 F.2d 837 (2d Cir.), *remanded to* 695 F. Supp. 1450 (S.D.N.Y.), *aff'd*, 852 F.2d 657 (2d Cir. 1988), *vacated*, 495 U.S. 660 (1990), *remanded to* 936 F.2d 723 (2d Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992).

84. *See* KWAW, *supra* note 1, at 133-40; Herring & Kübler, *supra* note 1, at 965-67 n.51; Smedresman & Lowenfeld, *supra* note 1, at 762-74; Jote Kassa, Note, *A Safety Net for the Eurodollar Market?:* Wells Fargo Asia Ltd. v. Citibank, 65 N.Y.U. L. REV. 126, 126-32 (1990).

85. *Wells Fargo*, 660 F. Supp. at 947.

86. *Wells Fargo*, 695 F. Supp. at 1450, 1454.

87. *Id.* at 1455 ("When the 'government or other restraint does not render performance absolutely impossible, it is the duty of the promisor to make a bona fide effort to dissolve and be relieved of the restraint which operates to prevent his performance.'" (quoting Brown v. J.P. Morgan & Co., 31 N.Y.S.2d 323, 334 (Sup. Ct. 1941), *rev'd on other grounds*, 40 N.Y.S.2d 229 (App. Div. 1943), *aff'd*, 67 N.E.2d 263 (N.Y. 1946))). Note that only United States tort law was cited as authority defining this overseas tort. *See id.* at 1454-55.

88. *Wells Fargo*, 852 F.2d at 657, 661.

New York).[89] The district court then concluded that the parties failed to come to an agreement on the issue of "collectibility" (i.e., the debt situs).[90] The Second Circuit, however, equated "collectibility" with "payability," and thus found a New York agreement.[91] In other words, use of the New York payment system effectively domesticated the obligation and rendered the Philippine decree irrelevant. The Second Circuit viewed payment through New York as a specific term negotiated between the parties:

> Finally, we note that the gist of the concerns expressed by the amici is their "policy interest in the principle that, *in the absence of agreement to the contrary,* a U.S. bank should not bear the risk that a foreign government will impose restrictions on the deposits of its foreign branches." (Letter of the United States to this Court, dated June 14, 1988; emphasis added). Our affirmance in the present case is based on the district court's finding of just such an agreement.[92]

The court seemed unaware that banks route almost all international dollar payments through New York for reasons having little to do with the choice or specific intent of their customers.[93] More ominously, it refused to acknowledge that a payment is a shifting of a liability that must exist in the first place, and that the case involved Philippine power over accounts in Manila, not the status of a subsequent payment from the account.[94] This error is akin to saying that a bank must pay on a check, even though there is no money in the checking account. The Second Circuit reached its result by failing to comprehend what payments are about.

Needless to say, the numerous financial institutions who routed their dollar transactions through New York were discomfited, and the

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89. *Wells Fargo,* 695 F. Supp. at 1450, 1452 ("Thus the [telex] confirmations [between Citibank and Wells Fargo] establish an agreement that repayment was to occur in [Wells Fargo's correspondent bank in] New York.").

90. *Id.* at 1453 ("In summary, since the deposit contracts do not reflect any agreement on the issue of where the deposits could be collected, and since no term can be implied based on custom or usage in the Eurodollar market, we find that the parties failed to come to an agreement on this question.").

91. *Wells Fargo,* 852 F.2d at 661 ("[A] debt may be collected wherever it is repayable, unless the parties have agreed otherwise. . . . [W]e conclude that [Wells Fargo] was entitled to collect the deposits out of Citibank assets in New York.").

92. *Id.*

93. United States dollar settlement is a technological imperative, not a meaningful choice by parties. *See infra* notes 159-163 and accompanying text.

94. *Wells Fargo,* 852 F.2d at 659 ("[T]his decree [by the Philippine government] prevented Citibank/Manila . . . from repaying the [Wells Fargo] deposits with its Philippine assets . . . .").

Supreme Court granted certiorari in response to amicus briefs.[95] The Supreme Court remanded because the appellate court had assumed facts not established by the district court, namely that "collection" was to occur through (or in) New York.[96] Upon remand, the appellate court then adopted the earlier decision of the district court, holding in favor of the plaintiff because of the tort committed abroad.[97] Finally, Congress joined the action, passing a statute whose meaning, although obscure, effectively overruled the Second Circuit's final *Wells Fargo* holding.[98]

The *Wells Fargo* court created severe doctrinal distortion in general payment law in order to resolve a conflicts issue. The Second Circuit went so far as to abandon the idea that payment law is based on predeterminate communicative liabilities. *Wells Fargo* ended up being a tort case.[99] Through the various levels of litigation and appeal, the case was adjudicated under multiple legal theories, which were predicated on different key facts. Some of these facts were not at all communicative in nature. The plasticity of the key facts is as worrisome as the multiplicity of the relevant doctrines. Cases like this have

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95. Wells Fargo Asia Ltd. v. Citibank, N.A., 495 U.S. 660, 662 (1990) (listing *amicus* briefs by the United States, the New York Clearing House Association et al., and the Bank of Montreal), *remanded to* 936 F.2d 723 (2d Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992).

96. *See id.* at 669. The Supreme Court noted:

> The Court of Appeals appears to have relied upon the first theory we have noted, adopting the premise that the parties did contract to permit recovery from the general assets of Citibank in New York. Yet the District Court had made it clear that there is a distinction between an agreement on "repayment," which refers to the physical location for transacting discharge of the debt, and an agreement respecting "collection," which refers to the location where assets may be taken to satisfy it, and in quite specific terms, it found that the only agreement the parties made referred to repayment.

Id.

97. *Wells Fargo*, 936 F.2d at 728 ("Citibank's acknowledged ability to obtain Philippine Central Bank approval of transfers to it of moneys as profits appears to support the district court's finding, if further support were needed, that Citibank in fact did not satisfy its good faith obligation to seek that government's approval of repayment of [Wells Fargo's] deposits to [Wells Fargo].").

98. *See* 12 U.S.C. § 633 (1994). This statute reads, in relevant part:

> A member bank shall not be required to repay any deposit made at a foreign branch of the bank if the branch cannot repay the deposit due to—
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> (1) an act of war, insurrection, or civil strife; or
>
> (2) an action by a foreign government or instrumentality (whether de jure or de facto) in the country in which the branch is located;
>
> unless the member bank has expressly agreed in writing to repay the deposit under those circumstances.

Id. § 633(a). This same provision applies to insured banks as well. *See id.* § 1828(q).

99. *See supra* notes 87, 97 and accompanying text.

precedential value, both for conflict of law and for substantive payment law. Such precedents endanger both bodies of law.

2. *Multiple Liability.*—Conflicts law can protect a bank from multiple liability. A hypothetical case illustrates what multiple liability means, and how conflicts law can eliminate it.

Assume that Polonius has borrowed money in many jurisdictions and that he has total debts of over $1,000,000. Polonius is also a creditor, having an account for $100,000 with the Bank of Denmark. The Bank of Denmark has branches in every jurisdiction in the world. One morning, ten of Polonius's creditors, located in ten different jurisdictions, all seek to attach Polonius's account at the Bank of Denmark. Each creditor has a legitimate cause of action against Polonius in its own jurisdiction. Each branch of the Bank of Denmark is subject to the full jurisdiction of the courts in which Polonius's creditors seek their writ of attachment. Ten creditors, in ten different jurisdictions, are all making the same assertion: "Polonius owes me $100,000. I have a right to an attachment of his account." Without any conflicts law, these creditors are all correct, and their claims are all equal. Because no court is likely to stiff its own local creditors, the creditors may all win in full. The bank is out $1,000,000 for having received a deposit of $100,000.

Such a result is an intolerable burden on the bank. This statement is intuitively obvious, but remains equally true after analysis. Multiple liability means that a bank is assuming the credit risk of its *creditor.* This would make a deposit riskier than a loan in some ways, because the amount of the loan usually caps the potential loss. Without a conflicts rule preventing multiple liability, the potential loss on a deposit is much greater. Specifically, the potential loss is the amount of the deposit multiplied by the number of legal systems in which the bank does business, minus one. (The original liability is a loss to the depositor, while the additional liability is a loss to the bank.)

The potential multiple liability is not, itself, economically inefficient; it is just a wealth transfer. The inefficiency enters when the bank seeks to protect itself from the possibility of multiple liability. Such a bank must monitor the credit and behavior of its *creditors* in much the same way as it monitors the credit and behavior of its debtors. Prevention of multiple liability therefore eliminates any monitoring costs of being a debtor. Because there are no discernible benefits of monitoring creditors, elimination of multiple liability provides real economic efficiency gains. It is no surprise that elimination of possible multiple liability is a theme seen elsewhere in payment law.[100]

Reducing monitoring costs through eliminating multiple liability has distributional, as well as efficiency, consequences. Banks subject to multiple liability would have to assess the creditworthiness of their creditors (i.e., their depositors). This could limit bank payment services to their more creditworthy customers and would make depositor privacy far more difficult.

3. *Sovereign Risk.*—The case law of international banking is more concerned with allocation of sovereign risk than any other issue of private international law. A conflicts law of banking is needed to sensibly allocate sovereign risk.

Although the term is easy to intuit, "sovereign risk" is an analytically murky term, associated with murky case law. For an easy intuitive example, an oil company suffers sovereign risk when its oil wells are expropriated. However, sovereign risk is more difficult to analyze. Sovereign risk is usually viewed as the risk of a multinational enterprise suffering a loss because of a legal transition in one of the countries in which it does business.[101] This definition, although perhaps useful to the business community, is legally inadequate. Within the borders of this foreign country, sovereign risk is a non-concept. All that has occurred is a straightforward legal transition that can pose no interesting problems of private international law.[102] There is nothing

100. For the best known example of eliminating multiple liability within payment law, see U.C.C. § 4-303 (1995), which allows any timely claim of a bank to defeat almost any other claim asserted in the check-collection process.

Limited corporate liability is a response to a similar problem. In a world of unlimited joint and several liability, all shareholders would be responsible for a corporation's debt, and they would pay more than their share if other shareholders were judgment-proof. *See* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1891, 1906 (1991) (noting the excessive costs under a joint and several liability rule of each shareholder monitoring the personal assets of each other shareholder). By contrast, in a limited liability corporation, shareholders are not concerned about the creditworthiness of other shareholders, and they therefore need not monitor each other's creditworthiness. *See id.* at 1891 (noting that "the valuations [of risk or other kinds of liability] of heterogeneous shareholders diverge more sharply under unlimited liability than under limited liability"). Without this monitoring burden, anonymous securities markets become possible.

101. *See, e.g.*, Herring & Kübler, *supra* note 1, at 947-48 (discussing the various types of losses and legal transitions that can occur in sovereign risk cases).

102. A "legal transition" may be viewed as any change in legal rules that have not been completely anticipated by the parties affected by the change. *Cf.* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 511, 517 (1986) (noting that "[a]lmost any change in legal rules or market conditions that is not fully anticipated will affect the value of firms, assets, or other investments").

internationally interesting, for example, about a new environmental or tax law. The new environmental law may be truly unexpected, and it may defeat investment-backed expectations. In some legal systems, it may even rise to the dignity of a "taking" meriting compensation.[103] But within the borders of the sovereign prescribing the law, the environmental, tax, or other law, or even flat-out expropriation, is just another exercise of sovereign power. Within these borders, such a law cannot be distinguished from any other decree that may deprive an international business of an expected profit.

The concept of sovereign risk as something that can be "allocated" or "adjudicated" requires an *external* perspective. A mere taking (or legal transition) cannot assume the status of adjudicable "sovereign risk" until some second sovereign, in considering its jurisdiction to adjudicate or enforce, takes note of the original sovereign's jurisdiction to prescribe. If the second sovereign shows no interest in accepting or questioning the first sovereign's prescription or adjudication, there is no sovereign risk to adjudicate. When we say "allocation of sovereign risk," we mean a contested application of conflict-of-laws rules triggered by a foreign legal transition. The concept of sovereign risk—if we are to invest it with any legal meaning at all—must sound in conflict of law.

4. Diversity.—A conflicts law of banking might be needed even in an ideal world in which sovereign risk did not exist, multiple liability were not a problem, and all nations' laws were perfectly harmonized. Elimination of sovereign risk and multiple liability would certainly be good, but harmonization is a mixed blessing. Distinctive local law is sometimes worth preserving. If distinctive local law remains, conflicts law is needed to prevent inadvertent importation of foreign policies and exportation of domestic policies.

Harmonization is generally the watchword in payment law.[104] Payment law is intensely instrumental, with excellent agreement on goals and little empirical disagreement on the effectuation of these shared goals. It is not surprising that the payment-harmonization movement has been a relative success.[105] As a general matter, the case for diversity in payment law is weak.

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103. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-32 (1992) (discussing the Takings Clause of the Fifth Amendment of the United States Constitution in reference to a state environmental law).

104. *See* Peter A. Alces, *A Jurisprudential Perspective for the True Codification of Payments Law*, 53 FORDHAM L. REV. 83, 87-88 (1984) (discussing the drafting of the Uniform New Payments Code as an effort to render existing payments law consistent).

105. *See infra* notes 118-119 and accompanying text.

However, consumer payment law may not lend itself to this approach. Both ends and means are disputable, and courts sometimes act deontologically. Therefore, local distinctions are often considered desirable in consumer payment law.[106] Conflicts law is needed to ensure that each jurisdiction is free to protect its consumers in ways it considers best, without interfering with the ability of other jurisdictions to do the same. Although the law of wholesale payments is well harmonized, the law of retail payments can be quite territorial. This can even be seen in United States law. Article 4A of the U.C.C., for example, expressly excludes from its scope all consumer wire transfers, and has been adopted with a fairly high degree of uniformity.[107] In contrast, Article 4, a consumer flashpoint, often varies from state to state.[108]

B. *Are There Good Alternatives to Conflicts Law?*

Our discussion so far shows that something like conflicts law is needed to address several problems in the law of international banking. It has not yet shown that other legal techniques might not serve in the place of conflicts law. This possibility, although comparatively easy to answer, is not otiose. It is possible to argue that an exogenous body of conflicts law is not necessary for international commercial disputes, specifically international banking law. There are several bases for this argument: party autonomy, arbitration, harmonization, and uniformity. First, one could argue that conflicts law is unnecessary because courts recognize party autonomy in choice of law and forum.[109] This argument asserts that banking law is contractual and that the combination of contract and party autonomy obviates the

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106. *See, e.g.*, Thomas C. Baxter, Jr., *The UCC Thrives in the Law of Commercial Payment*, 28 LOY. L.A. L. REV. 113, 127 (1994) (arguing for a "continuing role of state law in matters of commerce").

107. Specifically, it excludes all wire transfers governed by the Electronic Funds Transfer Act. U.C.C. § 4A-108 (1995). Article 4A is not perfectly uniform, but most of the state nonuniformities are stylistic and do not substantially affect the statute. *See* U.C.C. art. 4A, 2B U.L.A. 455-549 (1991) & 94-110 (Supp. 1997). Revised Article 5 has not yet been as widely adopted as Article 4A, but has been even more uniform. *See* U.C.C. art. 5, 2B U.L.A. 111-49 (Supp. 1997).

108. *See* U.C.C. art. 4, 2B U.L.A. 5-73 (1991) & 3-27 (Supp. 1997). The most amended section appears to be 4-406, describing a customer's duty to report account discrepancies. U.C.C. § 4-406, 2B U.L.A. 23-26 (Supp. 1997).

109. Recognition of party autonomy itself is a conflicts rule. *See, e.g.*, WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 202 (2d ed. 1993) (noting the development of "the proposition that the proper choice of law in a contract case was the law that conformed with the parties' intentions"). It is therefore formally improper to say that party autonomy is an "alternative" to conflicts law. However, party autonomy, when expressed and recognized, is certainly a preferable alternative to a complicated body

need for a separate body of conflicts law. After all, bankers are sophisticated parties who can appropriately structure their transactions. The argument would go that banks do not really need the default rules provided by private international law.

This argument founders on at least three grounds. First, even among bankers, contracting tends to be imperfect, and forum- and law-selection clauses are often omitted or incomplete. For example, many forum-selection clauses do not confer exclusive jurisdiction on the chosen forum.[110] Many old framework agreements, such as correspondent agreements, are seldom renegotiated, although they may have been originally negotiated in an era when forum- and law-selection clauses were not worth the trouble. Second, many international banking cases are not contractual. For example, the attachment of a bank account may be the result of a criminal, tort, or bankruptcy case to which the bank is not a party.[111] Finally, courts often do not recognize party autonomy. To some extent, this is the result of a lingering judicial hostility to the principle.[112] But disregard for party autonomy is often a matter of nonjudicial policy; rather, it is the decree of a state that purports to negate an agreement between a bank and its customer. For example, when the Office of Foreign Assets Control decides to block a trade transaction on grounds of national security, the desire of the parties to complete the transaction is not only legally irrelevant, it is contrary to United States policy.[113]

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of conflicts rules. See *infra* Part III.A for discussion of the trend toward increasing recognition of party autonomy.

110. *See, e.g.*, MORGAN GUARANTY TRUST CO. OF NEW YORK, TERMS AND CONDITIONS GOVERNING USE OF EUROCLEAR: THE CLEARANCE SYSTEM FOR INTERNATIONALLY TRADED SECURITIES § 22 (rev. ed. Dec. 1, 1982) ("Each Participant submits to the nonexclusive jurisdiction of the competent courts of Brussels for the purposes of any dispute arising hereunder."). Euroclear is a privately-operated international securities clearance system. Several jurisdictions, such as the Second Circuit, demand that a prorogation clause be extremely specific to be enforceable. *See* John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distribs., Inc., 22 F.3d 51, 52 (2d Cir. 1994) ("The general rule in cases containing forum selection clauses is that '[w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive.'" (quoting Docksider, Ltd. v. Sea Tech., Ltd., 875 F.2d 762, 764 (9th Cir. 1989))).

111. *See, e.g.*, *supra* note 97 and accompanying text.

112. *See infra* notes 134-135 and accompanying text.

113. *See, e.g.*, Message to the Congress on Iraq, 32 WEEKLY COMP. PRES. DOC. 230 (Feb. 9, 1996) (discussing the role of the Department of the Treasury's Office of Foreign Assets Control in "lawsuits seeking the prevent the unauthorized transfer of blocked Iraqi assets").

Arbitration is a special case of party autonomy, and it suffers from the same problems of residual judicial hostility,[114] nonconsensual transactions, and sovereign decrees. Other problems with arbitration are unique to banking. Although arbitration is common in international contractual disputes, it has been notoriously unpopular in banking. Several good general reasons have been articulated for this unpopularity,[115] but two others should be noted here. First, arbitration is oriented toward dispute resolution, not public articulation of norms. Many lawyers therefore think that arbitration is less doctrinal than litigation: Arbitrators split the baby. As discussed above, rule integrity is unusually important in the law of bank liabilities.[116] Judges, unlike arbitrators, know that they are making rules of future applicability, and courts are known to issue harsh opinions in protection of the payment system.[117] In other words, many bank lawyers see bank liabilities as better suited to adjudication by litigation. Second, large-scale bank payment liabilities are seldom disputed, except in cases of bank insolvency and conflict of laws. Arbitration may be of

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114. *See, e.g.*, Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1301 (9th Cir. 1994) (refusing to uphold an arbitration clause incorporated in the Standard Applications for Securities Industry Regulation because plaintiffs did not knowingly enter into any agreement to arbitrate employment disputes); Jones v. Sea Tow Servs. Freeport NY, Inc., 30 F.3d 360, 361 (2d Cir. 1994) (refusing to uphold a Lloyd's Standard Form of Salvage Agreement requiring arbitration in London because the parties, both being U.S. citizens, lacked sufficient relation with the foreign state to invoke the Convention on the Recognition and Enforcement of Foreign Arbitral Awards); Allied-Bruce Terminix Cos. v. Dobson, 628 So. 2d 354, 355 (Ala. 1993) (denying a motion to compel arbitration because under Alabama law, predispute arbitration agreements are unenforceable), *rev'd*, 513 U.S. 265 (1995).

115. *See* S. Isabella Chung, *Developing a Documentary Credit Dispute Resolution: An ICC Perspective*, 19 FORDHAM INT'L L.J. 1349, 1361-62 (1996) (noting as one reason for reluctance to enter arbitration the view that "which party has greater access to arbitrators with the requisite experience may be outcome determinative"); William W. Park, *When the Borrower and the Banker Are at Odds: The Interaction of Judge and Arbitrator in Trans-Border Finance*, 65 TUL. L. REV. 1323, 1323-25 (1991) (observing that banks usually have the negotiating strength to insist on a hometown forum and that litigation provides summary procedures and interim relief not available in arbitration, especially with the collection of debt).

116. *See supra* Part II.A.1.

117. *See, e.g.*, General Elec. Capital Corp. v. Central Bank, 49 F.3d 280, 286 (7th Cir. 1995) (applying the discharge-for-value rule to a mistaken wire transfer, so that "[o]n reading this conclusion, the president of Central Bank may be tempted to tear out his hair in exasperation"); Tucker v. Meredith, 232 F.2d 347, 350-51 (D.C. Cir. 1956) ("[T]he maker of a negotiable instrument may suffer hardship because he is unable to assert against a holder in due course valid defenses he might have against the payee or any subsequent holder not a holder in due course. . . . [T]he law regards the security of negotiable instruments in the hands of holders who took for value before maturity without notice of infirmities or defects as of far greater importance."); Dziurak v. Chase Manhattan Bank, N.A., 396 N.Y.S.2d 414, 417 (App. Div. 1977) (characterizing as "harsh" its holding that a depositor cannot stop his bank from making payment on his cashier's check, except by a court order or an indemnification bond), *aff'd*, 377 N.E.2d 474 (N.Y. 1978).

some aid in conflict-of-law cases, but is inherently inapplicable to a bank insolvency case.

Another possible argument against the need for a private international law of banking comes from movements for harmonized municipal law. One could argue that harmonized laws are making conflict of law irrelevant. Certainly, commercial and banking laws are becoming increasingly harmonized. For example, as a condition of admission to the club of sophisticated international banks, supervisors are demanding some degree of payment-law harmonization.[118] The United Nations Commission on International Trade Law (UNCITRAL) has developed a sophisticated model law on international wire transfers, among many other subjects.[119] But harmonized laws are not necessarily uniform laws. Even uniform commercial laws are of little help in noncommercial contexts, or when the decrees of a government purport to disturb preexisting legal relations. Furthermore, the harmonization movement will probably never be universal. Some conflicts law

118. *See, e.g.*, BANK FOR INTERNATIONAL SETTLEMENTS, DELIVERY VERSUS PAYMENT IN SECURITIES SETTLEMENT SYSTEMS: REPORT PREPARED BY THE COMMITTEE ON PAYMENT AND SETTLEMENT SYSTEMS OF THE CENTRAL BANKS OF THE GROUP OF TEN COUNTRIES § 5.5 (Sept. 1992) (demanding that the legal enforceability of the system's rules and procedures in all relevant jurisdictions should be established for international securities transfers); BANK FOR INTERNATIONAL SETTLEMENTS, REPORT OF THE COMMITTEE ON INTERBANK NETTING SCHEMES OF THE CENTRAL BANKS OF THE GROUP OF TEN COUNTRIES § 3.2 (Nov. 1990) (requiring that "[n]etting schemes should have a well-founded legal basis under all relevant jurisdictions").

This harmonization effort has been successful. Bilateral and multibranch close-out netting agreements are enforceable in all G-10 countries, except Italy, and most additional important jurisdictions, except Spain and Portugal. *See* DANIEL P. CUNNINGHAM & CRAIG T. ABRUZZO, MULTIBRANCH NETTING: A SOLUTION TO THE PROBLEMS OF CROSS-BORDER BANK INSOLVENCIES 43-44 (Capital Mkts. Forum, Int'l Bar Ass'n Discussion Paper 1995).

There are several key United States laws implementing this harmonization effort. 11 U.S.C. §§ 556-557, 559-560 (1994) (allowing a contractual right in bankruptcy to liquidate or terminate various types of contracts); 12 U.S.C. § 1821(e)(8) (1994) (permitting the netting-out of the termination value in certain qualified financial contracts entered into before the appointment of a conservator or receiver); Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, §§ 401-407, 105 Stat. 2236, 2371-75 (1991) (codified as amended at 12 U.S.C. §§ 4401-4407 (1994)) (setting forth netting arrangements for the efficient processing of transactions between financial institutions); N.Y. BANKING LAW § 618 (McKinney 1971 & Supp. 1997) (authorizing netting in procedures for the liquidation and conservation of assets by the state superintendent).

119. *See United Nations Commission on International Trade Law: Model Law on International Credit Transfers*, 32 I.L.M. 587 (1993) [hereinafter UNCITRAL]. *See generally* Amelia H. Boss & Patricia B. Fry, *Divergent or Parallel Tracks: International and Domestic Codification of Commercial Law*, 47 BUS. LAW. 1505, 1506 (1992) (discussing steps "currently under way on the international level leading to the creation of what might be called an 'International Uniform Commercial Code'"); Permanent Editorial Board for the Uniform Commercial Code, Commentary No. 13: The Place of Article 4A in a World of Electronic Funds Transfers, 31 U.C.C. REP. SERV. 2D (Callaghan) 2, 11 (1994) (noting that Article 4A and UNCITRAL's model law cover the same type of transaction but sometimes conflict).

must exist so that courts of the harmonized jurisdictions can resolve disputes involving the nonharmonized jurisdictions.

Finally, one could argue that the laws of international trade are part of the law of nations and that there is no such thing as national authority, and thus conflict of laws. This argument may sound quaint to modern ears accustomed to an ever-expanding sphere of sovereignty. It is, however, still encountered in the case law on occasion.[120] At least one private supranational body—the International Chamber of Commerce—is in the business of creating rules of practice treated like international law merchant.[121] Law merchant is also arguably a de facto norm of international arbitration, although arbitration is unpopular in the banking business.[122] But despite its sporadic support and possible normative appeal, international law merchant is not particularly convincing in a world economy in which trade relations are a continuation of diplomacy by other means.[123]

III. PRINCIPLES TO LOCALIZE LIABILITIES

It is time to regroup. We now know that the location of a bank account can have only a legal meaning, if it has any meaning at all. A bank liability has no location, except the location of the relevant courthouse.[124] The previous Part has shown that there is much to be gained by associating a bank liability with a courthouse; therefore, a conflicts law of international banking is needed. We have not yet discussed the substantive content of such a conflicts law.

This Part will not yet concentrate on substantive conflicts law. Rather, it discusses the principles that must underlie the conflicts law

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120. *See, e.g.*, Power Curber Int'l Ltd. v. National Bank of Kuwait S.A.K., [1981] 1 W.L.R. 1233, 1243 (C.A.) (determining that English law should govern because "the approach of the Kuwaiti court appears to be so out of step with that of our own courts and the courts of other trading nations that I fear we cannot recognise it").

121. For a brief account of the international law merchant, see Susie A. Malloy, Note, *The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts*, 19 FORDHAM INT'L L.J. 662, 690-92 (1995).

122. Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487, 492-94 (1995). Professor Juenger's conclusion would be at best weakly applicable to banking law even if arbitration became a more popular form of dispute resolution, because large-scale bank payment liabilities are usually only litigated in bank insolvency proceedings, which are not subject to arbitration.

123. *See* KWAW, *supra* note 1, at 121 (citing trade embargoes, freezing of assets and other economic policies used by the United States "as a means of demonstrating its opinion of what it considers to be unacceptable acts by other states"); Smedresman & Lowenfeld, *supra* note 1, at 747 (describing the United States' freeze of Iranian assets during the 1979 hostage crisis).

124. *See supra* Part I.

of banking. Contemporary United States conflicts law is predicated on two principles: party autonomy and legal realism. As discussed below, party autonomy is uncontroversial (apart perhaps from consumer cases) but limited in scope.[125] The key question addressed by this Part is whether the other bedrock principle of conflicts law—legal realism—is up to the task. This Part concludes that it is not. Legal realism implies a relevant reality apart from the communications that create bank liabilities.[126] It is difficult to understand or even imagine such a reality. These difficulties are best appreciated through parsing individual cases.

This Part discusses two such cases in detail. One New York case is a model of clumsy and disingenuous legal realism, adopted uncritically by subsequent courts.[127] The other case, an English opinion, is a judicial *tour de force* dependent upon realism.[128] But even the English realistic choice-of-law approach, although applied as intelligently as possible, leads to ambiguities and contradictions. The realistic English conflicts law does not accord with the nominalistic substantive law of bank liabilities.

This suggests another possible approach to the conflicts law of banking: a nominalistic approach that tracks the substantive law of bank liabilities. This Part concludes with a discussion of nominalistic law that elaborates on the discussion in Part I and hints at the applicability of legal nominalism to the private international law of banking. Part IV, which follows, discusses a nominalistic doctrinal basis for the conflicts law of international banking—a basis that already permeates the Uniform Commercial Code and much of the case law.

A. *Party Autonomy*

Although party autonomy used to be suspect,[129] it is now the least controversial of conflicts rules. Most courts will respect an explicit

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125. *See infra* Part III.A.

126. *See infra* Part III.B.

127. *See infra* notes 147, 149-163 and accompanying text.

128. *See infra* notes 165-196 and accompanying text.

129. Some traces of this old suspicion of party autonomy can still be found. U.C.C. § 1-105(1) (1995) only countenances party autonomy as a choice-of-law principle if there is some "reasonable relation to this state." *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971) (listing exceptions to the application of a contractual choice of law). Some states are still skeptical about forum-selection clauses. *See* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R.4TH 404, 409-14 (1984) (citing cases invalidating forum-selection clauses as contrary to public policy); *cf.* William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 151 (1995) ("While many states have held court selection clauses valid, others have not." (footnote omitted)).

choice-of-law agreement, especially in commercial cases.[130] A forum-selection clause receives comparable judicial deference.[131]

Unfortunately, many transactions do not receive the benefit of an explicit conflicts agreement.[132] This is just as true for transactions among sophisticated financial parties as it is for other transactions.[133] Although documentation is becoming increasingly prevalent, a large number of trades are still evidenced by nothing more formal than a confirmation slip. In addition, many courts will find ways of refusing to honor explicit conflicts agreements they do not like,[134] even in the law of international banking.[135] Even at best, party autonomy is inherently inadequate. As discussed above, party autonomy can be irrele-

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130. *See* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 962-65 (1994) (discussing the resolution of choice-of-law problems through acceptance of party autonomy). Particularly noteworthy has been the recent widespread statutory abolition of the "reasonable relationship" requirement. *See, e.g.*, CAL. CIV. CODE § 1646.5 (West Supp. 1997) (allowing parties to a contract to choose the law of California to govern their rights and duties, whether or not the contract bears a reasonable relationship to California); N.Y. GEN. OBLIG. LAW §§ 5-1401 to -1402 (McKinney 1989) (allowing parties to a contract to choose the law of New York to govern their rights and duties, whether or not the contract bears a reasonable relationship to New York). Several of the new U.C.C. banking articles also abolish this "reasonable relation" requirement, notwithstanding section 1-105. *See* U.C.C. §§ 4A-507(b), 5-116(a).

131. *See, e.g.*, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541 (1995) (holding that federal law did not invalidate a foreign arbitration clause in a maritime bill of lading); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (upholding a forum-selection clause in a consumer contract of adhesion); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972) (upholding a forum-selection clause in an admiralty contract).

132. *See supra* note 110 and accompanying text.

133. *Cf.* Dougherty, *supra* note 129, at 409-14 (citing cases invalidating forum-selection clauses).

134. *See, e.g.*, Leslie v. Lloyd's of London, No. CIV.A.H-90-1907, 1995 WL 661090, at *17-23 (S.D. Tex. Aug. 20, 1995) (refusing to honor a choice-of-law and forum-selection clause in a contract of adhesion where the chosen English forum and law would deny an American investor substantive rights); *cf.* Donald B. Brenner, *There Is a Developing Trend Among Courts of Making Choice of Forum Clauses in Franchise Agreements Presumptively Invalid*, 102 COM. L.J. 94, 95 (1997) (arguing that courts invalidate choice-of-forum clauses in franchise agreements due to the unequal bargaining power between franchisors and franchisees); Park, *supra* note 129, at 151 n.82 (listing states that are chary of forum-selection clauses).

135. *See, e.g.*, Trinh v. Citibank, N.A., 850 F.2d 1164, 1168 (6th Cir. 1988) (refusing to uphold Citibank's disclaimer of liability to depositors for losses resulting from acts of the Vietnamese government); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863-64 (2d Cir. 1981) (stating that the defendant bank might have successfully defended against the plaintiff depositors' claims if there had been a waiver of the depositors' rights to proceed against the American home office). In its holding, the *Vishipco* court ignored the *force majeure* clause explicitly cited in the district court's opinion. The district court was unequivocal:

> "In accepting this deposit, the Bank assumes no responsibility or liability for any losses to the depositor arising out of delays in or interruptions of the Bank's business due to Acts of God, acts of governmental authority, acts of a public enemy or

vant in sovereign risk cases, in which the force of the state trumps the will of the parties.[136] Furthermore, party autonomy is generally subordinated to other norms in the law of insolvency, because general creditors are not parties to any agreement between the debtor and a specific creditor.[137] Finally, party autonomy is not even relevant in some cases, such as those involving the law of attachments.

Party autonomy is not enough. Some kind of exogenous conflicts law must govern the law of bank liabilities, at least for cases in which all relevant parties have not consented. Realism of some kind is the usual mode of analysis in contemporary United States conflicts law.[138] However, nominalism, although now rare in conflicts law, is the usual mode of analysis in payment law.[139] Can a realistic conflicts law of bank liabilities coexist with a nominalistic substantive law? This is the topic of the next subpart.

B. Realism

1. Realism and Conflicts Doctrine.—Most of this subpart parses individual cases. But, before discussing the application of modern conflicts doctrine to the law of bank liabilities, the realistic structure of modern conflicts doctrine should be noted.

In finding an applicable law, modern courts, steeped in realism, use something called "interest analysis." Most courts do so, although often through congeners, such as "center of gravity," "comparative impairment," "better law," or the *Restatement (Second) of Conflict of Laws.*[140] Because interest analysis comes in so many varieties (each

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> due to war, riots, . . . civil commotions, insurrections . . . or causes beyond the Bank's control."

Vishipco Line v. Chase Manhattan Bank, N.A., No. 77 Civ. 1251 (RLC), 1980 WL 13801, at *3 (S.D.N.Y. Nov. 26, 1980) (quoting a bank deposit slip), *rev'd*, 660 F.2d 854 (2d Cir. 1981).

136. *See supra* Part II.A.3.

137. *See, e.g., In re* High-Line Aviation, Inc., 149 B.R. 730, 734-35 (Bankr. N.D. Ga. 1992) (holding that choice-of-law provision in a consignment agreement was not binding on the consignee's secured creditors because they were not parties to the agreement).

138. "[R]eactions to modern conflicts theory vary according to one's attitude toward judicial realism." Gene R. Shreve, *Conflicts Law: State or Federal?*, 68 IND. L.J. 907, 912 (1993); *see also* Harold G. Maier, *Baseball and Chicken Salad: A Realistic Look at Choice of Law*, 44 VAND. L. REV. 827, 841-43 (1991) (reviewing LEA BRILMAYER, CONFLICT OF LAWS, FOUNDATIONS AND FUTURE DIRECTIONS (1991)) (arguing that until an authoritative decisionmaker has decided the outcome, there is no law, only abstract arguments about what the law ought to be).

139. *See infra* Part III.C.

140. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). For a discussion of these various analytic devices, see LEA BRILMAYER, CONFLICT OF LAWS §§ 2.1 to 2.2.3 (2d ed. 1995) and RICHMAN & REYNOLDS, *supra* note 109, at 193-248.

with its own differing exponents), it may be unfair to lump them together. However, this Article requires only a brief sketch, and the author will risk unfairness for the sake of clarity.

Interest analysis calls for careful examination of the facts of cases and the relevant policies to be applied by various states in deciding these cases on their facts.[141] Courts should not hide behind conceptual categorizations, but rather should concentrate on the policies presented by the fact pattern of the case. Most of these relevant policies are expressed in section 6 of the *Restatement*:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.[142]

For our purposes, the key to interest analysis is not so much that it relies on ascertaining "state interests" or "relevant policies," whatever they may be. More important to us is that interest analysis, as a species of legal realism, uses these criteria to seek optimal *decisions*. Interest analysis seeks the *best* decision for *each* case, rather than an optimal rule that will yield the best decision rule for a class of cases.[143] All of the section 6 criteria are therefore applied to each case in which they are relevant. Each policy-weighing is purely contextual, and it is conducted on the facts of a specific case alone.

The generic weaknesses of this case-specific multifactor approach have been thoroughly discussed in the literature.[144] Even some proponents of this approach admit that their method does not lead to a high degree of certainty in adjudication, especially in international

141. BRILMAYER, *supra* note 140, § 2.1.1, at 50-51.

142. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2). "It is not suggested that this list of factors is exclusive." *Id.* § 6 cmt. c.

143. *See id.* § 6 cmt. f (stating that the forum should achieve the best possible accommodation of the relevant policies and appraise the interests of the states involved in the determination of a particular issue).

144. *See, e.g.*, Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 7-16 (1991) (discussing the *Restatement (Second) of Conflict of Laws* and problems with choice of laws in general); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 321 (1990) (criticizing the case-by-case approach to conflicts resolution).

banking law.[145] Of course, realism has its strengths in conflicts law, but these strengths do not impress international bankers.[146] Rather than describe realism's weaknesses and its lack of compensating strengths, this Article now discusses two cases that use a realistic approach in international banking law.

2. *Realism and the Case Law of International Banking.*—Two cases warn of different perils of realism in international banking law: *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*[147] and *Libyan Arab Foreign Bank v. Bankers Trust Co.* (*LAFB*).[148] *Zeevi* warns of the perils of bad legal realism; *LAFB* shows that even the best legal realism may not be good enough for payment law. We start with *Zeevi.*

Zeevi involved a letter of credit issued by a Ugandan branch (or perhaps bank), to be paid in dollars through a New York correspondent account upon presentment of drafts in Kampala. Idi Amin, the dictator of Uganda, let the bank officers know that paying the Israeli beneficiaries would not be good for their health. The beneficiaries, as prudent as their Ugandan bankers, avoided Kampala. They presented their drafts at the New York correspondent of the Ugandan bank, which was supposed to pay the drafts after they had been honored in Kampala. After denial of their demand for honor and payment, the beneficiaries brought suit against the correspondent account.[149]

The *Zeevi* court asserted quasi in rem jurisdiction over the correspondent account and dismissed several statutory defenses.[150] It then proceeded to its choice-of-law analysis:

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145. *See* H. Thomas Byron III, Comment, *A Conflict of Laws Model for Foreign Branch Deposit Cases,* 58 U. CHI. L. REV. 671, 701 (1991) ("[C]ourts engaged in the balancing required by interest analysis could reach different outcomes.").

146. *See* EUROCLEAR OPERATIONS CENTER OF MORGAN GUARANTY TRUST CO. OF NEW YORK, CROSS-BORDER CLEARANCE, SETTLEMENT, AND CUSTODY: BEYOND THE G30 RECOMMENDATIONS 24 (1993) ("In practice, [interest analysis] rules are sometimes skewed in favor of local law; if the balance is unclear, courts may apply what they consider to be the 'best' law under the circumstances—which may all-too-regularly turn out to be local law."). To address this problem, Euroclear recommended the adoption of "categorical" choice-of-law rules. *Id.* at xx-xxi.

147. 333 N.E.2d 168 (N.Y. 1975).

148. [1988] 1 Lloyd's Rep. 259 (Q.B. 1987) (*LAFB*).

149. *Zeevi,* 333 N.E.2d at 170-71. This arrangement is reminiscent of *Wells Fargo,* in which the obligor branch was supposed to pay the obligee through an account at a New York office. *See supra* notes 83-92 and accompanying text. Such correspondent payments are quite common in banking, whether the correspondent is a branch of the obligor, e.g., *Wells Fargo,* or an independent entity, e.g., *Zeevi.*

150. *Zeevi,* 333 N.E.2d at 171, 174. These defenses included the following: the Act of State Doctrine; N.Y. BANKING LAW § 200-b (McKinney 1990); and Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. VIII, § 2(b), 60 Stat. 1401, 1411, 2

> New York has an overriding and paramount interest in the outcome of this litigation. It is a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions, such as to be so recognized by our decisional law. A vast amount of international letter of credit business is customarily handled by certain New York banks whose facilities and foreign connections are particularly adaptable to this field of operation. The parties, by listing United States dollars as the form of payment, impliedly accepted these facts and set up procedures to implement their trust in our policies. In order to maintain its pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected. Since New York has the greatest interest and is most intimately concerned with the outcome of this litigation, its laws should be accorded paramount control over the legal issues presented.[151]

The choice-of-law analysis contains two arguments. Its equation of United States dollars with United States choice of law, obvious *ipse dixit*, has been ignored by most other courts.[152] But the instrumentalist argument that a choice of New York law would maintain New York's position as a financial center has been quite persuasive in the case law.[153] It reads like a good example of legal realism in action: law implementing state policy. Although this argument looks good, it relies on a non sequitur: What is the connection between adopting New York law and preserving New York's preeminent financial status?

U.N.T.S. 39, 66-68 (incorporated in part into United States law through 22 U.S.C. § 286h (1994)).

151. *Zeevi*, 333 N.E.2d at 172-73 (citations omitted).

152. *But see* World Point Trading Pte. Ltd. v. Credito Italiano, 622 N.Y.S.2d 862, 863-64 (Sup. Ct. 1994) (suggesting that United States dollars imply United States law), *rev'd*, 649 N.Y.S.2d 689 (App. Div. 1996).

153. Several courts have inferred New York law from New York's place as financial capital. *E.g.*, A.I. Trade Finance, Inc. v. Petra Bank, 989 F.2d 76, 82-83 (2d Cir. 1993); Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992); Wells Fargo Asia Ltd. v. Citibank, N.A., 936 F.2d 723, 726 (2d Cir. 1991); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir. 1985); Manela v. Garantia Banking Ltd., 940 F. Supp. 584, 596 (S.D.N.Y. 1996) (mem.); Pravin Banker Assocs. v. Banco Popular del Peru, 895 F. Supp. 660, 665 (S.D.N.Y. 1995), *aff'd*, 109 F.3d 850 (2d Cir. 1997); *In re* Allstate Ins. Co., 613 N.E.2d 936, 939 (N.Y. 1993); *cf.* Ehrlich-Bober & Co. v. University of Houston, 404 N.E.2d 726, 730 (N.Y. 1980) (discussing a jurisdictional rather than a choice-of-law problem). Against this flood of authority is one mildly skeptical rejoinder in *Weltover*, 504 U.S. at 618, which questioned the inference of New York law in order to meet Congress's supposed desire to preserve New York City's status as a financial capital.

Perhaps the *Zeevi* court thought that this connection was obvious, but the putative beneficiary of the court's decision—the New York international banking community—did not. In *Zeevi*, the New York Clearing House Association ("Clearing House") commissioned an amicus brief siding with the bank defendant.[154] Amicus briefs have a built-in credibility that party briefs do not. A lawyer, trying to win a case, might be willing to sacrifice the long-term interests of the client's industry, or even the long-term interests of the client.[155] But amicus parties do not pay the cost of adverse judgments out of their pockets, and they need not be shortsighted. Real bankers, when they commission expensive amicus briefs, are voicing their real interests.

The Clearing House has filed numerous amicus briefs in international conflict-of-law cases.[156] In all but one of these cases, the Clearing House has argued that foreign law should apply.[157] It is difficult to believe that the bankers' fear of New York law is unrelated to their bottom line: the prosperity of New York as a financial center.

The opposition of the New York banks to New York law is rooted, in large part, on an important technical consideration. International payments of dollar-denominated bank money must be settled in New York, even for wire transfers between two parties located on opposite sides of the Champs Élysées. A typical overseas payment transaction is

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154. *Zeevi*, 333 N.E.2d at 170.

155. For a good example in the banking industry, see *United Equities Co. v. First National City Bank*, 383 N.Y.S.2d 6 (App. Div. 1976), *aff'd mem.*, 363 N.E.2d 1385 (N.Y. 1977), where the defendant, First National City Bank, prevented the plaintiff from winning a $59,400 judgment by arguing that a foreign exchange agreement drafted by the defendant should not have been interpreted according to its language.

156. *See, e.g.*, Citibank, N.A. v. Trinh, 496 U.S. 912, 912 (1990); Chase Manhattan Bank, N.A. v. Vishipco Line, 459 U.S. 976, 976 (1982); Consarc Corp. v. Iraqi Ministry, 27 F.3d 695, 697 (D.C. Cir. 1994); Wells Fargo Asia Ltd. v. Citibank, N.A., 852 F.2d 657, 658 (2d Cir. 1988), *vacated*, 495 U.S. 660 (1990); Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 646 (2d Cir. 1984); Perez v. Chase Manhattan Bank, N.A., 463 N.E.2d 5, 6 (N.Y. 1984); *supra* note 154 and accompanying text; *see also* Joseph H. Sommer, *The Subsidiary: Doctrine Without a Cause?*, 59 FORDHAM L. REV. 227, 272 n.171 (1990) (identifying the appeal of *SEC v. Wang*, 699 F. Supp. 44 (S.D.N.Y. 1988) (mem.), as another case in which Clearing House filed an amicus brief and discussing the government's frequent participation in such amicus briefs); *cf.* Reibor Int'l Ltd. v. Cargo Carriers (KACZ-CO.), 759 F.2d 262, 263-64 (2d Cir. 1985) (involving Clearing House's electronic payment system). In addition to the New York Clearing House, the Institute of International Bankers, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the United States Comptroller of Currency, and the Departments of State, Justice, and Treasury participated in amicus briefs in *Wells Fargo*; the Federal Reserve and United States Departments of State, Justice and Treasury participated in amicus briefs filed in *Allied Bank*; and the Federal Reserve Bank of New York and the British government submitted amicus briefs in *Wang*. *See* Sommer, *supra*, at 272 n.171. The author was of counsel in the Federal Reserve Bank of New York's brief in *Wang*.

157. The exceptional case was *Allied Bank*, 757 F.2d at 518.

shown in Figure 2.[158] Several variations of this theme are commonly encountered. For example, banks, rather than their customers, may initiate the payment order, or the correspondent bank may be a New York branch of the French bank, rather than an unaffiliated correspondent. But what is invariable (unless *A* and *B* banks are one and the same French bank) is that the settlement of dollar payments involves New York. The New York component of the settlement is neither a conscious decision nor a meaningful contingency: It is simply the way things happen.[159] This is not a matter of tradition either: It is economically more efficient.[160] Parties use New York settlement for their dollar payment chain the same way they use silicon in their computers. They have little practical choice, they do not notice, and (provided the courts leave matters alone) they do not care. In Figure 2, Monsieur *A* and Madame *B* are probably unaware that New York is involved in their dollar payment.

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158. *See also* Mark Sneddon, *The Effect of Uniform Commercial Code Article 4A on the Law of International Credit Transfers*, 29 LOY. L.A. L. REV. 1107, 1111 (1996) (diagramming an international credit transfer).

159. *See* Libyan Arab Foreign Bank v. Bankers Trust Co., [1988] 1 Lloyd's Rep. 259, 278 (Q.B. 1987) (*LAFB*) (acknowledging that Eurodollar transactions, unless involving a transfer within the same bank, must be cleared in the United States); KWAW, *supra* note 1, at 169 (explaining the necessity of using the clearing system of the country of issue for the repayment of eurocurrencies); Richard Hooley & John C. Taylor, *Payment by Funds Transfer*, *in* LAW OF BANK PAYMENTS 25, 31-37 (Michael Brindle & Raymond Cox eds., 1996) (also discussing variations common in London). For a more detailed discussion of a hypothetical international wire transfer, see KWAW, *supra* note 1, at 46-71.

160. More specifically, it is efficient to concentrate high-value settlement of a currency in a single process. Aggregation of all settlements means that banks need only have one correspondent for high-value settlements. If there is only one correspondent, random fluctuations in correspondent balances are at a minimum. This implies that the amount of capital committed to the correspondent balances (intended in part to protect the correspondent bank against these fluctuations) is also at a minimum. Therefore, concentrated settlement reduces the amount of costly bank capital required to safely operate the payment system. The most sensible place to concentrate settlements is in the country of the central bank of issue. This central bank serves as a settlement counterparty of perfect creditworthiness. Consequently, it is technically—but not legally—difficult to settle overseas. (Low-value overseas settlement systems are occasionally seen because they use little capital and can enjoy higher profit margins.)

Overseas clearing, unlike overseas settlement, is fairly common. *E.g.*, *LAFB*, [1988] 1 Lloyd's Rep. at 275. (For the purposes of this Article, "clearing" is the process of netting out interbank obligations among counterparties; "settlement" is the discharge of these obligations.) Clearing, however, does not require capital. Overseas clearing is usually followed by a settlement process in the country of issue. *See id.*

FIGURE 2

Given these technical details, New York banks naturally oppose the routine imposition of New York law based only on a New York dollar clearing-and-settlement nexus. They wish to keep New York insulated from foreign transactions that are routed through New York solely for technical reasons. It makes no more sense to apply New York law to a dollar-denominated wire transfer between two foreign parties than it does to apply Singapore law to a slander suit between two Americans just because the slanderous letter was drafted in Kansas on a personal computer manufactured in Singapore. The drafters of U.C.C. Article 4A were well aware of this problem when they drafted section 4A-503:

> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.[161]

The drafters intended this section to keep intermediary banks (e.g., New York correspondent banks) uninvolved in any possible litigation among the end-parties.[162]

161. U.C.C. § 4A-503 (1995).

162. *See* U.C.C. § 4A-503 cmt. (noting that the section is "designed to prevent interruption of a funds transfer after it has been set in motion," and that "[i]n particular, intermediary banks are protected [against injunctions]"). This section works together with U.C.C. § 4A-502(d), which states:

> Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

Id. § 4A-502(d); *see also* U.C.C. § 4A-502 cmt. 4 (discussing a creditor's ability to impose a levy on funds being transferred through an intermediary bank). Section 4A-502 is preempted by federal asset-forfeiture law. *See* Manufacturas Int'l LTDA v. Manufacturers Han-

If courts choose to construe the technical necessity of New York dollar clearing as a mandatory insurance policy against unfavorable foreign law, banks will pass the cost of the policy on to their customers. Customers may then seek cheaper alternatives. Alternatives to New York clearing, such as payment in foreign currency or offshore dollar clearing, are not difficult to find. These alternatives will not help the international competitiveness of "certain New York banks whose facilities and foreign connections are particularly adaptable" to correspondent operations.[163]

Zeevi, for a number of reasons, serves as a warning about the use of realism in choice-of-law analysis. First, the court's "realistic" reasoning was counterproductive in terms of the court's own normative scheme. Second, *Zeevi* hints that a realistic style is often a smokescreen for other concerns. No court primarily concerned with the well-being of the New York financial community would ignore without careful analysis a New York Clearing House brief. Finally, and more to the point, it is easy for generalist courts to be misled by a "realistic" analysis of a highly technical field. Many courts subsequently cited *Zeevi* in good faith for the proposition that New York choice of law

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over Trust Co., 792 F. Supp. 180, 194 (E.D.N.Y. 1992) ("[E]ven if the U.C.C. were applicable, under the Supremacy Clause a state could not in its regulation of commercial activity inhibit federal law enforcement agencies in applying federal drug laws."), *aff'd without opinion*, 47 F.3d 1159 (2d Cir. 1995).

Arguably, the role of the New York bank in *Zeevi* was not purely an intermediary role. After all, the payment to the beneficiary was actually to be made in New York. J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 333 N.E.2d 168, 170-71 (N.Y. 1975). Even if this distinction has merit, it was not drawn by the Court of Appeals. In any event, this distinction is not supported in letter-of-credit law. *See infra* notes 271-274 and accompanying text.

163. *Zeevi*, 333 N.E.2d at 172-73. Some courts are occasionally concerned about the effect of poor domestic law on the New York banking business, and these courts support their concerns with reasoned argument. An example is in *Sigmoil Resources, N.V. v. Pan Ocean Oil Corp.*, 650 N.Y.S.2d 726 (App. Div. 1996), where the court noted:

> Great care must be taken to avoid impeding the role of correspondent accounts in the facilitation of international transactions. "Domestic and foreign banks should not become embroiled in controversies surrounding underlying transactions of which they have no knowledge or connection * * * If New York permits correspondent bank accounts to be regularly subject to attachment after a credit has been made by a foreign bank to its local customers, the entire system of correspondent banking, in which New York banks play an important role, will be disrupted."

Id. at 727 (quoting Sidwell & Co. v. Kamchatimpex, 632 N.Y.S.2d 455, 459 (Sup. Ct. 1995)); *accord* Young v. United States Dep't of Justice, 882 F.2d 633, 643 (2d Cir. 1989) ("We are particularly concerned that if we found no duty requiring New York banks to keep account information confidential, some customers might be inclined to transfer their business from institutions in this jurisdiction, home to one of the world's financial capitals, to banks in 'confidential' jurisdictions.").

benefitted New York's international banking primacy.[164] These courts seemed unaware that the truth is often the opposite.

Do *Zeevi* and its progeny show that there is anything wrong with realism in the private law of international banking? Not necessarily. One could argue that the problem is not with the approach, but only with the courts that apply this approach. This argument has its weaknesses, as shown by the large number of courts that have followed *Zeevi*. Even if realism is applied with great contextual sensitivity, the result can be disappointing.

Justice Staughton's opinion in *Libyan Arab Foreign Bank v. Bankers Trust Co.* (*LAFB*)[165] is as well reasoned and sensitive to facts and policy as is possible. All that can be criticized is the realistic law that Justice Staughton had to apply, a law that included currency fundamentalism. This may absolve Justice Staughton, but it leaves wide room for criticizing legal doctrine.

For our purposes, the facts of *LAFB* are straightforward.[166] Libyan Arab Foreign Bank (Libyan Bank) kept two accounts with Bankers Trust Company (BT): one in New York and one in London. The New York account was mainly used for United States payments. Any excess in the New York account over $500,000 was swept into the London branch of BT every day. (BT was compensated because this minimum balance bore no interest.) The sweep from New York to London occurred each day at 2:00 p.m., as per the agreement between Libyan Bank and BT. During the day of January 8, 1986, United States government officials jawboned BT not to make its daily transfer, and BT complied.[167] At 4:10 p.m., President Reagan issued an immediately effective proclamation blocking all transfers of Libyan funds, including funds held at foreign branches of United States banks. Libyan Bank had about $160 million in the New York sweep account and $130 million in the London branch. Libyan Bank issued a demand to BT's London branch for both the $160 and $130 million accounts to be paid in London. BT, complying with President Reagan's order, refused to pay in London. After formal demand, the litigation commenced.[168]

164. *See supra* note 153 and accompanying text.

165. [1988] 1 Lloyd's Rep. 259 (Q.B. 1987).

166. A more detailed account, including a procedural history, can be found in KWAW, *supra* note 1, at 123-32.

167. *LAFB*, [1988] 1 Lloyd's Rep. at 261-66. BT had refused to make its daily transfer the previous day as well. However, most of the excess money was used the next day for payments to United States parties. *Id.* at 265-66. Although Libyan Bank also sued for this money, this discussion will not address that issue.

168. *Id.* at 261-68.

The court's analysis invoked two English conflicts principles: Performance is excused if either (1) performance becomes illegal by the proper law of the contract or (2) performance necessarily involves doing an act in a place where performance of the act has become illegal.[169] The court recited the traditional rule for locating the "proper law of the contract":

> As a general rule the contract between a bank and its customer is governed by the law of the place where the account is kept, in the absence of agreement to the contrary. . . .
>
> That rule accords with the principle, to be found in the judgment of Lord Justice Atkin in *N. Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110 at p. 127, and other authorities, that a bank's promise to repay is to repay at the branch of the bank where the account is kept.[170]

As discussed above, this traditional rule employs circular reasoning. The only meaningful way to determine where an account is kept is to determine its proper law.[171] The *LAFB* court, forced by the traditional rule to reason backwards, seemed confused:

> In the age of the computer it may not be strictly accurate to speak of the branch where the account is kept. Banks no longer have books in which they write entries; they have terminals by which they give instructions; and the computer itself with its magnetic tape, floppy disc or some other device may be physically located elsewhere. Nevertheless it should not be difficult to decide where an account is kept for this purpose, and is not in the present case. The actual entries on the London account were, as I understand it, made in London, albeit on instructions from New York . . . . At all events I have no doubt that the London account was at all material times "kept" in London.[172]

Any search for debt situs that is not a search for "proper law" is a search for real books made out of paper, doubtless kept by a real clerk who made entries in these books with a real quill pen. There is not enough reality in modern banking practice to support such a search. Fortunately, the court's knowledge of banking was better than the doctrine it was dealt. It knew which facts were relevant, even if there was no doctrine into which these facts could be fitted. The court ana-

169. *Id.* at 268.
170. *Id.* at 270.
171. *See supra* note 66 and accompanying text.
172. *LAFB*, [1988] 1 Lloyd's Rep. at 270.

lyzed the negotiations between BT and Libyan Bank at some length. During these negotiations, Libyan Bank had discussed United States "political risk" as a factor making a London account more favorable.[173] Without articulating that the London account was "kept" in London because the parties had negotiated for English law, the court nevertheless found that English law applied.[174]

The *LAFB* court then turned to the New York account, whose location was apparently not disputed. The court decided that two accounts held by one depositor amounted to a single contract governed by two proper laws (i.e., that of England and that of New York) with the rights to each account governed by local law.[175] New York law required that the New York account be paid. Justice Staughton came to this conclusion because the New York office had an obligation to transfer the funds at 2:00 p.m. (while transfer was still mandatory according to New York law) and had not done so before the account was frozen at 4:10 p.m. This was a breach of the proper law of the contract—New York law.[176]

Here was another analytical weakness in Justice Staughton's opinion. Although BT had breached its New York contractual obligations between 2:00 and 4:10, it appeared unlikely that BT was in breach after that time. According to the usual nonconsequential measure of damages in commercial law, Libyan Bank's remedy for the breach should have been the interest on two hours of delay, rather than the total amount of the deposit. The New York branch—governed by New York law—could not have been in breach after 4:10; therefore, the frozen funds were a consequence of the breach, not the breach itself. The court, in effect, awarded consequential damages in a commercial case, without articulating why it had chosen such an unusual measure of damages.

The major portion of the *LAFB* court's opinion was not spent on proper law and breach, but rather on the illegality of performance defense.[177] The court viewed payment as involving some kind of real performance by a bank. If performance of the payment would necessarily involve an act illegal in the United States, BT would be excused. This belief is not congruent with the definition of payment provided earlier in this Article that "payment" is a settlement of a license to judgment against a bank by replacing the license with another license

173. *Id.* at 264.
174. *Id.* at 271.
175. *Id.*
176. *Id.* at 284.
177. *See id.* at 270-71, 283-88.

to judgment.[178] Rather, it views payment as some kind of real *act* by the bank. The difference between these positions seems subtle, but it was of great consequence in the *LAFB* case. If payment is simply novating a license to a judgment, a bank that refuses to novate the license can be sued, and a judgment can be collected from the bank. Impossibility of performance should be irrelevant, however, as long as enough bank assets are in the jurisdiction of the court. In contrast, the *LAFB* court had to conduct a searching inquiry into modes of payment.[179]

As the court viewed English law, BT would be excused from performance if payment necessarily had to involve actions in the United States after 4:10 p.m.[180] The court seemed to be thinking of a payment from BT's London branch to some London bank with whom Libyan Bank had an account. Such a payment would normally be routed through BT's New York head office, into the New York Clearing House Interbank Payment System (CHIPS), and thence out to the New York correspondent (or branch) of Libyan Bank's London bank.[181] CHIPS transfers were indisputably through New York, and would indisputably have been illegal. BT argued that CHIPS was an implied term of any large-value payment contract, a theory properly rejected by the court.[182]

The court then carefully and accurately reviewed possible forms of payment from BT-London to Libyan Bank: an on-us transfer to a debtor of Libyan Bank who had an account with BT-London, a correspondent-bank transfer involving no United States bank, a bankers draft, a bankers payment, a London dollar clearing, other foreign dollar clearing systems, certificates of deposit, dollar bills, and sterling notes. It reviewed them for three characteristics: feasibility, dependence on New York, and whether Libyan Bank had a right to demand that particular means of payment. After this exhaustive analysis, the

178. *See supra* notes 22-24 and accompanying text.

179. *See LAFB*, [1988] 1 Lloyd's Rep. at 271-76.

180. *See id.* at 285.

181. Such a payment would have followed the route described in Figure 2, with London replacing Paris.

182. *See LAFB*, [1988] 1 Lloyd's Rep. at 277-78. The beneficiary of a payment simply wants its account timely credited. It may specify a certain payment medium to assure timeliness and safety, but it has very little legal complaint if another medium is nevertheless used successfully. *See* U.C.C. § 4A-406(b) (1995) (enforcing payments made by means prohibited by the beneficiary unless the beneficiary notifies the originator of its refusal of the payment within a reasonable time, does not touch the money, *and* would have suffered an avoidable loss if the originator had complied with the contract). Conversely, if the originator does not specify the payment system intermediaries, it suffers no loss from its bank's choices. U.C.C. § 4A-305(b).

court found that most forms of payment were impossible, involved New York, or were not Libyan Bank's entitlements. However, payments by tender of dollar bills (or sterling) could be made in England, without necessarily requiring an illegal act in New York.[183] The court continued:

> Of course it is highly unlikely that anyone would want to receive a sum as large as $131m. in dollar bills, at all events unless they were engaged in laundering the proceeds of crime. [An expert witness] said in his report:
>
> > As to the demand for payment in cash, I regard this simply as the assertion of a customer's inalienable right. In practice, of course, where such a large sum is demanded in this manner, fulfilment of the theoretical right is unlikely, in my experience, to be achieved. A sensible banker will seek to persuade his customer to accept payment in some more convenient form, and I have yet to encounter an incident of this nature where an acceptable compromise was not reached, even where the sum was demanded in sterling.
>
> I would substitute "fundamental" for "inalienable"; but in all other respects that passage accords with what, in my judgment, is the law. One can compare operations in futures in the commodity markets: everybody knows that contracts will be settled by the payment of differences, and not by the delivery of copper, wheat or sugar as the case may be; but an obligation to deliver and accept the appropriate commodity, in the absence of settlement by some other means, remains the legal basis of these transactions. So in my view every obligation in monetary terms is to be fulfilled, either by the delivery of cash, or by some other operation which the creditor demands and which the debtor is either obliged to, or is content to, perform.[184]

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183. *LAFB*, [1988] 1 Lloyd's Rep. at 274-83.

184. *Id.* at 281. This is a false analogy. As discussed above, there is no reason in payment law why an obligation to deliver currency must underlie all payment transactions. *See supra* notes 24-47 and accompanying text. However, the underlying right to physical delivery of physical-commodities contracts prevents manipulation. The spot market for physical delivery is generally far thinner than the market for the futures contract. If there were no delivery requirement at expiry date, contracts could only be settled by reference to the spot price of the commodity. But, because of the relative illiquidity of the physical commodity, this spot price is generally easy to manipulate. A physical-delivery requirement guarantees that manipulations of the spot-market price around the expiry date of the future will cause few effects in the futures settlement process. Those financial futures markets with deep markets in the underlying commodities are frequently cash-settled on the exchange on expiry date. *See generally* Kenneth D. Garbade & William L. Silber, *Cash Settlement of Futures*

The holding seems clear. Currency fundamentalism is the law. *All* payments are substitutes for the ur-payment, a physical transfer of currency. Tender of currency is a real act, in a real location, against which all legal entitlements can be measured. This seems to be an accurate statement of English law.[185] It is, however, also fraught with at least three problems.

The first problem is technical. The transaction was denominated in United States dollars, which are legal tender in the United States. Justice Staughton referred to the mutual consent of the parties to a noncurrency medium of payment, but did not require consent for tender of dollars or sterling.[186] This would be defensible if English law recognized dollars as legal tender in England, but it does not.[187]

Second, this view of the law results in a schizophrenic opinion. Elsewhere in the opinion, Justice Staughton veered away from currency fundamentalism:

> The credit balance of the Libyan bank with Bankers Trust constituted a personal right, a chose in action. At bottom there are only two means by which the fruits of that right could have been made available to the Libyan bank. The first is by delivery of cash, whether dollar bills or any other currency . . . . The second is the procuring of an account transfer. (I leave out of account the delivery of chattels, such as gold, silver or works of art, since nobody has suggested that Bankers Trust were [sic] obliged to adopt that method. The same applies to other kinds of property, such as land.)[188]

This characterization of Libyan Bank's legal rights is virtually the same as that in Part I of this Article. Libyan Bank was not entitled to currency (or money); it only had a license to a judgment against BT.[189] The judgment could be satisfied by BT's tendering articles of value that would satisfy Libyan Bank, either directly or indirectly. Libyan Bank would be directly satisfied if it could be induced to sign a release of claim, and it would be indirectly satisfied if the articles of value

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Contracts: An Economic Analysis, 3 J. FUTURES MARKETS 451 (1983) (explaining how liquidated transactions have replaced physical settlements of futures contracts).

185. *See* KWAW, *supra* note 1, at 85, 89-90 (explaining the necessity of localized repayment at common law); MANN, *supra* note 13, at 81-85 (discussing place and time of payment under English law). It is also a limited statement. *See infra* note 194.

186. *LAFB*, [1988] 1 Lloyd's Rep. at 283.

187. *See* MANN, *supra* note 13, at 192 (stating the general rule that foreign money is not legal tender).

188. *LAFB*, [1988] 1 Lloyd's Rep. at 273.

189. *See supra* text accompanying notes 19-20.

were auctioned for more units of account than BT's debt to Libyan Bank. (Justice Staughton should not have omitted chattels or land, because these assets would have also been available in a sheriff's auction, and Libyan Bank might have accepted them in accord and satisfaction of the debt.)

Finally, it is simply not practical to view the "ultimate" right of a payment recipient as a right to currency. This much was admitted—as a matter of practice—by the expert witness. It is also the law. United States law is extremely practical about inappropriate tenders of—or demands for—money. As early as 1821, a New England bank tried to avoid an interbank payment by slowly counting small coin, rather than tendering large amounts of bullion.[190] Justice Story viewed this as a default, and assessed the bank statutory punitive damages.[191] One hundred years later, Justice Holmes suggested that a bank demanding a large interbank payment with the intent of destabilizing the paying bank would be a tortfeasor.[192] In 1988, a New York court ruled that a New York City bus could refuse dollar bills. Convenience trumped the legal-tender status of the dollar bills: New York could not afford to accept paper currency in its fare machines.[193] English law may not be very different.[194] French law goes further. It forces certain kinds of payments to be made via bank money, rather than currency. For such classes of payments, currency is *illegal* tender![195]

This discussion has not been an effort to establish that Justice Staughton's opinion was inadequate. To the contrary, *LAFB* is one of the better judicial opinions in payment law. The flaws in the opinion resulted from attempted realism, an attempt mostly demanded by the case law with which Justice Staughton had to contend. The clumsy determination of debt situs was an attempt to find a "real" location for

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190. *See* Suffolk Bank v. Lincoln Bank, 23 F. Cas. 346, 347 (C.C.D. Me. 1821) (No. 13,590) (Story, J.).

191. *Id.* at 348. What would happen if Bankers Trust started tendering $1 bills in New York at 2:00 and was stopped by the 4:10 p.m. decree?

192. American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358 (1921).

193. Nemser v. New York City Transit Auth., 530 N.Y.S.2d 493, 495 (Sup. Ct. 1988).

194. *See* MANN, *supra* note 13, at 77 ("Where large amounts [of money] are involved (and as a result of inflation they are becoming increasingly larger) payment by legal tender is frequently unthinkable and in many contexts cannot possibly be within the contemplation of the parties, so that a robust process of construction ought to displace the legal [tender] principle in most cases." (citing Tenax S.S. Co. v. Reinante Transoceanica Navegacion S.A., *The Brimnes*, [1973] 1 W.L.R. 386, 400 (Q.B. 1972), *appeal dismissed sub nom.* Tenax S.S. Co. v. The Brimnes (Owners), [1975] 1 Q.B. 929 (C.A. 1974))). In light of this opinion, it is not surprising that Mann does not approve of Justice Staughton's reasoning in *LAFB*. *See id.* at 201-02. Nevertheless, Mann purports to be a chartalist, advocating that a tender of currency is the only legally cognizable form of money. *See id.* at 272.

195. *See id.* at 79 n.79.

something that could only be determined by the content of communications. The tacit choice of consequential damages came about because BT had done nothing "real" to transfer the funds to England. The ultimate right to payment in currency—although it contradicted law that Justice Staughton knew well—was required by a doctrine that referred to "real" actions undertaken in New York. Wire transfers are not spatially localized; they are communications whose locations can be determined only by their data content.

As discussed in Part I, banking is mostly a trade in symbols. But a realistic approach is chary of purely symbolic events:

> [U]sing references in telexes as indications of the governing law, trivializes the whole choice of law process and is unrealistic. Furthermore, the reliance by courts on references made in the telexes, is bound to make the court neglect other circumstances, such as the location of the bank and other parties, which, although not appearing in the telex, may be more important indicators of the governing law. Thus, although the only documentation from which courts may infer the governing law are the confirmations exchanged, it is arguable that the mere references to locations in such confirmations ought not to be taken as indications of the governing law. All the circumstances of the case need to be examined.[196]

Why look for reality underneath the exchanged symbols? Why not let the symbols constitute the relevant reality?

C. *Nominalism*

"Nominalism" is the usual term ascribed to treating symbols as if they were reality.[197] It can be particularly powerful in social contexts, in which shared symbols *are* social reality. Nominalism can be viewed as the antithesis of realism, and it is the characteristic intellectual device of payment law. Before discussing nominalistic law, one should first consider "formalism," which usually is taken as the antithesis of legal realism.

Formalism can be viewed as the belief that legal doctrine is somehow determinative of a case and independent of an adjudicator's view of the "correct" result.[198] A more thorough exponent of formalism realizes that legal doctrine does not exist in a vacuum: Legal doctrine is applied to facts. A formalistic decisionmaker takes these facts and

196. KWAW, *supra* note 1, at 232.
197. *See supra* note 13 and accompanying text.
198. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 531 (1988).

fits them into some categorical pattern. It is this categorical pattern, rather than the naked facts, upon which formal doctrine acts. For formalistic doctrine to succeed on its own terms, the "decisionmakers in the system [must] perceive [the facts] as being members of the same category perceived by the addressees and will be seen as so perceiving by those affected."[199]

If all parties categorize facts the same way, formalism provides predictability, a quality dear to the hearts of payment lawyers. Although formalism sacrifices the possible increase in accuracy that may inhere in contextual decisionmaking, it does not make realism's demand that generalist judges be omniscient decisionmakers,[200] or even that they be as good as Justice Staughton.[201] Similarly, nonjudicial actors are aided by formalism, because they too are spared the burden of comprehending reality—or the even greater burden of trying to anticipate the judge's version of reality. Formal doctrine permits a legal division of labor, separating the formation of rules from the adjudication of disputes.

Formalism is not enough for payment law. Formalism still involves fact-finding and the fitting of facts into patterns. Facts can be disputed, and the fit of a fact pattern to a doctrine can involve discretion. As discussed above, payment law is predicated on an outrageous idea—making a mere cause of action not only a reliable asset, but the very basis of money.[202] An outrageous idea demands outrageous law. Payment law must dispense with facts whenever possible.

Payment law transcends facts through nominalism, the treating of symbols as reality.[203] The world of nominalistic payment law is a world of pure communicative events—a world of "courier[s] without luggage."[204] It is no accident that this quotation derives from an old negotiable instruments case. Nominalism is an old technique of banking commercial law, especially payment law. Negotiability, for example, is

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199. *Id.* at 540. In other words, "people perceive pelicans as birds; decisionmakers perceive pelicans as birds; and people know that decisionmakers will perceive pelicans as birds." *Id.*

200. *See, e.g.,* Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 95 (1989) (discussing fundamental values of the legal process and providing judges with useful decisionmaking rules). These rationality constraints are central to Professor Kramer's preference for choice-of-law rules over ad hoc choice-of-law principles. *See* Kramer, *supra* note 144, at 321 n.148 (arguing that ad hoc decisionmakers offer proposals that are too general and analyses that are too complex to be useful).

201. *See supra* text accompanying notes 166-195.

202. *See supra* Part I.

203. *See supra* note 13 and accompanying text.

204. Overton v. Tyler, 3 Pa. 346, 347 (1846) (holding that a "payable to bearer" note that contained additional legal language was not a negotiable note).

almost purely a question of magic words, not external facts. The words "to order" or "to bearer" are all-important; anything else is irrelevant:

> Total exclusion from [U.C.C.] Article 3 of other promises or orders that are not payable to bearer or to order serves a useful purpose. It provides a simple device to clearly exclude a writing that does not fit the pattern of typical negotiable instruments and which is not intended to be a negotiable instrument. If a writing could be an instrument despite the absence of "to order" or "to bearer" language and a dispute arises with respect to the writing, it might be argued that the writing is a negotiable instrument because the other requirements of subsection (a) are somehow met. Even if the argument is eventually found to be without merit it can be used as a litigation ploy.[205]

Imagine that! The law dismisses an inquiry into the true intent of the parties as a "litigation ploy." Form governs all.

This nominalistic technique goes beyond Article 3 and pervades all of the U.C.C. banking articles. The subject matter of Article 4A, for example, is "payment orders," defined as "instructions" (i.e., communications).[206] After assuring the authenticity and accuracy of these communications,[207] Article 4A turns them into the stuff of payments. The independence principle at the core of letters of credit transforms a very real commercial transaction into a nominalistic document-checking exercise: "If . . . a letter of credit . . . contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated."[208] "Nondocumentary" conditions, such as whether goods financed by a letter of credit are acceptable to the buyer, are very real conditions. Reality is to be ignored.

The facts in a payment case are symbols. To the extent that payment-system participants can assure the authenticity of these symbols, the nominalistic doctrines of payment law can produce an unambiguous answer to almost all potential disputes. To the extent that the law unambiguously and noncontextually operates on certain symbols, the symbols are something real. This reification of symbols should not be a surprise. Nominalism must underpin almost any notion of money.

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205. U.C.C. § 3-104 cmt. 2 (1995).

206. *See id.* § 4A-103 (providing definitions regarding payment orders).

207. *See id.* §§ 4A-201 to -208.

208. *Id.* § 5-108(g) (regarding issuer's rights and obligations).

"Money" is a constructed social meaning, not a physical fact.[209] Any law of money must be sensitive to the social construction of money and must rely strongly on a nominalistic underpinning.

Social construction is not, of course, limited to money. Law has long served to construct and regulate social meaning in many spheres far removed from commercial law.[210] It should be no surprise that commercial transactions require shared social meaning provided by law and that this requirement is particularly prominent in the law of money. After all, nothing is a medium of exchange unless we all think of it as a medium of exchange and treat it as a medium of exchange. The law of money is different primarily in its use of an explicitly nominalistic approach to construct social meaning. Nominalistic law is a subset of formalism, and formalism is more generally viewed as destroying rather than constructing social solidarity.[211] Nominalism works in the law of money not because it interprets social relations but because it directly constructs them.

This nominalistic approach to bank-liability money has been highly successful. Because of a nominalistic law of money, we enjoy a reliable monetary system based on the most improbable store of value—traded rights to sue and obtain judgment.

Let us place the argument in perspective. Part II argued that the substantive law of money requires an adjective set of conflicts rules. This Part and Part I argue that the law of money *must* be nominalistic. By implication, the *conflicts* law of money must be nominalistic. The only meaningful facts on which the conflicts law operates are communications without physical locations. The output of the conflicts law is something that can have only a socially shared meaning—the location of a promise. A promise is nowhere, especially a disembodied promise made in a world of high-speed telecommunications. Without the strong consensus that can only be created by nominalism, the promise effectively can have no location.

Can nominalistic conflicts law work as well as nominalistic substantive law? To give a hint, imagine how quickly Justice Staughton could have decided the *LAFB* case[212] if he had taken a nominalistic approach, looking merely at the content of communications establishing the liabilities. Some communications clearly established a liability

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209. *See supra* Part I.

210. *See, e.g.*, Lessig, *supra* note 53, at 962-90 (describing the social constructivism of law in many contexts, including motorcycle-helmet laws in Russia, civil rights and dueling in the American South, language laws, smoking, and homosexuals in the military).

211. ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY 206-09 (1976).

212. *See supra* notes 165-189 and accompanying text.

in London, some in New York. BT had clearly promised Libyan Bank that, as of 2:00 p.m., New York time, all deposits over $500,000 would be sent to London.[213] There was no need to decide whether the funds were "really" sent to London, and no need to suppress a discussion of why consequential damages were assessed for not sending the money before the 4:10 p.m. currency freeze.[214] *The funds had been sent to London because BT told Libyan Bank that they would be sent there.*[215] BT's debt to Libyan Bank was therefore all in London, except the $500,000 retained by the agreement and any monies sent to the New York account after 2:00 p.m.[216] The *LAFB* court's long discussion about impossibility of payment through New York is irrelevant. BT is liable in London, whatever the details of novating the liability to another bank. Libyan Bank could execute a judgment against BT's English assets, if the judgment could not be otherwise satisfied.

IV. A RULE TO LOCALIZE LIABILITIES

A quick recapitulation may be in order. Bank money consists of traded licenses to sue banks for judgment. The law governing these licenses must be very clear for operational reasons, and it must also be a firm basis for the shared social construct that is money. A nominalistic law, referring only to communications, is the clearest law possible. In order to retain its clarity in a world of multiple sovereigns, "money" requires some location. The location of money—the location of a license to judgment—must be a conflict-of-law rule. This rule should be nominalistic for the same reason that the rules governing the content of the licenses are nominalistic. There is no reality but the communications themselves. Unfortunately, the rules governing the location of a license to a judgment derive from modern choice-of-law theory, which is highly realistic. The result has been the recent explosion of case law and the even greater explosion of scholarship on the subject.

A rule is needed. The first subpart will discuss some criteria for a good nominalistic conflicts rule, the second will introduce such a rule, and the third will show this rule in operation.

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213. Libyan Arab Foreign Bank v. Bankers Trust Co., [1988] 1 Lloyd's Rep. 259, 265 (Q.B. 1987) (*LAFB*).

214. *See id.* at 285.

215. This is not the only possible resolution of *LAFB*. For a more detailed doctrinal discussion, see *infra* notes 285-292 and accompanying text.

216. *LAFB*, [1988] 1 Lloyd's Rep. at 265.

A. *Criteria for a Good Nominalistic Conflicts Rule*

As discussed above, the realistic approach of interest analysis does not fit the law of bank liabilities, which demands nominalism. However, there is considerable wisdom in some techniques of interest analysis, if not in its realistic methodology. Specifically, the *Restatement (Second) of Conflict of Laws* factors for arriving at optimal conflicts *decisions* can also be viewed as a set of criteria for optimal conflicts *rules*, independent of the decisions that create these rules.[217]

If viewed as a set of criteria for rules rather than as factors for decisions, the seven *Restatement* factors become far more useful.[218] Three of these factors seek the "best" conflicts rule for a given fact pattern;[219] three seek the rule yielding the most predictable result;[220] and one factor warns courts of different jurisdictions that they must cooperate with each other.[221] This grouping implies that the essential tension in conflicts law is between conflicts rules that yield determinate results and those that yield sensible results.[222] Determinacy and sensibility are both good, but somewhat inconsistent. A determinate (i.e., mechanical) rule can often lead to silly results.

The argument that sensible conflicts rules are good is, of course, tautological. The argument for determinacy is somewhat more complex. As discussed above, a conflicts rule for bank liabilities must be determinate because bank liabilities are the stuff of money, and money, by its nature, cannot be questioned.[223] Furthermore, it is difficult to imagine an indeterminate law of bank liabilities when bank liabilities are the product of standardized communications. Given

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217. *See supra* note 142 and accompanying text. This distinction was made in Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1245 (1987).

218. For the text of the seven *Restatement* factors, see *supra* text accompanying note 142.

219. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b) (1971) (forum policies); *id.* § 6(2)(c) (nonforum policies); *id.* § 6(2)(e) (legal policies).

220. *See id.* § 6(2)(d) (justified expectations); *id.* § 6(2)(f) (certainty); *id.* § 6(2)(g) (ease in determination).

221. *See id.* § 6(2)(a) (needs of the interstate and multinational systems).

222. This tension is subject to the constraint of international acceptability. *See* Sommer, *supra* note 156, at 248 (discussing the tension between the "uniqueness" of a result derived from a fact pattern and the "optimality" of the same); Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 735 (1957) (discussing the need for comparative investigation of typical international-commerce transactions in which there are conflict-of-law problems). "Determinate" conflicts rules are conceptually a bit tricky. *See* Sommer, *supra* note 156, at 254-55 (discussing the effect of forum shopping on the information available to parties to a contract); *see also* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 9 (1963) (discussing how choice-of-law rules affect predictability in the forum-shopping context).

223. *See supra* note 53.

these standardized inputs, an indeterminate law would have to be based on judicial caprice, not factual contextuality.

These arguments are specific to payments law. A more general argument for determinacy is based on the problems of forum shopping[224] and associated problems such as double liability. The evils of forum shopping are straightforward. First, if forum shopping flourishes, the most pro-plaintiff rules reign, because the plaintiff chooses the forum.[225] Second, parties have a more difficult time predictably structuring their transactions, and unintended breaches of contract become easier.[226] Finally, forum shopping permits the effect of legal transitions to spread outside the sovereign that initiates the transition, upsetting more expectations than the transition otherwise would have.[227]

As a general matter, the tension between sensible and determinate rules is difficult to resolve. However, the tension largely disappears in commercial conflicts law. "In contract . . . the best adjudicator or law is the one that the parties expect. With benign circularity, an inflexible (and transparent) contractual conflicts regime reinforces expectations, aligning the [sensibility] and [determinacy] goals."[228] This is true *a fortiori* for the law of bank liabilities. The most sensible rule governing bank liabilities is the most determinate one—the best foundation for nominalistic doctrine.

B. *The Separate Entity Doctrine*

This subpart introduces a nominalistic conflicts rule for bank liabilities—the separate entity doctrine. In some ways, this doctrine is very old. It can be traced back to 1829.[229] However, the modern sepa-

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224. *See* Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 782-83 (1983) (defining forum shopping and problems associated with it); *see also* Sommer, *supra* note 156, at 253-59 (discussing costs of forum shopping).

225. The opposite—and equally undesirable—result exists in cases, such as those involving federal diversity jurisdiction, where the defendant chooses the forum. *See* Sommer, *supra* note 156, at 255 (noting that forum shopping differs from other types of degraded information that decrease predictability and possibly favor either party).

226. *See id.* at 254-56.

227. *See id.* at 256-59.

228. *Id.* at 250 (footnote omitted). The omitted footnote reads:

> If a contractual conflicts rule runs counter to intuition, inflexibility is a vice, rather than a virtue. The problem is that intuitions tend to be contextual, and an intuitive, flexible rule runs counter to the [determinacy] goal and does little to further the [sensibility] goal. The solution in contractual conflicts is to pick a widely-held intuition, and stick by it.

Id. at 250 n.88.

229. *See infra* note 238.

rate entity doctrine is young, owing its existence to the U.C.C. revision movement of the 1980s and the 1990s.[230]

The separate entity doctrine is straightforward in operation. This doctrine deems all bank liabilities as liabilities of specific *branches*.[231] The appropriate branch identity is decided according to the ordinary nominalistic factors of commercial law, such as the place payable on a negotiable instrument, the address on a letter of credit, or the name of a branch on a payment-order instruction. Consequently, each branch's obligations are under the jurisdiction of (or governed by the laws of) the branch location.[232] The branch merges into the rest of the bank only for enforcement of judgments (i.e., "ultimate liability" remains with the bank as a whole).[233] It does not matter if the transaction was "really" conducted at another branch. The nominalistic separate entity doctrine only uses the content of communications to determine the relevant branch location. Therefore, this doctrine, which is consonant with bankers' intuition, successfully localizes the liabilities of an international bank.

This subpart first discusses the separate entity doctrine in connection with the U.C.C., where it is the strongest today. It then examines some relations between the separate entity doctrine and the doctrine of the corporate veil.

1. The Separate Entity Doctrine and the U.C.C.—Probably the best example of the separate entity doctrine appears in revised section 5-116 of the U.C.C.,[234] which addresses the choice of law and forum in

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230. *See infra* text accompanying notes 234-244.

231. Kassa, *supra* note 84, at 136.

232. Heininger, *supra* note 1, at 931-32.

233. The "ultimate liability" expression originated in *Sokoloff v. National City Bank*, 224 N.Y.S. 102 (Sup. Ct. 1927), *aff'd*, 227 N.Y.S. 907 (App. Div. 1928), *aff'd*, 164 N.E. 745 (N.Y. 1928), which held that a New York bank that opened an account in its Russian branch for a depositor was liable to the depositor upon closing of the Russian branch. *Id.* at 114. The expression was later refined in an attachment case, *Bluebird Undergarment Corp. v. Gomez*, 249 N.Y.S. 319 (N.Y. City Ct. 1931), which noted that "[a]lthough the branch deposit be the ultimate debt of the parent bank, the obligation to its customer . . . is localized so as to be confined primarily to the branch where it originated." *Id.* at 322. There is no standard definition of "ultimate liability," and some courts have taken it to mean very little. *See, e.g.*, Trinh v. Citibank, N.A., 850 F.2d 1164, 1168-69 (6th Cir. 1988) (holding a New York home office of a bank to be liable to a Vietnamese depositor after the Vietnamese branch of the bank was closed by *force majeure*). The author takes the "ultimate liability" rubric to refer to a depositor's ability to *enforce* a valid judgment against any branch in the world, while asserting that a depositor cannot *obtain* a judgment against any branch. *Accord* Herring & Kübler, *supra* note 1, at 977.

234. U.C.C. § 5-116 (1995). The author's admiration for section 5-116 doubtless owes something to his familiarity with it; he was an Advisor to the Drafting Committee responsible for the text of the statute.

letter-of-credit transactions. Section 5-116, particularly subsection 5-116(b), takes an explicitly nominalist approach:

> (a) The liability of an issuer, nominated person, or adviser [i.e., banks] for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties . . . or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.
>
> (b) Unless subsection (a) applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. . . . For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, [i] all branches of a bank are considered separate juridical entities and [ii] a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.
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> . . . .
>
> (e) The forum for settling disputes arising out of an undertaking within this article may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a).[235]

Subsection 5-116(a) refers to an explicit agreement, and it is straightforward enough. This subsection requires an agreement, evidenced by a record, to prevent subsequent allegations of oral understandings from undermining the default rules of subsection 5-116(b).[236]

Subsection 5-116(b) is more interesting. The first sentence begins with a bow to explicit agreement and then refers to a default rule. The default rule seems realistic: A bank obligation is governed by the location of a bank. The second sentence of subsection 5-116(b), however, states that a bank's location is only where the bank says it is—the address on a letterhead. This two-step is logically unnecessary. The choice of law could have been directly identified with the address on the letterhead. Why take an unnecessary step, and call this address the location of the branch? As discussed above, nominalism does best

235. *Id.* § 5-116(a), (b), (e).

236. *See id.* § 5-116(a)-(b). The author remembers suggesting the insertion of the word "written" before "agreement" for exactly this reason. The Drafting Committee accepted this suggestion, and the Reporter later generalized it to "record . . . authenticated by the affected parties." *Id.* § 5-116(a); *cf. id.* § 5-104 (statute of frauds for Article 5).

when it reifies shared social conventions (i.e., when it appears "real" or "natural"). A "branch" with a "location" is a natural idea to a banker. The first two sentences of this subsection establish the logical rule—that a choice of law is a pure communicative event—but place this logical rule in a shared social context.

The social context is rooted, as usual, in history. Before telecommunications, branches were necessarily unconnected with each other, to the point where they were autonomous in governance.[237] The law often treated antebellum branches as separate.[238] Throughout this era and up to the middle of the twentieth century, physical location had been an accurate guide to the "location" of the transaction. This is true no more. However, the word "branch" provides some comfort to old habits of thought, at no cost to the precision required by the law of bank liabilities. Such comfort is key to nominalistic law: "For an action to convey a social meaning . . . it must do so without appearing contingent or contested; it must do so in a way that feels natural. . . . [I]t must function with a sort of social magic."[239] "Branch" conveys the necessary magic to bankers and their customers. There-

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237. BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 312-14 (1957).

238. *Id.* The branches of the Second Bank of the United States each had their own boards of directors. *Id.* at 313. To prevent excessive independence of separate branches, the cashier of each branch was appointed by the head office in Philadelphia. *Id.* As late as 1829, Daniel Webster argued for the Bank of the United States, emphasizing that "[t]he different branches of the Bank of the United States, have no connexion with each other; but treat each other as different institutions." Bank of the United States v. Goddard, 2 F. Cas. 694, 696 (C.C.D. Mass. 1829) (No. 917) (holding that each branch of the Bank of the United States should be treated as a separate bank). Albert Gallatin viewed the notes of the Bank of the United States as "nominally of twenty-four currencies, each payable at a distinct place," and which were merely collected, rather than paid, by other branches of the Bank. ALBERT GALLATIN, CONSIDERATIONS ON THE CURRENCY AND BANKING SYSTEM OF THE UNITED STATES 88 (reprint 1968) (1831). Banks sued in the name of their branch right up to the eve of the Civil War. *See, e.g.,* Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 448-50 (1861) (holding that under the Charter of the State Bank of Ohio, the Jefferson Branch bank was not liable for higher taxes upon the branch's property, as this would violate the Contracts Clause of the Constitution); Piqua Branch of State Bank v. Knoop, 57 U.S. (16 How.) 369, 376-77 (1853) (stating that under Ohio law each branch of the State Bank of Ohio was considered an independent banking association until 1866, and thereafter unless its affairs wound up); *cf.* Crawford v. Branch Bank, 48 U.S. (7 How.) 279, 281 (1849) (citing an Alabama statute providing that legal title to a promissory note vested in the branch in which it was negotiated). Through at least the first third of the twentieth century, Georgia and North Carolina both had separate boards of directors for their branches, Fordham, *supra* note 1, at 980, as do Federal Reserve Banks to this day. *See* 12 U.S.C. § 521 (1994) (providing for establishment of boards of directors at Federal Reserve bank branches).

239. Lessig, *supra* note 53, at 959 (internal quotation marks omitted). As discussed above, contractual conflicts rules must be "intuitive" to be fully successful. *See supra* note 228.

fore, all of the revised banking Articles of the U.C.C. associate "branch" with choice of law or jurisdiction.

We return to U.C.C. Article 5. The third quoted sentence of subsection 5-116(b) deals with international banks—those that conduct business in many jurisdictions. This terse sentence could bear restatement. When unpacked, this sentence means that each branch's liabilities are separate from those of other branches, but a judgment obtained against the appropriate branch can be enforced against the bank as a whole.[240] This sentence implies that each branch is governed by local law. Furthermore, judgment cannot be *obtained* against an inappropriate branch, although a judgment can be *enforced* against any branch. In other words, bank liabilities are compartmentalized by branch (i.e., jurisdiction), but bank assets are unitary worldwide. The reference to "interbranch letters of credit" refers to situations where a bank plays several roles and refers to different jurisdictions that govern the different roles. For example, if one branch of a bank issues a credit, and another branch is the paying bank, a lawsuit for wrongful dishonor can only be brought against the issuing bank.[241]

Thus, the separate entity doctrine consists of three components. First, it contains a rule of *identification* of a liability with a branch. This rule is purely nominalistic, referring only to communications that identify the branch with the liability. The second component is a formalistic rule of *separateness*: Branches are treated separately for all juridical purposes, particularly choice of law and jurisdiction. If two branches of the same bank in different jurisdictions act in different roles in the same transaction, they will be adjudged according to different laws. The final component is an equally formalistic rule of *unity*: All branches draw on the same asset pool, belonging to the institution as a whole.

The two formalistic rules—separateness on the liability side and unity on the asset side—both draw on the nominalistic fact of branch

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240. *Cf.* Libyan Arab Foreign Bank v. Bankers Trust Co., [1988] 1 Lloyd's Rep. 259, 271 (Q.B. 1987) (*LAFB*) ("That notion [i.e., branch separateness], of course, has its limits. A judgment lawfully obtained in respect of the obligation of a branch would be enforceable in England against the assets of the head office."). This idea can be traced back to *Sokoloff v. National City Bank*, 145 N.E. 917 (N.Y. 1924). "The intangible chose in action, at least when it is the result of a deposit in a bank, has for some purposes a situs at the residence or place of business of the debtor, though the creditor be far away." *Id.* at 920.

241. This rule predated Revised Article 5 of the U.C.C. *See* Chuidian v. Philippine Nat'l Bank, 976 F.2d 561, 563 (9th Cir. 1992) (holding that Philippine law governed where Manila was the sole place of performance of a letter of credit); *cf.* Pan-American Bank & Trust Co. v. National City Bank, 6 F.2d 762, 766-67 (2d Cir. 1925) (holding that the bank that procured a letter of credit by another bank must reimburse the latter bank for the amount paid).

identity. The precision of formalistic rules is no better than the facts upon which these rules operate. Because these formalistic rules refer to nothing but the nominalistic fact of branch identity, they both enjoy the same precision as the nominalistic rule of identification.

This approach is replicated elsewhere in the U.C.C. Consider Article 4A, governing wire transfers. Section 4A-105(a)(2) defines "Bank" and states: "A branch or separate office of a bank is a separate bank for purposes of this Article."[242] This section interacts with section 4A-507, a choice of law provision establishing the rule of separateness:

> (a) The following rules apply unless the affected parties otherwise agree . . . :
>
> (1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.
>
> (2) The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.
>
> (3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.
>
> (b) If the parties described in each paragraph of subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.[243]

The result of Article 4A is similar to that of Article 5, although Article 4A sounds only in choice of law, and not also in jurisdiction. Like Article 5, it clearly states rules of identification and separateness. Unlike Article 5, it has no explicit rule of unity stating that branch judgments can be enforced elsewhere. (This may be inferred from general principles of corporate law, however.) Furthermore, Article 4A is less explicit than Article 5 about the nominalism inherent in branch location, and it does not operationally define a branch in terms of communicative content. However, the drafters of Article 4A were clearly contemplating a nominalistic concept of the bank

242. U.C.C. § 4A-105(a)(2) (1995). This language is a variation of U.C.C. § 5-116(b)(i)-(ii), which establishes branch identification.

243. *Id.* § 4A-507(a)-(b).

branch. Comment 2 to section 4A-507 shows that the Reporters thought that the branch location is a comparatively simple idea: "Since it is difficult in many cases to determine where a beneficiary is located, the location of the beneficiary's bank [i.e., branch] provides a more certain rule."[244] As any lawyer coping with the arcane regulatory law of bank branches can attest, a realistic concept of branch location is not a simple one.[245] Only a nominalistic concept of bank branches is simple.

The separate entity doctrine, illustrated by Articles 4A and 5, is an old warhorse of international banking law.[246] This doctrine permeates banking insolvency law,[247] the U.C.C.,[248] and other domestic and

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244. *Id.* § 4A-507 cmt. 2.

245. The regulatory law of bank-branching has been characterized as "at the same time highly plastic and very rigid." Douglas H. Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1133, 1220 (1981).

246. The modern separate entity doctrine can be found in embryonic form in *Pan-American Bank & Trust Co. v. National City Bank*, 6 F.2d 762, 766-67 (2d Cir. 1925), which held that the issuing bank was liable to the paying bank for reimbursement upon a letter of credit. The doctrine was later refined in two cases: *Bluebird Undergarment Corp. v. Gomez*, 249 N.Y.S. 319, 323 (N.Y. City Ct. 1931), which held that a bank's debt on deposit on its Puerto Rican branch could not be reached by an attachment proceeding in New York, because the situs of the debt was in Puerto Rico, and *Dougherty v. National City Bank*, 285 N.Y.S. 491, 505 (Sup. Ct. 1935), which held that the Soviet government's closure of Russian branches of a New York bank excused the home bank from liability to Russian branch depositors. The early history of this doctrine can be traced back to *Bank of the United States v. Goddard*, 2 F. Cas. 694, 696 (C.C.D. Mass. 1829) (No. 917), which held that each branch of the Bank of the United States should be treated as a separate bank.

247. *See, e.g.*, 12 U.S.C. § 3102(j)(2) (1994) (treating United States branches of foreign banks as separate entities for the purposes of insolvency and unpaid judgments); CAL. FIN. CODE §§ 1781-1785 (West Supp. 1997) (treating foreign branches of banks as separate entities for the purposes of suspension or revocation of banking licenses); 205 ILL. COMP. STAT. ANN. 645/12 (West 1993) (regarding bank branches or offices as separate entities for the purposes of deposits); N.Y. BANKING LAW § 606(4) (McKinney 1971 & Supp. 1996) (treating branches and agencies as separate and independent legal entities for insolvency purposes).

248. *See, e.g.*, U.C.C. § 4-102(b) (determining liability of bank branch for purposes of presentment, payment, or collection); *id.* § 4-107 (providing that branch is a separate bank for purposes of deadlines and locations of actions to be taken); *id.* § 4A-105(a)(2) (defining branch or separate office of bank as separate bank for purposes of fund transfers); *id.* § 5-116(b) (applying separate entity doctrine for purposes of jurisdiction, choice of law, and letters of credit, but not for enforcement of judgments); *id.* § 8-110 (applying separate entity doctrine in context of investment securities); U.C.C. § 9-304 (Draft October 1997) (governing security interests in deposit liabilities). It is noteworthy that the securities liabilities of a financial intermediary are localized in exactly the same fashion as their general liabilities. *See* U.C.C. § 8-110 (1995). For discussions regarding choice-of-law considerations for securities transfers, see RANDALL D. GUYNN, MODERNIZING SECURITIES OWNERSHIP, TRANSFER AND PLEDGING LAWS 35-41 (1996); EUROCLEAR OPERATIONS CENTER, *supra* note 146.

international banking statutes as well.[249] The nominalistic separate entity doctrine dominated the case law from the 1930s until about 1960, but has since receded into relative insignificance in the case law.[250] The current vigor of the separate entity doctrine may be found in the statutory law, whose recent development seems responsive to the desuetude in the case law.

2. *Varieties of the Separate Entity Doctrine.*—The separate entity doctrine imposed by the U.C.C. (and the old case law) comes in four varieties: jurisdictional, choice-of-law, informational, and agency. The discussion thus far has mainly concentrated on the choice-of-law

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249. *See, e.g.*, 12 U.S.C. § 604 (1994) (requiring as a regulatory matter separate accounts for foreign branches); UNCITRAL, *supra* note 119, art. Y(3)(b), at 589 ("[B]ranches and separate offices of a bank in different States are separate banks."). The I.C.C.'s rules are of international scope. *See* INTERNATIONAL CHAMBER OF COMMERCE, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS art. 2 (ICC No. 500 LF, 1993) (treating foreign branches of banks as independent banks for the purposes of credit rules); INTERNATIONAL CHAMBER OF COMMERCE, UNIFORM RULES FOR BANK-TO-BANK REIMBURSEMENTS UNDER DOCUMENTARY CREDITS art. 2(i) (ICC No. 525 LF, 1995) (considering foreign branches of a bank to be separate banks for the purposes of banking rules).

250. It is probably safe to say that the common-law separate entity doctrine remains intact for international attachments. *See, e.g.*, Reibor Int'l Ltd. v. Cargo Carriers (KACZ-CO.), 759 F.2d 262, 264 (2d Cir. 1985) (stating in dictum that bank branches are autonomous for purposes of maritime attachment); McCloskey v. Chase Manhattan Bank, 183 N.E.2d 227, 227 (N.Y. 1962) (no opinion) (denying attachment in New York of funds on deposit in a German branch bank). It is probably not good law for intrastate attachments, at least in banks with good computer systems. *See* Digitrex, Inc. v. Johnson, 491 F. Supp. 66, 68-69 (S.D.N.Y. 1980) (mem.) (holding that the service of a restraining notice at a bank's home office is effective against a branch account when the main office centrally monitors the accounts at all branches); Therm-X-Chemical & Oil Corp. v. Extebank, 444 N.Y.S.2d 26, 27 (App. Div. 1981) (mem.) (acknowledging the *Digitrex* rationale, but ruling that the respondent bank did not possess sufficient computer equipment to void the separate entity rule in the instant case). The *McCloskey* line was distinguished from the *Digitrex* line in *Fidelity Partners, Inc. v. Philippine Export & Foreign Loan Guarantee Corp.*, 921 F. Supp. 1113, 1120 (S.D.N.Y. 1996), which characterized the New York branch and the Philippine main office of a bank as separate entities for the purposes of attachment and execution. It is uncertain whether the separate entity doctrine is still applicable to interstate attachments.

The doctrine has otherwise been abjured as federal law in the Second Circuit. *See* First Nat'l Bank v. Banco Nacional de Cuba, 658 F.2d 895, 900 (2d Cir. 1981) ("[F]ederal law regards a national bank and its branches as a single entity."). However, it continues to retain some vitality in courts outside the Second Circuit. *See, e.g.*, Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 207 (3d Cir. 1990) (noting "some authority" for the abrogation of the separate entity doctrine but assuming the doctrine probably to be correct); Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., 576 F. Supp. 107, 162 n.80 (D. Del. 1983) (favorably noting old case law), *aff'd without opinion*, 740 F.2d 958 (3d Cir. 1984). Still other courts, although acknowledging the separate entity doctrine, read it narrowly. *See, e.g.*, Trinh v. Citibank, N.A., 850 F.2d 1164, 1168-69 (6th Cir. 1988) (stating that although branch banks are separate entities, home offices are ultimately liable for obligations on deposits).

approach, but has briefly touched on the jurisdictional approach regarding Article 5. These two approaches will be discussed in greater detail below, especially the jurisdictional approach. For the time being, we shall leave jurisdiction and choice of law alone, and concentrate on the agency and informational varieties of the separate entity doctrine.

The jurisdictional approach is adopted by U.C.C. Revised Article 5[251] and by many old cases[252]—a court has no jurisdiction of a foreign branch simply because a domestic branch is within the jurisdiction of the court. Other statutes, such as Article 4A of the U.C.C. or section 138 of the New York Banking Law, are not jurisdictional in nature, but only choose the law of the relevant branch.[253]

Many of the old cases and a few of the statutes are rooted in agency law. This was originally a muddled kind of corporate law,[254] but had settled down to a coherent agency doctrine in the middle of the twentieth century. To understand the agency-law rationale for the separate entity doctrine, consider multiple simultaneous demands for payment at different locations. Before the advent of modern telecommunications, this kind of fraud could have been disastrous for a bank. The case law made clear that a bank could protect itself by insisting that demand be made at a specified physical location.[255] Today, of course, banks keep their books on centralized computers. A multiple

251. U.C.C. § 5-116(a).

252. *See, e.g.*, *In re* Harris, 27 F. Supp. 480, 481 (S.D.N.Y. 1939) (stating that the jurisdictional test regards a bank's control, not merely its location), *overruled by* First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959); Walsh v. Bustos, 46 N.Y.S.2d 240, 241 (N.Y. City Ct. 1943) (holding that the jurisdiction of a New York court did not extend to a Mexican branch of a bank despite the existence of a New York branch); Bluebird Undergarment Corp. v. Gomez, 249 N.Y.S. 319, 322 (N.Y. City Ct. 1931) (holding that a debt owed by a Puerto Rican bank could not be reached by an attachment proceeding in New York because the attachment was limited to property in the jurisdiction).

253. *See* N.Y. BANKING LAW § 138 (McKinney 1990 & Supp. 1997) (designating that branches located in foreign countries are governed by the laws of those foreign countries); U.C.C. § 4A-507(a) (designating the law of the jurisdiction to govern the funds transfer).

254. For a particularly confusing case, see *Citizens' & Southern Bank v. Taggart*, 138 S.E. 898, 902 (Ga. 1927), which determined that the Atlanta branch of a bank was not an agent of the parent bank, but rather its own principal.

255. The leading United States case for this may still be *Chrzanowska v. Corn Exchange Bank*, 159 N.Y.S. 385, 388 (App. Div. 1916), *aff'd*, 122 N.E. 877 (N.Y. 1919), which stated that New York banking law requires a bank's business to be conducted at a place specified in the certificate of incorporation, emphasizing the distinctness of bank branches. *See also* Idah-Best, Inc. v. First Sec. Bank, N.A., 584 P.2d 1242, 1248-52 (Idaho 1978) (holding that the receipt of a dishonored check by the data-processing center of the payor bank's branch did not constitute "receipt by" the payor bank for the purposes of determining whether the payor bank failed to give timely notice of dishonor); Dean v. Eastern Shore Trust Co., 150 A. 797, 799-800 (Md. 1930) (holding that the bank cashing a check was a separate entity from the branch bank acting as the drawee); Fordham, *supra* note 1, at 984-95 (arguing

simultaneous demand for payment will elicit only one payment (or if fraud is suspected, maybe none).

The problem of imperfectly informed bank agents still emerges in some specialized contexts, such as offers of accord and satisfaction made in offices unequipped for dispute resolution. This problem, adequately addressed by special statutory solutions,[256] is no longer significant. This Article does not further discuss the use of the separate entity doctrine to remedy problems of bank agency, except to point out one irony. Modern telecommunications technology has superseded most of the agency version of the separate entity doctrine.[257] This Article has argued that it is precisely these telecommunications technologies that have rendered the realistic approaches to conflict of laws meaningless. As luck, necessity, and the U.C.C. drafters would have it, the modern separate entity doctrine is the cure for the same telecommunications technology that superseded the old separate entity doctrine.

The informational cases were another staple of the old doctrine. These cases involved an informational demand made on a domestic branch for a deposit account booked abroad. Before 1959, the case law forbade extraterritorial enforcement of such requests.[258] After 1959, courts became increasingly hostile to limited international dis-

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that the only legitimate role for the separate entity doctrine is to protect a bank from fraud by requiring demand to be made at a uniquely specified physical location).

256. *See, e.g.*, U.C.C. § 3-311(c)(1) (providing that accord and satisfaction statements must be delivered to designated offices); *id.* § 4-107 (establishing branches as separate banks "for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders shall be given under this Article and under Article 3").

257. *See, e.g.*, Digitrex, Inc. v. Johnson, 491 F. Supp. 66, 68 (S.D.N.Y. 1980) (mem.) (holding that a main office may be liable for a branch account where a centralized computer monitors all branches).

258. *See In re* Harris, 27 F. Supp. 480, 481 (S.D.N.Y. 1939) ("[T]he records of a depositor's account with a foreign branch, not kept here, are not so within the control of the main office here as to be subject to production by subpoena duces tecum served here."), *overruled by* First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959); Clinton Trust Co. v. Compania Azucarera Cent. Mabay S.A., 14 N.Y.S.2d 743, 746 (Sup. Ct. 1939) (holding that the examination of the respondent banks could not extend to an inquiry about deposit accounts, because the deposit in the Cuban branch could not be reached by the attachment served on the New York agency of the Canadian bank, which lacked control over the Cuban branch), *aff'd*, 15 N.Y.S.2d 721 (App. Div. 1939); *accord* United States v. Kyle, 21 F.R.D. 163, 164 (E.D.N.Y. 1957) (denying a motion directing a branch bank to produce records located in a Canadian branch, because the branch was considered a separate entity that controlled its own records); Walsh v. Bustos, 46 N.Y.S.2d 240, 241 (N.Y. City Ct. 1943) (holding that the jurisdiction of a New York court did not extend to a Mexican branch of a bank despite the existence of a New York branch of the same bank).

covery,[259] and the separate entity doctrine soon ceased to be a barrier to extraterritorial discovery. Whatever the policies involved in extraterritorial discovery, they are not relevant to the localization of branch liabilities, and they do not require further discussion in this Article.

3. *The Separate Entity Doctrine and the Corporate Veil.*—We now return to the jurisdictional version of the separate entity doctrine. This version is reminiscent of the familiar law of corporate veil-piercing. These two bodies of law deserve comparison.[260]

The corporate veil is dual: It is a jurisdictional veil on the liability side of the balance sheet, and an enforcement veil on the asset side. The jurisdictional veil prevents a plaintiff from suing a corporation for the misdeeds of its affiliate, and the enforcement veil prevents a plaintiff from collecting from the assets of an affiliate who is not a defendant. The jurisdictional corporate veil is identical to that provided by the jurisdictional separate entity doctrine. Both the jurisdictional corporate veil and the jurisdictional separate entity doctrine work only on the liability side of the balance sheet. The corporation differs only in having the additional layer of insulation on the asset side.

The liability-side corporate veil is provided by something called the *Cannon* doctrine.[261] *Cannon* stands for the proposition that, by itself, jurisdiction over one corporate affiliate is insufficient to provide jurisdiction over another affiliate.[262] Like the separate entity doctrine, the *Cannon* veil serves as an effective conflicts device, neatly compartmentalizing the liabilities of any organization whose business affiliates do not overlap jurisdictionally.

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259. The first case in this sequence was *First National City Bank v. IRS*, 271 F.2d 616, 620 (2d Cir. 1959), which held that a bank could not defeat the Internal Revenue Service's summons for production of a foreign branch's records just because Panamanian law prohibited such production. It was followed by *United States v. First National City Bank*, 396 F.2d 897, 901-05 (2d Cir. 1968), which required a bank to comply with a subpoena to produce documents in the possession of its German branch.

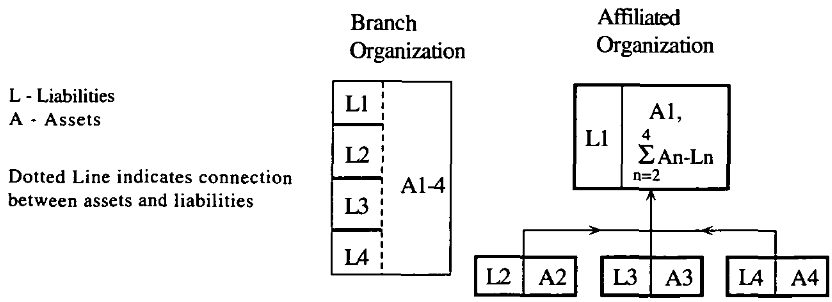
260. For a discussion of corporate veil-piercing and the separate entity doctrine, see Sommer, *supra* note 156, at 238-41, 243-44.

261. *See* Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 336-38 (1925) (holding that defendant's Alabama subsidiary was a separate entity despite the concentration of the Alabama corporation's stock in defendant's ownership). Although *Cannon* is an old case, it retains its vitality in the courts. *See* Sommer, *supra* note 156, at 265-70 (discussing the *Cannon* doctrine's relationship to enterprise and entity theories); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1044-70 (1991) (presenting a study that addresses the structure and contextual nature of the piercing-the-corporate-veil question). *Cannon* is not without its critics. *See* Sommer, *supra* note 156, at 266 n.145 (listing commentators and noting that "[o]nly one recent commentator seems to like *Cannon*, more because the doctrine comports with judicial precedent rather than because of any independent policy rationale").

262. *Cannon*, 267 U.S. at 336-38.

Figure 3 explains the differences and similarities between branch organizations and associations composed of affiliated corporations. This figure denotes both interbranch and interaffiliate liabilities as distinct: the separate entity doctrine and *Cannon.* The real difference between the branch and the affiliated organization is on the asset side. Interbranch assets are pooled; hence, a judgment against any branch is enforceable against the entire organization. In contrast, intercorporate assets are distinct, and they can only be applied to corresponding liabilities. (The assets of parent corporations include the net worth—but not the assets—of their subsidiaries.) This asset-side veil is the one usually referred to in discussions of the corporate veil, but the corporate veil is really a dual structure. The conjoint corporate veil is only occasionally rent asunder, typically in conditional forum non conveniens cases. In these cases, dismissal from a United States court is allowed on the condition that any subsequent foreign judgment will be enforced in the United States against the domestic parent corporation.[263] When used this way, the forum non conveniens doctrine permits courts to compartmentalize the legal liabilities of a multinational organization, while retaining unitary assets from which to satisfy worldwide judgments. This kind of application of forum non conveniens is a pure application of *Cannon,* as it separates the jurisdictional veil from the asset veil. In such a situation, the corporate veil becomes identical to the jurisdictional separate entity doctrine. But, as a general matter, nonfinancial organizations expect that the conjoint corporate veil will compartmentalize both the assets and liabilities of their international operations.

FIGURE 3



263. *See* Sommer, *supra* note 156, at 273-74 & n.176 (discussing problems with the doctrine of forum non conveniens); Tim A. Thomas, Annotation, *Validity and Propriety of Conditions Imposed upon Proceeding in Foreign Forum by Federal Court in Dismissing Action Under Forum Non Conveniens,* 89 A.L.R. FED. 238, 241 (1988) (listing federal cases that considered the validity of conditions in court orders that dismissed disputes under forum non conveniens).

The separate entity doctrine is nearly unique to banking because international banks are unusual business organizations. Most multinational business organizations compartmentalize their activities by national subsidiaries.[264] Banks are among the few firms that retain the branch structure in their international operations, although they do so with good reason.[265] Branched business organizations—which place all of a firm's assets at the disposal of all of its creditors—are inherently more creditworthy than organizations composed of affiliates.

To simplify a more complex argument, an organization composed of subsidiaries will have an incentive to behave opportunistically. It can load bad assets onto weak subsidiaries and then abandon them, relying on the difficulties of a fraudulent conveyance action and the corporate veil. A branched organization cannot do this, because the insolvency of one branch is the insolvency of the entire organization.[266] Banks—which are in the business of credit—therefore cannot afford the subsidiary.[267] Furthermore, as a practical matter, a solvent bank would probably feel compelled to bail out an insolvent affiliate, if its regulators permitted.[268] The bank subsidiary, therefore, has no *ex post* advantages to overcome its weak *ex ante* credit.

For ordinary multinational business corporations, the subsidiary helps ensure that all jurisdictions do not govern at once. They do not need the extra credit advantages of the branch organization, or they

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264. *See generally* 2 RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS ch. 21 (1995) (explaining that subsidiaries are more suitable than branches for multinational corporations because of liability, economic, organizational, operational, and termination considerations).

265. *See* Herring & Kübler, *supra* note 1, at 973-74 (explaining why banks prefer to operate through foreign branches); Smedresman & Lowenfeld, *supra* note 1, at 741 ("Unlike other multinational enterprises, which almost invariably operate through subsidiaries . . . banks generally operate in countries other than their home base through branches, without separate incorporation in the countries in which they are established.").

266. *See* Sommer, *supra* note 156, at 230-38 (arguing that risk-shifting provided by limited subsidiary liability bears few economic advantages); *id.* at 241-44 (discussing special liability needs of banks under the source-of-strength doctrine and the separate entity doctrine).

267. Every rule has an exception. A few banking activities—such as running a derivatives book—require more creditworthiness than inheres in the organization as a whole. The bank might therefore establish a special-purpose derivatives vehicle, carefully insulated from the rest of the business. This creditworthy special-purpose vehicle weakens the credit of the organization as a whole, but it can be justified if the derivatives business is sufficiently lucrative. But apart from such special cases, "[t]he existence of subsidiaries in banking has to be explained by considerations other than insulation from liability." Gunther Dufey & Ian H. Giddy, *Eurocurrency Deposit Risk*, 8 J. BANKING & FIN. 567, 575 (1984).

268. *See id.* at 574-75 (providing examples in which parent banks accepted responsibility for their affiliates' liabilities).

can selectively obtain it by appropriate interaffiliate cross-guarantees.[269] However, ordinary multinational business organizations badly need the jurisdictional compartmentalization wrought on their affiliate structure by the *Cannon* doctrine. Banks have similar (or stronger) reasons for jurisdictional compartmentalization, but they do not have recourse to the subsidiary device. A bank, therefore, wants the *Cannon* part of corporate separateness without limited interaffiliate liability for judgments against branches. The separate entity doctrine may be viewed as a specialized analogue to the subsidiary doctrine, applicable to the financial-services business.

C. *The Separate Entity Doctrine in Operation*

This subpart applies the separate entity doctrine to some of the cases discussed above: *Zeevi*, *Wells Fargo*, and *LAFB*.[270] The only difficult question in any of these cases regards which branch had which obligation to perform. This question is very easy to answer in *Zeevi* or *Wells Fargo*, and the resolution of these cases according to the separate entity doctrine is straightforward. Only the *LAFB* case would cause any difficulty. Even in *LAFB*, the separate entity doctrine would crisply frame the issues and ease the resolution of the case.

Zeevi involved a Ugandan issuer of a letter of credit that was to pay through a United States correspondent bank.[271] In letter-of-credit law, only issuers or "confirming" banks are obliged to pay under a presentment of conforming documents.[272] The correspondent bank in *Zeevi* had neither role.[273] The United States correspondent had essentially the same obligation as any bank on whom a check is drawn—no obligation to the presenter, but an obligation to the drawer only if the drawer can put the bank in funds.[274] The underlying obligation, therefore, was that of the foreign branch.

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269. STUART W. ROBINSON, JR., MULTINATIONAL BANKING 31 (1972) (describing the use of subsidiaries by multinational business corporations as a way to insulate the parent corporation from liability in foreign jurisdictions).

270. *See supra* notes 83-98, 148-159, 162-189 and accompanying text.

271. J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 333 N.E.2d 168, 170-71 (N.Y. 1975). Because the issuer used a separate bank as its correspondent, we may infer that it had no United States branch.

272. *See* U.C.C. § 5-107(a)-(b) (1995). This is also the case under the old U.C.C. *See* Chuidian v. Philippine Nat'l Bank, 976 F.2d 561, 562 (9th Cir. 1992) (noting that the issuing and paying banks were branches of the same bank).

273. *See Zeevi*, 333 N.E.2d at 170-72.

274. *See* U.C.C. § 4-402.

The plaintiff, then, could have no complaint against the New York paying bank.[275] Because there was no misdeed by a New York entity, the jurisdictional version of the separate entity doctrine would have stopped the lawsuit without more ado.[276] A choice-of-law approach might have permitted the New York court to hear the suit, but under Ugandan law.[277] Ugandan law did not seem to encourage payment, to say the least.[278]

LAFB involved two branches of the same bank, and a tricky problem of characterization. The question was whether the deposit, at the time of suit, was located in New York or London.[279] (After this question has been answered, the separate entity doctrine works mechanically.) The answer is not a simple one. Article 4A does not provide for the standing sweep arrangement between BT and Libyan Bank, and there was no case law on point.[280] Justice Staughton solved this problem by finding that the account was in New York, but that the

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275. Indeed, the plaintiff was not suing the correspondent bank, but was suing the Ugandan branch for wrongful dishonor in New York; the plaintiff was merely using the New York correspondent account as a source of jurisdiction and assets. *Zeevi*, 333 N.E.2d at 170-72.

276. *See supra* notes 251-252.

277. *See supra* note 253.

278. *See Zeevi*, 333 N.E.2d at 171. Idi Amin's actions were arguably inconsistent with Ugandan law, but such an approach is more common in human rights litigation than in commercial litigation. *See* Galu v. Swissair, 873 F.2d 650, 654 (2d Cir. 1989) (finding that the behavior of officials clothed in state power does not necessarily constitute state action); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (holding that torture and murder perpetrated by a Paraguayan individual acting under the color of official authority violated Paraguayan law, and conferring United States jurisdiction based on statute). *But see* Grupo Protexa, S.A. v. All Am. Marine Slip, 20 F.3d 1224, 1236-37 (3d Cir. 1994) (employing, in the context of a commercial case, reasoning similar to that adopted in *Galu*).

The Russian revolution taught commercial courts not to be choosy about the legitimacy of the acts associated with a foreign sovereign. *Compare* Sokoloff v. National City Bank, 145 N.E. 917, 920 (N.Y. 1924) (Cardozo, J.) (noting that "no power short of sovereignty in all its plenitude has a competence so high" as to justify the expropriation of a foreign liability) *with* M. Salimoff & Co. v. Standard Oil Co., 186 N.E. 679, 681 (N.Y. 1933) (finding that the diplomatic nonrecognition of the Soviet regime was irrelevant to the judicial recognition of Soviet law) *and* N.Y. BANKING LAW § 138 (McKinney 1990 & Supp. 1997) (following the *Salimoff* approach).

279. *See* Libyan Arab Foreign Bank v. Bankers Trust Co., [1988] 1 Lloyd's Rep. 259, 261-62 (Q.B. 1987) (*LAFB*); *see also supra* notes 165-189 and accompanying text.

280. One recent case comes close to, but does not coincide exactly with, the *LAFB* fact pattern. *See* Centre-Point Merchant Bank Ltd. v. American Express Bank Ltd., 913 F. Supp. 202, 204-05 (S.D.N.Y. 1996) (mem.) (involving instructions to roll-over a time deposit rather than making it available for payment). Article 4A had not been drafted at the time of the *LAFB* litigation, but it would have at least represented a good baseline for normative analysis of old wire-transfer law. *See* U.C.C. § 4A-103(a)(1) (containing no condition for a "payment order" except time of payment). The sweep arrangement at issue in *LAFB* was conditioned on the size of the Libyan Bank's New York account. *LAFB*, [1988] 1 Lloyd's Rep. at 264-66.

New York contract had been breached by the 2:00 p.m. failure to transfer, which led to damages in England.[281] However, this approach seems to concede the continuing validity of New York law, which would make payment illegal. Justice Staughton, of course, evaded this issue through his *sub silentio* choice of consequential damages.[282]

The nominalistic separate entity doctrine suggests, but does not quite compel a solution. Nominalism holds that the location of a branch is solely determined by the contents of communications among parties.[283] Libyan Bank and BT had initially agreed that the deposit would be swept from New York to London by 2:00 p.m. every day.[284] The nominalist approach to the law of liabilities would argue that a communication *between* branches is meaningless because all branches, in a computerized age, share the same information. The lack of subsequent interbranch communication is therefore irrelevant.[285] If no additional interbranch communication is required to shift liabilities, the initial agreement becomes tantamount to the result. The money moved to London at 2:00 p.m. because the parties agreed as such. As the freeze occurred after 4:00 p.m., the bulk of the money was safely in London. A lawsuit in London for a London branch liability should result in an easy victory for the plaintiff.

LAFB is a more difficult case than *Zeevi*, however. One could argue that an interbranch communication is necessary to shift money, and that as no communication was forthcoming in *LAFB*, New York law therefore should have governed. If this were the law, the plaintiff would lose. The chief practical problem with this approach, however, is that it can become bogged down in difficult issues of interbranch "notice." "Notice" poses no problem for the stereotyped evidence of a wire room, but it can become very contextual in an interbranch setting. U.C.C. Article 4A states that a payment order is "received" when the bank receiving the payment order (in this case, BT's London branch) receives "notice."[286] The U.C.C. defines "notice" as follows:

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281. *LAFB*, [1988] 1 Lloyd's Rep. at 283-85.

282. *See id.*

283. *See supra* notes 66-67, 211-215 and accompanying text.

284. *LAFB*, [1988] 1 Lloyd's Rep. at 265.

285. The text of Article 4A clearly requires some kind of interbranch payment order to create an interbranch funds transfer. However, this interbranch payment order need not necessarily take the form of a discrete communication: "'Payment order' means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay." U.C.C. § 4A-103(a)(1) (1995). Would such a definition be satisfied by possession of a common central computer? If so, the requisite payment order would exist in the *LAFB* fact pattern.

286. *See* U.C.C. § 4A-106.

> Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines.[287]

Should BT be treated as a single entity for informational purposes? With modern telecommunications, why not?

Justice Staughton's preferred result appears correct. However, the separate entity doctrine does not compel it, because there is no accepted rule of identification for the circumstances under which an interbranch sweep arrangement becomes effective. This should not be viewed as a weakness in the structure of the separate entity doctrine, but as a weakness in Article 4A, which did not definitively handle the special problems of standing orders and interbranch communications. Perhaps the Permanent Editorial Board of the U.C.C. should address this issue.

Wells Fargo is similar to *LAFB*, but much easier.[288] The difference between these two cases is one of timing: The deposit in *Wells Fargo* did not leave Manila before the Philippine freeze became effective.[289] Because the timing in *Wells Fargo* is clear, there is no doubt that the deposit remained in the Philippines after the freeze became effective. The deposit contract therefore remained under Filipino jurisdiction, and was involuntarily novated to an indefinite term by the government. Remembering that separate branches are separate banks for Article 4A purposes, the obligation of the New York head office was only that of a beneficiary's bank in a payment order. A beneficiary's bank is not obligated to pay unless it has received and "accepted" a payment order, which was clearly not the case in *Wells Fargo*.[290] Here, the plaintiff would lose under either the jurisdictional or choice-of-law version of the separate entity doctrine.

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287. *Id.* § 1-201(27).

288. *See* Wells Fargo Asia Ltd. v. Citibank, N.A., 660 F. Supp. 946 (S.D.N.Y. 1987) (mem.), *mot. for summ. j. denied*, 612 F. Supp. 351 (S.D.N.Y. 1985), *remanded without opinion*, 847 F.2d 837 (2d Cir.), *remanded to* 695 F. Supp. 1450 (S.D.N.Y.), *aff'd*, 852 F.2d 657 (2d Cir. 1988), *vacated*, 495 U.S. 660 (1990), *remanded to* 936 F.2d 723 (2d Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992); *see also supra* notes 83-99 and accompanying text.

289. *Wells Fargo*, 660 F. Supp. at 947.

290. *See id.*; *see also* U.C.C. § 4A-404.

Significantly, the Second Circuit decided *Wells Fargo* for the plaintiff on the basis of a tort theory (i.e., that the defendant bank had committed a tort by not trying as hard as possible to lift the foreign decree).[291] This tort theory could not have been heard if *Wells Fargo* were decided based on the jurisdictional separate entity doctrine. If the separate entity doctrine sounded in choice-of-law, Philippine tort law—not the New York tort law used by the court—would probably have been dispositive.[292]

The discussion of *Zeevi* and *Wells Fargo* shows that the jurisdictional version of the separate entity doctrine forecloses arguments that remain open with the choice-of-law version. Choice of law has more wiggle-room than jurisdiction. The *Wells Fargo* court resolved the case by equating Philippine tort law to United States tort law (without analysis),[293] something it could not have done if it declined jurisdiction. The *Zeevi* court resolved the case by following the Ugandan law on the books,[294] ignoring that Idi Amin was the law in Uganda.[295] Again, this approach would have been foreclosed if the court had simply denied its jurisdiction.

A jurisdictional approach does not let a court intervene in a dispute involving a foreign branch, except perhaps to enforce a judgment. A choice-of-law approach may point to foreign law, but invites a domestic court to determine it.[296] The choice-of-law approach to the separate entity doctrine suffers from at least three weaknesses. First, not all United States courts are willing to apply foreign law. Some of these courts simply insist that United States law governs notwithstanding any choice-of-law doctrine or agreement. Other courts purport to apply foreign law, but force the foreign law to replicate United States law.[297] Second, even the most careful application of foreign law is less determinate than a jurisdictional approach, because a domestic court is less likely to apply foreign law correctly than a foreign court apply-

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291. *Wells Fargo*, 936 F.2d at 727.

292. *See supra* Part IV.B.2.; *see also supra* text accompanying note 277 (applying the choice-of-law approach to *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 333 N.E.2d 168 (N.Y. 1975)).

293. *See supra* note 87 and accompanying text.

294. *Compare Wells Fargo*, 660 F. Supp. at 947 (detailing Philippine governmental decree) *with Zeevi*, 333 N.E.2d at 171 (describing the Exchange Control Act of Uganda).

295. *See* Byron F. Burmester, *On Human Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 289.

296. *See* discussion *supra* Part IV.B.2.

297. Both variants of this unwillingness appeared in the same case. *Compare* Wells Fargo Asia Ltd. v. Citibank, N.A., 936 F.2d 723 (2d Cir. 1991) (applying New York law) *with Wells Fargo*, 660 F. Supp. at 948-51 (applying Philippine law). *See generally* Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMP. L. 581 (1995).

ing its own law. Finally, this indeterminacy is biased. The choice of forum is up to the plaintiff in most litigation; all a court can do is decline jurisdiction requested by the plaintiff.[298] If a plaintiff chooses a domestic court to hear a dispute arising in a foreign country, the plaintiff is likely to have thought it would have lost in the foreign court where the dispute arose.[299] The domestic court, in applying foreign law, is attempting to replicate the foreign court's result. This is better done by throwing the dispute back home.

But even the jurisdictional separate entity doctrine does not resolve all disputes of private international banking law. In some interstitial cases, such as *LAFB*, it is difficult to determine precisely which communication changes the location of a bank liability. Such cases are fortunately rare because existing payment law does a good job of associating communications with their consequences. More significantly, not all private international banking law disputes hinge on the location of a predeterminate bank liability.

But even in these disputes, the separate entity doctrine can often sharpen the issues. For example, the location of a bank liability may be only one factor in a dispute that involves other elements of international law. The separate entity doctrine ensures that the location of a liability is not a disputed factor. *In re Maxwell Communication Corp.*[300] illustrates this point well. The court had to consider whether dollar transfers made from a London account to other foreign accounts were extraterritorial for purposes of United States bankruptcy law. The record showed that dollar payments from London were—as usual—routed through New York, and one of the parties tried to make something of this fact. Fortunately, the *Maxwell Communication* court had the sense to avoid this non-issue.[301]

298. *See, e.g.*, FED. R. CIV. P. 12(b).

299. This statement is plausible because of modern telecommunications technologies. Except perhaps for consumer and small business cases, no forum is truly "inconvenient" any more in logistical terms. Even consumer claims of inconvenience appear to be getting short shrift from the courts. *See, e.g.*, Effron v. Sun Line Cruises, Inc. 67 F.3d 7, 8-10 (2d Cir. 1995) (holding cruise company's contractual choice of forum valid despite the chosen forum's distance from the consumer plaintiff); Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 916 (3d Cir. 1988) (finding "inconvenience" a matter of language, not geography). Although forum non conveniens has much to do with forum, it has little to do with convenience. Rather, it should be viewed as a technique for ripping through the asset side of the corporate veil, but preserving the liability side. *See supra* notes 261-263 and accompanying text.

300. 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

301. The *Maxwell Communication* court promptly disposed of the irrelevancy that payments were routed through New York:

> As detailed by the bankruptcy court, MCC's initial transfer to Barclays was made from an MCC Natwest account in London to Barclays' branch in New York,

V. CONCLUSION

In the early 1980s, the courts had no idea where a bank account was located, and statutory law offered little guidance.[302] Today, the statutes, at least, are fairly clear, although their rationale is not apparent on their face. The courts have not yet had an adequate opportunity to respond to the new statutes.[303] This Article has sought to help the courts understand the statutes, by providing the courts with a rationale based upon the law of money.

As is often the case, an old problem solved is a new question posed. This Article has made some headway with the law of money, but no comprehensive treatment has been provided. For example, this Article has not addressed the fundamental issue of payment finality, even though the courts have recently been destabilizing this field, much as they destabilized the location of money in the 1980s.[304] Nor has this Article discussed the location of bank assets. The location of bank assets, like the location of bank liabilities, is an important topic in international banking law. This concluding Part will briefly sketch these problems, but does not attempt to resolve them.

A. *Where Is a Bank Asset?*

Bank assets, like bank liabilities, must have locations. To be sure, the separate entity doctrine implies that the location of bank assets is irrelevant: Bank assets anywhere can satisfy localized judgments.[305] But the separate entity doctrine is limited in scope. It assumes a solvent bank, for example. When the bank is involved in an insolvency proceeding, local assets are often applied to local liabilities.[306] Regu-

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> through which all payments made to Barclays in dollars are routed. However, the funds were then immediately credited to the outstanding balance on MCC's London overdraft account with Barclays.

Id. at 817 n.5.

302. *See supra* notes 1-7 and accompanying text.

303. For example, states only began adopting the 1995 revisions to Article 5 in early 1996. *See* U.C.C. art. 5, 2B U.L.A. 118-19 (Supp. 1997).

304. *See, e.g.*, Koreag, Controle et Revision S.A. v. Refco F/X Assocs. (*In re* Koreag), 961 F.2d 341, 356-59 (2d Cir. 1992) (holding that a currency exchange was not final because currency is an Article 2 good, subject to the right of reclamation); Sheerbonnet, Ltd. v. American Express Bank, Ltd., 905 F. Supp. 127, 134-35 (S.D.N.Y.) (holding that the receiving bank's acceptance of a payment order, although sanctioned by U.C.C. § 4A-209, subjected the bank to common law tort liability), *amended by* 951 F. Supp. 403 (S.D.N.Y. 1995), *modified*, 1996 WL 221829 (S.D.N.Y. 1996).

305. *See supra* note 240 and accompanying text.

306. *See, e.g.*, 12 U.S.C. § 3102(j)(2) (1994) (allowing Comptroller of the Treasury to appoint a receiver for an insolvent United States branch of a foreign bank); N.Y. BANKING LAW § 606(4) (McKinney 1971 & Supp. 1996) (allowing superintendent to take possession of foreign bank's property located in New York when the bank is insolvent).

lators need to locate bank assets, both to ensure that local operations are safe, and to prevent banks from conducting activities that are prohibited locally. Courts also need to locate bank assets when a foreign sovereign has purported to expropriate the asset.[307]

Because asset location arises in different contexts, it can have different meanings. In commercial law, the location of an intangible asset is the same problem as the location of a liability, except from the creditor's point of view—the choice of law concerning the existence and ownership of the asset. (This statement can also be true of tangible assets, but is complicated by the physical reality of such an asset.) In insolvency law, asset location is more likely to correspond to the jurisdiction of the receiver who distributes the assets to creditors, irrespective of the ordinary choice-of-law rules applied outside of insolvency law. Asset location in regulatory law is more complex yet. To regulators, an asset can be "booked" to a jurisdiction, irrespective of choice of law or jurisdiction to enforce.[308]

On top of this multiplicity of meanings, the law of bank assets is difficult to formulate. The separate entity doctrine is easy, in large part, because liabilities are promises and take well to a nominalistic treatment. Bank assets need not be nominalistic promises, but may be very tangible property. We cannot say that a bank asset has no location other than the location we ascribe to it. Buildings and factories can be sited on a map, regardless of how society construes their location.

Even those bank assets that are promises are complex. Consider a loan by a branch of a multinational bank to a Ruritanian corporation, specifying New York choice of law. This asset may be clearly "located" in New York for choice-of-law purposes. However, if the bank becomes insolvent, the Ruritanian branch receiver is likely to determine the relevant location, because only the Ruritanian receiver can collect against the loan to the Ruritanian corporation.

No simple legal theory can easily localize all the assets of international banks. Because of the power of nominalism to resolve the location of intangible property, the situs of tangible property is far more difficult to determine than the situs of intangibles.

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307. *See* Herring & Kübler, *supra* note 1, at 946-49 (describing the "central issue" of political risk in cross-border deposit transactions).

308. *See* N.Y. BANKING LAW § 138(2) (McKinney 1990 & Supp. 1997) (allocating sovereign risk according to where assets are "booked"); N.Y. BANKING LAW § 606(4) (McKinney 1971 & Supp. 1996) (allowing superintendents to apply all assets to insolvency proceedings whether the assets are in New York or booked to New York).

B. The Finality Problem

One of the most difficult and fundamental problems in the law of money is that of payment finality. Payment finality is fairly easy to define for the majority of payments accomplished by the shifting of bank liabilities. Such payments are final when the identity of the intermediary banks ceases to be relevant, the funds have been shifted, and the original obligation between the end-parties has been discharged.[309] A payment by currency is final when the recipient of currency can no longer reject the payment as counterfeit.[310]

Phrased this way, payment finality seems like another technical and fussy detail of payment law. However, finality is very fundamental to the concept of money. Payment finality permits a shifting contract right to be treated as property free of adverse claims: It is central to the negotiability of money.[311] Second, finality is the interface between the extremely nominalistic law of payment systems and the very different general law of commercial obligations. Before the moment of payment finality, legal rights are determined by the unusual law of money and payment systems, in which symbols are everything.[312] When a payment has become final (or before it has been initiated), we are in the far more ordinary world of contract, in which symbolic and non-symbolic facts compete. Finally, payment finality plays an extremely important role in the world of high-value payments. Large financial institutions send and receive an enormous volume of money every day, often far more than their capital, and sometimes more than their assets![313] A very reliable law of payment finality allows these institutions to rely on the payments they have received, so that they may make the payments they must transmit. A full treatment of the law of money will not be possible until a full theory of payment finality is developed.

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309. William B. Davenport & Donald J. Rapson, *Impact of Article 4A on Banks and Their Customers, in* THE EMERGED AND EMERGING NEW UNIFORM COMMERCIAL CODE 53 (A.L.I.-A.B.A. Course of Study No. C965, 1994). The events do not necessarily coincide.

310. Bank of the United States v. Bank of Georgia, 23 U.S. (10 Wheat.) 333, 343 (1825) (Story, J.) ("[R]eceipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them.").

311. *See* Miller v. Race, 97 Eng. Rep. 398 (K.B. 1758) (Mansfield, J.).

312. *See supra* Part III.C.

313. *See* Raj Bhala, *The Inverted Pyramid of Wire Transfer Law*, 82 KY. L.J. 347, 349 (1993) (noting that every day, two trillion dollars are transferred by wire).

APPENDIX A

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APPENDIX B

A FEW WORDS ON E-MONEY AND PAPER CURRENCY

Although this Article focuses on international banking law, other issues of monetary law bear heavily on the issue, "where is a bank account?" This short essay discusses currency monies, both traditional paper money and new electronic systems under development: so-called e-money.

Two definitions are key: "currency" and "e-money." A "currency" is a kind of money in which payment finality occurs without the involvement of the issuer of the currency.[314] A transfer of dollar bills, for example, discharges the obligation upon physical transfer, without involving the United States Treasury or a Federal Reserve Bank. Similarly, a cashier's or certified check—issued by a bank—discharges an obligation when the obligee takes it.[315] The cashier's check, in the peculiar sense the term is used here, is a currency, even though the holder of the bank's check must subsequently collect the check. The payment is final before collection, and the first holder ceases to be an obligee when it passes the check.[316] Although a cashier's check usually passes by endorsement, it can also be in bearer form and be legally identical to a dollar bill (apart from the distractions of a transfer warranty and legal tender status).[317] Significantly, these cashiers' checks do not pass hand-to-hand. They therefore meet this Article's legal definition of a currency, but are not functionally currencies.

Unlike cashiers' checks, conventional checks are not currencies. The payor's obligation to the payee is not discharged until the payee's bank has decided to pay the check.[318] Similarly, wire transfers are not currencies. The originator cannot discharge an obligation to a beneficiary without the action of at least one bank, and more often several banks.[319]

Most forms of e-money are electronic bank currencies.[320] (Most contemporary bank money, although electronic, is not currency in

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314. *Cf.* U.C.C. § 1-201(24) (1995) (defining "money" as "a medium of exchange authorized or adopted by a domestic or foreign government" as part of its currency).

315. *Id.* § 3-310(a).

316. *Id.* § 3-310.

317. *See id.* § 3-416.

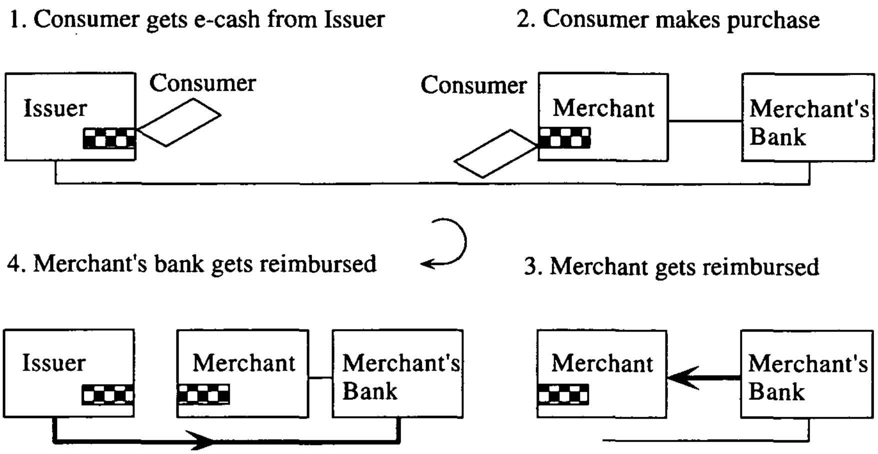
318. *Id.* § 3-310(b).

319. *See supra* notes 23-26 and accompanying text.

320. The best current commercial law discussion of e-money is probably The Task Force on Stored-Value Cards, *A Commercial Lawyer's Take on the Electronic Purse: An Analysis of Commercial Law Issues Associated with Stored-Value Cards and Electronic Money*, 52 BUS. LAW. 653 (1997).

the sense the term is used here.) To be a currency, the receipt of an electronic communication by a nonbank payee must discharge the payor's debt to the payee, without any bank action. The analogy to a cashier's check is close, and most e-monies, like most cashiers' checks, are collected shortly thereafter. A typical e-money scheme would look like Figure B-1.

FIGURE B-1



First, the consumer's bank adds value to the consumer's card: the bank acts as the "issuer."[321] (Some forms of e-money rely on pure cryptanalytic security and do not require cards.) The consumer then pays for the merchandise through an electronic communication, with payment finality discharging the consumer's debt to the merchant.[322] The merchant, equipped with secure information of a payment, then receives a credit from its bank, which is, in turn, reimbursed by the issuer through an account credit wire transfer.[323]

Because the consumer's bank debits the consumer's account when it adds value to the card, payment finality is important only if the issuer becomes insolvent. If the payment to the merchant is final, the merchant (or its bank), rather than the consumer, will bear the risk of issuer insolvency.[324] E-cash schemes can be either auditable

321. *See id.* at 677-89.
322. *See id.* at 689-700, 709-15.
323. *See id.* at 711-13.
324. *See id.* at 714-15.

(like a cashier's check, with the names of all the parties available, at least, to the issuing bank) or unauditable, like cash.[325]

Nobody knows, as of the time of this writing, the fate of e-money in the marketplace. However, many banks are betting large amounts of money on its success. But even if e-money is ultimately insignificant, it sharply illustrates two important issues in the law of money.

First, e-money is an excellent conceptual refutation of currency fundamentalism. Most e-money schemes are designed as substitutes for paper currency. E-money may be superior to currency in several respects: It can bear interest; the auditable kinds of e-money provide individual protection against loss or theft and social protection against money laundering and counterfeiting; and e-money is well suited to market schemes such as affinity cards.[326] Imagine that the promoters of e-money succeed, as they might. Maybe e-money will prove superior to currency on the marketplace and supplant it! Maybe it will be so superior that no one will choose to hold cash anymore.

This prospect threatens currency fundamentalism. If the fundamentalists are correct, all payments are mere substitutes for cash tenders. What will happen on the day the final dollar bill is redeemed for bank credit? There will be nothing to support the fundamentalists' version of the law of money. Probably, the rest of us will not notice. If a lawsuit is brought, a court might profess adherence to the old-time religion, but will nevertheless find a way to decide the case in the interests of commerce, as it usually does when confronted with the "legal tender" mantra.[327]

E-money also helps clarify a great source of confusion in the law and economics of money: the origin of the state monopoly of paper currency. No one is suggesting that the state monopolize e-money, although it is also a currency. Commercial banks will issue e-money competitively, and no one will mind. Does this mean that the state has been wrong in monopolizing paper currency? Probably not. It is easy to justify differential treatment without lapsing into currency fundamentalism.

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325. *See* Thomas P. Vartanian, *Doing Business on the Internet: The Law of Electronic Commerce*, *in* DOING BUSINESS ON THE INTERNET, at 141, 152 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. G4-3988, 1996).

326. *See id.* at 169-70 (describing how technological and financial advances, including e-money, will bring social, business, and legal changes and may deter crime).

327. *See supra* notes 42, 190-195 and accompanying text; *cf.* WHITE, *supra* note 47, at 169-94 (arguing that the market will force the unit of account to correspond to a physical medium of exchange, but assuming that manual transmission of currency will remain the most cost-efficient means of accomplishing certain transactions).

E-money and paper currency are both currencies, but they are very different kinds of currency. Most e-money circulates once, on a defined path: from the issuer to the customer to the merchant to the collecting bank to the issuer.[328] In this respect, it is like a cashier's check (except more secure). Paper currency takes a long time before returning to the issuer, and crosses many palms. These stylized facts alone suggest a strong argument for a natural monopoly of paper currency, but not e-money.

Conceptually, the key instrument is the cashier's check. A bearer cashier's check does not appear to be banned by law,[329] and has precisely the same commercial law attributes as state currency. In other words, the state's monopoly on circulating currency is not based on a legal barrier to potential competition. Could monopolistic paper currency be a superior product to the competitive version? A very plausible argument for the superiority of government-monopoly paper currency can be made in a few words.

Because any form of currency gives payment finality upon tender, the recipient of currency has only one means of protecting itself from currency issued by a bad bank: rejecting the currency. If it takes the currency, it has no recourse against a nonfraudulent buyer. Rejection of bad currency is easy enough, in some cases. Consider a car dealer offered a cashier's check drawn on the Freeman's Bank of Justus, Montana. A quick telephone call to the dealer's own bank will provide comfort. True, it might delay the transaction by a few minutes, but the dealer and customer can afford a few minutes for a $20,000 retail transaction. However, nobody can afford a similar delay in selling a newspaper; they need currency reliable *on its face.* Credit information is expensive in petty retail transactions. It must therefore be rigorously economized.[330] For a paper payment medium, only monopoly (or perhaps a small oligopoly) will do.

Although e-money legally resembles a cashier's check, it employs a very different technology, one that greatly reduces the cost of information. The merchant's terminal can be programmed with all the

328. *See supra* notes 317-323 and accompanying text; *see also supra* fig.B-1.

329. The 1865 tax on state bank notes has long been repealed by Congress. There is no federal prohibition on state bank emissions. *But see* 18 U.S.C. § 491 (1994) (prohibiting counterfeit currency, and perhaps coins intended to circulate as money). National banks lost their vestigial power to issue notes in 1994. *See* 12 U.S.C. §§ 101-110 (repealed 1994). But national banks may issue cashier's checks, even those made to bearer. In any event, national banks may (and do) issue name cashier's checks.

330. *See* Klein, *supra* note 31, at 444. "The entry into the market of additional currencies creates social information-transaction costs associated with detecting counterfeits and therefore a single currency must be established." *Id.* at 450 (footnote omitted).

issuers acceptable to the system, eliminating all delays in ascertaining issuer credit. In most systems, the terminal will be reprogrammed when the merchant downloads to its bank for value. The merchant's bank therefore has a day-to-day ability to judge the issuers with whom it—and by extension, its merchant—will deal. Interestingly, the few e-money systems which permit a meandering offline circulation employ only one issuer, albeit an issuer that is a cooperative of issuing banks. The market endorses monopoly when appropriate.