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Carl Felsenfeld
Fordham University School of Law

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THE COMPATIBILITY OF THE UNCITRAL MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS WITH ARTICLE 4A OF THE UCC

CARL FELSENFELD*

In this Article, Professor Felsenfeld compares the provisions of Article 4A of the Uniform Commercial Code with the Model Law of the United Nations Commission on International Trade Law. Professor Felsenfeld argues that these laws are compatible by contrasting each section of both laws and resolving the differences between them. Professor Felsenfeld concludes that the Model Law is ready for acceptance and adoption in the United States.

INTRODUCTION

THIS Article in many ways updates an article I wrote last year¹ comparing the proposed Model Law on International Credit Transfers with Article 4A of the Uniform Commercial Code ("UCC"), both of which deal with electronic funds transfers. The Model Law, which is being drafted by the United Nations Commission on International Trade Law ("UNCITRAL"), is restricted to transfers that cross international borders. Article 4A ("4A") is concerned with all transfers, domestic and international, and will have its greatest effect upon funds transfers received, regardless of where they are sent, in the United States. Since that writing, Article 4A has been adopted in thirty-two states, and the Model Law is probably near the end of its drafting process.

In the past two years, the United States delegation to UNCITRAL has continued its efforts to conform the Model Law to the 4A model. International drafting groups have not resisted those efforts. The representatives of other countries, however, have not seen various 4A results as necessarily the right answers to the problems they were designed to solve. There remain, therefore, some inconsistencies between the Model Law and Article 4A, although not as many as had existed two years ago.

As of January 1991, the Model Law was still being written. It is generally anticipated that a plenary session of UNCITRAL, to be held in New York in May 1992, will be the final consideration of the Law before

* Professor of Law, Fordham University School of Law; A.B. 1948, Dartmouth College; M.S. 1950, Columbia University; J.D. 1954, Columbia University.

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1. Felsenfeld, *Strange Bedfellows for Electronic Funds Transfers: Proposed Article 4A of the Uniform Commercial Code and the UNCITRAL Model Law*, 42 Ala. L. Rev. 723 (1991).

it goes through the procedures to obtain UN ratification.² In a sense, therefore, this article is a few months premature. One may fairly anticipate, however, that relatively few changes will be made at the final session and that, in all probability, those changes will parallel the 4A model.

This Article will deal with the question of whether the two laws can live together in harmony. It argues that the laws are compatible because of the "progress" made in the Model Law drafting process. Whether this means that the United States or any of its states should adopt the Model Law, however, is a separate question that will be considered at the conclusion of the Article. Part I of this Article briefly describes the core issue of the compatibility of the UNCITRAL Model Law and Article 4A of the Uniform Commercial Code. Part II reviews the Model Law section by section with a view towards resolving the issue of compatibility. Part III then questions whether anything of significance from the longer Article 4A has been omitted in drafting the Model Law. Finally, Part IV concludes that the Model Law in its basic form is ready for acceptance and adoption in the United States.

I. SETTING FOR THE LAW

We will assume for purposes of this Article that a company goes to its bank in London and orders it to transfer one million dollars to the New York bank account of that company's creditor. The transfer may be diagrammed as follows:

O → OB → I → CHIPS → BB → B

The diagram means that the company (an Originator - "O") goes to its bank (the Originator's Bank - "OB") and orders it to send the money to the New York bank (the Beneficiary's Bank - "BB") and deposit it into the account of the Beneficiary ("B"). To accomplish this, OB sends the money through an Intermediary Bank located in New York ("I"), which puts it through the Clearing House for International Payments ("CHIPS") in New York. CHIPS then transfers the funds to BB which puts them in B's bank account so that B has the benefit of the funds.

New York has adopted Article 4A as part of its UCC. We will assume that the Model Law has also been adopted as the controlling law in New York. We meet here our first question: how has the Model Law been adopted? UNCITRAL gives no particular direction as to how a country (called a "state" in UNCITRAL language), or a subdivision thereof, shall effect such an adoption. We can, in terms of the United States legal system, suggest two alternatives. First, the United States Congress can adopt the Model Law as the law of the United States. Alternatively, New York State (or any other state) can adopt the Law as its own, and

2. See Bergston, *UNCITRAL Model Law on International Credit Transfers*, 6 J. Int'l Banking L. 276, 276 (1991). "[I]t is clear that the Model Law will be adopted by the Commission at its session in May 1992." *Id.*

modify it so that it does not conflict with the established legal structure, including Article 4A.³

Either way, the Model Law prescribes the underlying principle that "the law of the state of the receiving bank shall apply."⁴ In our hypothetical transfer, this will be either the law of the United States under option 1 (which must supersede any contrary New York State law) or the law of New York State itself under option 2.

Bank BB, a New York bank, is also presumably receiving funds that are transferred from, for instance, Chicago in addition to those transferred from London. If the Model Law is adopted by either New York or the United States, then the New York bank must treat the hypothetical London transfer under one legal system and the Chicago transfer under another. Therein lies the problem that this Article examines.

New York, along with a growing portion of the country, now has a legal system in place to handle both types of transfers under one law—the new Article 4A of the Uniform Commercial Code. There are no territorial restrictions that apply to the transactions covered by Article 4A. By contrast, if the Model Law were in place, it would govern the London transfer and leave 4A in place for the Chicago transfer. It is cumbersome, and indeed arguably illogical, for one bank to treat the two similar transfers under markedly different laws. If, however, the Model Law and 4A are sufficiently similar, Bank BB can handle them both under the same principles and procedures. Thus, Bank BB can operate conveniently with both systems in place.

By comparing the Model Law with 4A, this Article examines whether they are similar enough to promote convenience and efficiency in banking transactions. The author believes UNCITRAL has made sufficient modifications in the Model Law so that it may co-exist with Article 4A.

II. ANALYSIS OF MODEL LAW SECTIONS

This portion of the Article will examine all eighteen Articles of the Model Law to determine whether they are fundamentally compatible with, or antagonistic to, their Article 4A counterparts. This writing will consider only the Model Law in general, rather than all of its details. Although there are more differences between the two laws than those discussed here, those not addressed do not interfere sufficiently with the harmony between the Model Law and Article 4A. More often than not,

3. Both the United States and New York might adopt the Model Law to cover all funds transfers, whether domestic or foreign, and thereby simply eliminate Article 4A of the UCC. See *Report of the United Nations Commission on International Trade Law*, U.N. GAOR Supp. (No. 17), at 6 n.19, U.N. Doc. A/46/17 (1991) [hereinafter *UNCITRAL Report*]. While we cannot fully ignore this possibility, it is sufficiently remote that it may be ignored for the purposes of this article.

4. *UNCITRAL Report*, *supra* note 3, art. 18(1), at 99. This Article refers to other tests, including the ability of the parties to select governing law by agreement. In general, however, the law of the receiving bank will govern.

language accomplishing essentially the same ends will vary; that too will not concern us.

A. Article 1

1. Sphere of Application

Article 1(1) gives the Model Law its international scope. The movement of funds from O until they become available to B must occur between different countries. Thus, at least two "banks"—the sending bank and the receiving bank—must be involved.⁵ The Model Law, however, fails to define the term "bank." This was one of the most troublesome concepts dealt with by UNCITRAL throughout the drafting process and, indeed, a definition has not yet been adopted.

This is hardly surprising, since it was difficult enough to define this term in drafting Article 4A, which does not have an international scope. Ultimately, Article 4A's drafters only slightly modified the UCC's description of a "bank"⁶ in formulating the definition contained in Section 4A-105(a)(2).⁷ The definitions in Articles 1 and 4A of the UCC are understandably ambiguous; too many institutions of varying forms are involved in banking functions of one sort or another for any single satisfactory definition to be found.

The pervasiveness of banking functions also underlies the difficulty in defining "bank" under the Model Law. In Europe, various institutions such as post offices conduct services deemed to be the equivalent of "banking" in the United States. Thus, the drafters decided to omit any definition of bank, but, in order to satisfy some European concerns, included in Article 1 a statement that the Model Law applies to entities that "as an ordinary part of their business engage in executing payment orders."⁸

The United States, however, has traditionally been opposed to applying the Model Law to non-bank institutions.⁹ To the extent that such institutions only exist abroad, there seems to be little problem from the United States point of view. If the institutions are in the United States, however, different considerations apply, and those will be dealt with in Part IV of this article.¹⁰

5. Both the Model Law and Article 4A define a branch of a bank as being a separate bank for purposes of the applicable law. See *UNCITRAL Report, supra* note 3, art. 1(2), at 87; U.C.C. § 4A-105(a)(2) (Supp. 1990).

6. The UCC defines a bank as "any person engaged in the business of banking." U.C.C. § 1-201(4) (Supp. 1990).

7. Section 4A-105(a)(2) provides: "'Bank' means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for the purposes of the Article." U.C.C. § 4A-105(a)(2) (Supp. 1990).

8. *UNCITRAL Report, supra* note 3, art. 1(2), at 87.

9. Institutions such as insurance companies or stock brokers might be included, since they execute what are defined in the Model Law as payment orders.

10. See *infra* notes 113-123 and accompanying text.

2. The Consumer Footnote

A footnote to Article 1 of the Model Law specifies that it “does not deal with issues related to the protection of consumers.”¹¹ This is consistent with the spirit of Article 4A, which relates principally to commercial funds transfers. For instance, Article 4A excludes consumer credit transactions by providing that transfers under the Electronic Fund Transfer Act of 1978 (“EFTA”),¹² a consumer protection statute, are not covered by 4A.¹³ The balance between consumer and commercial funds transfers sought by 4A is less than complete, however, for two reasons. First, the EFTA may include some commercial transactions and thus, under the Article 4A test, the EFTA would supplant 4A.¹⁴ In addition, the EFTA and 4A cover different subjects. The EFTA is largely a consumer protection statute and covers such issues as whether financial institutions have issued proper notices to users. By contrast, if the question is whether a debtor has paid a creditor with a funds transfer, it will be governed by Article 4A but not by EFTA.

Despite some overlap between 4A and EFTA, both the Model Law and 4A exclude virtually all consumer transactions. Thus, if the Model Law were adopted along with 4A, Bank BB should be able to handle its transfers from Chicago and from London in much the same manner as it does now. Finally, should the Model Law be enacted in the United States, its Article 1 footnote could be amended to conform to Section 4A-108's exclusion of the EFTA transactions.

B. Article 2: Definitions

The definitions in Article 2 of the Model Law, including those for “credit transfer” and “payment orders,” substantially conform to their counterparts in Article 4A.¹⁵ Both establish a fundamental system whereby the overall transfer from O to Bank BB (in B's account) is the credit, or funds, transfer. Payment orders consist of any intermediate transfers involved to procure that result.¹⁶

Both the Model Law and Article 4A provide that only transfers

11. *UNCITRAL Report*, *supra* note 3, at 87.

12. 15 U.S.C. §§ 1693-1693r (1988).

13. *See* U.C.C. § 4A-108 (Supp. 1990).

14. Federal Reserve Board Regulation E under the EFTA excludes from its coverage “any wire transfer of funds for a consumer through the Federal Reserve Communications System or other similar network that is used *primarily* for transfers between financial institutions or between businesses.” 12 C.F.R. § 205.3(b) (1991)(emphasis added). Such consumer transfers would not be under EFTA; they would be under 4A.

15. Both are also clear that only credit transfers—and not debit transfers whereby the intended beneficiary can initiate the transfer by demanding payment to it—are covered. *See UNCITRAL Report*, *supra* note 3, art. 2(a)-(b), at 87; U.C.C. § 4A-103(a)(1)(ii) & Comment 4 (Supp. 1990).

16. U.C.C. Article 4A specifies that the funds transfer is completed by acceptance by the beneficiary's bank. *See* U.C.C. § 4A-104(a) (Supp. 1990). The Model Law does not have this refinement, but its absence does not seem crucial.

through banks should be covered.¹⁷ Thus, many of their rules, such as limitations on liability,¹⁸ are structured only for banks and are not intended to apply to non-bank parties. A direction by O to his friend X to pay funds to B, for example, is not covered by either the Model Law or Article 4A. Whether transfers through such non-bank intermediaries as Western Union will ultimately be covered by the Model Law still remains to be seen.

C. Article 3: Variation by Agreement

Article 3 grants an unlimited right to parties affected by the Model Law to vary their rights and obligations by agreement. Article 4A has a similar provision,¹⁹ and thus most distinctions between the two are matters of form, not substance. For example, Article 3 of the Model Law permits variation without exception; 4A permits variation unless it is specifically prohibited within 4A. The apparently limitless Model Law is, however, clearly limited by such provisions as Article 16(7), which prohibits agreements that contravene the underlying purposes of the Law.

Despite their many similarities, Article 3 of the Model Law and Article 4A of the UCC differ in one significant respect.²⁰ Article 4A clearly provides that the parties may agree to vary the rules relating to credit, or funds, transfers, and these variations also govern third parties who are not in privity to the agreement.²¹ The Model Law, however, may dictate a different result. The 1991 *UNCITRAL Report* notes that the issue of rule-modifying agreements relating to third-party beneficiaries had been considered by the entire body,²² but it decided that general contract law should govern the question.²³

Pursuant to New York state contract law, persons not party to a contract are generally unaffected by obligations imposed by the contract. If the contract involves a credit, or funds, transfer, then New York contract law places the Model Law at odds with Article 4A. Thus, in our hypothetical, should the CHIPS rules have an effect upon any of the parties to the London credit transfer other than Intermediary Bank I and Bank BB, Bank BB would not know whether these rules apply to those parties. The next part of this Article considers the issue more fully in the discussion of funds transfer systems.²⁴

17. For a discussion on the difficulty of defining a "bank," see *supra* notes 5-10 and accompanying text.

18. See *infra* notes 75-86 and accompanying text.

19. See U.C.C. § 4A-501 (Supp. 1990).

20. Article 4A's references are to rules of such associations as the Clearing House Interbank Payment System ("CHIPS") and the Automated Clearing House systems. See U.C.C. § 4A-105 Comment 2 (Supp. 1990).

21. See U.C.C. § 4A-501(b) (Supp. 1990).

22. *UNCITRAL Report, supra* note 3, ¶¶ 97-98, at 24-25.

23. See *id.* ¶ 98, at 25.

24. See *infra* text accompanying notes 25-27, 93-97.

D. *Article 4: Obligations of Sender*

Article 4 of the Model Law contains provisions that are covered, either explicitly or implicitly, by Article 4A Sections 4A-201 to 4A-204. Both approaches establish the same basic pattern. First, under both the Model Law and 4A, if the sender (or someone authorized by the sender) has authorized a payment order, then the sender is bound by the order.²⁵ Second, if the sender and receiver have established a mechanism for the verification of payment orders, the sender may be bound by an order that it did not in fact make or authorize, if the receiver complies with the requirements of the security mechanism.²⁶

Both rules excuse the sender from liability for an unauthorized payment order that satisfied the verification procedure if the sender can prove that the order did not come from someone whose relationship with the sender enabled that person to submit the order.²⁷ Although the rules are worded differently, the intent and result are essentially the same. The Model Law gives the receiving bank a simultaneous opportunity to prove that the unauthorized payment order *did* come through an authorized person,²⁸ while Article 4A does not. Such an opportunity can fairly be implied, however, within the scope of Article 4A.²⁹

The Model Law and Article 4A differ as to the permissible objectives for rule-modifying agreements. Article 4A permits an unlimited agreement between parties that sets the rules for security procedures. The Model Law says that the parties may agree upon any authentication method that is commercially reasonable. Thus, Bank BB might agree with Intermediary Bank I to use an authentication device that is not commercially reasonable, but the device would be ineffective under the Model Law. Such an agreement, however, would be effective under Article 4A. Thus, the only way that Bank BB can be certain that the orders it accepts will be deemed the sender's orders is to adopt two procedures, one under the Model Law and the other under Article 4A. This is precisely the result we believe should be avoided, but the conflict here may be insignificant as a practical matter. In general, Bank BB would adopt a security procedure that, as a matter of good banking practice, is commercially reasonable, and thus would satisfy both the Model Law and Article 4A.

As is true of the Model Law generally, Article 4(6) takes a different approach than that of Article 4A to reach the same result.³⁰ Both agree

25. See *UNCITRAL Report*, *supra* note 3, art. 4(1), at 89; U.C.C. § 4A-202(a) (Supp. 1990).

26. See *UNCITRAL Report*, *supra* note 3, art. 4(2)(b), at 89; U.C.C. § 4A-202(b) (Supp. 1990).

27. See *UNCITRAL Report*, *supra* note 3, art. 4(4), at 89; U.C.C. § 4A-203(a)(2) (Supp. 1990).

28. See *UNCITRAL Report*, *supra* note 3, art. 4(4), at 89.

29. See U.C.C. § 4A-101 & Comment 3 (Supp. 1990). Article 4A regulates large money transfers, primarily by electronic means. See *id.*

30. See generally Crawford & Bradley, *International Credit Transfers: The Influence*

that the duty of a receiving bank is to pass the payment along as instructed. Both give the receiving bank a virtually unlimited right to accept or reject the payment order it receives.³¹ The Model Law, however, considers acceptance to occur upon the fulfillment of certain financial and time requirements.³² Upon acceptance, the receiving bank then has certain duties: payment forward if it is not the beneficiary's bank;³³ putting funds at the disposal of the beneficiary if it is.³⁴ Under 4A, however, if the receiving bank is not the beneficiary's bank, it accepts only by actually executing the order.³⁵

These two approaches require varying time periods for the sending bank to make actual payment to the receiving bank on the order. Payment must, of course, be distinguished from a funds transfer or a credit or payment order.³⁶ In the Model Law and the U.C.C., payment by the sender to the receiver is due upon the receiver's acceptance,³⁷ and the acts of acceptance vary between the laws. This distinction is not fatal, however, to the compatibility of the two models.

E. Article 5: Payment to Receiving Bank

The question of when a payment is made by a sender to the receiver is ambiguous under both the Model Law and Article 4A. Article 5 of the Model Law is, however, sufficiently consistent with 4A-403, since both sections implicitly acknowledge the existence of an infinite number of methods of payment. Moreover, both conclude that law outside the drafts can also be determinative.

of Article 4A on the Model Law, 19 Canadian Bus. Law Q. 166, 169-70 (1991)(discussing the divergent views between the United States and foreign delegations).

31. An example of an exception is where the receiving bank has agreed in advance to accept payment orders of a particular type. See Model Law Article 6(2)(b). Presumably the same result can occur under 4A with its unlimited authorization to make agreements.

32. See *UNCITRAL Report*, *supra* note 3, art. 6(2), at 91.

33. See *id.* art. 7(2), at 92-93.

34. See *id.* art. 9(1), 93.

35. See U.C.C. § 4A-209(a) (Supp. 1990).

36. A funds or credit transfer does not necessarily mean that money is moved from every sender to every recipient. It represents a series of orders among banks, often resulting in banks accepting the risk of not being paid. The orders create responsibilities and obligations among the banks. The obligations are, however, not honored or satisfied until actual payment—the actual transfer of funds—is effected. This step is often called settlement or cover. Funds may be transferred along networks that do not conduct settlement at all. The Society of Worldwide Interbank Financial Telecommunication ("SWIFT") is an example. The settlement or actual payment step may be accomplished in many ways, including one bank debiting the account of another. It may also be accomplished, although it rarely is, through the medium of a simple cash payment.

37. See *UNCITRAL Report*, *supra* note 3, art. 4(6), at 90; U.C.C. § 4A-402(c) (Supp. 1990).

F. *Article 6: Acceptance or Rejection of a Payment Order by Receiving Bank that is not the Beneficiary's Bank*

As previously noted,³⁸ a receiving bank has a virtually unlimited right to accept or reject payment orders sent to it. Acceptance by a bank that is not the beneficiary's bank, however, occurs differently under the two laws. Under Article 4A, acceptance is the act of executing the order by the receiving bank (that is, sending it on to the next receiving bank). Under the Model Law, acceptance and rejection are subject to an odd, unsatisfactory pattern. Acceptance may, as in 4A, be accomplished by the receiving bank's execution;³⁹ it may also be deemed to occur⁴⁰ under the following conditions: (1) the receiving bank receives the payment order; (2) the sender pays the receiving bank the amount of the order; and (3) the receiving bank does not give a notice of rejection within the time required.

Assuming that the receiving bank fails to give notice of rejection, the payment order continues to bind it.⁴¹ Under Article 4A, the payment order is automatically cancelled after five days if it is not executed by the receiving bank.⁴² Pursuant to the Model Law, "[a] payment order ceases to have effect if it is neither accepted nor rejected"⁴³ before the close of the fifth banking day following execution. This procedure is not as clear as one might wish, but we should be able to accept that if an order "ceases to have effect," it is effectively "cancelled." If the order is not executed under the foregoing scenario and no rejection notice is given, however, the effects under the two laws differ slightly.

Under the Model Law, interest must be paid on the amount held by the receiving bank for any period of delay.⁴⁴ Article 4A also requires the payment of interest, but the requirement ends upon the expiration of the five-day cancellation period.⁴⁵

The principal difference between the two laws is thus the nature of the obligation to pay interest—one ending after five days, the other continuing. The difference does not appear significant. Pursuant to Article 4A, there is an implicit duty upon the sending bank to see that its funds are properly accounted for. If it fails in this duty, it loses interest on those funds after five days. Under the Model Law, the receiver may, at worst, have a continuing obligation to pay interest. Because the receiver holds

38. See *supra* notes 28-31 and accompanying text.

39. See *UNCITRAL Report, supra* note 3, art. 6(2)(c), at 91.

40. See *id.* art. 6, ¶ 136, at 34.

41. Section 4A-210(a) says that "[a] payment order is rejected by the receiving bank by a notice of rejection." It does not, however, require that a payment order be rejected if it is not accepted. The scheme seems to be that the receiving bank has the additional option simply to let the order expire.

42. See U.C.C. § 4A-211(d) (Supp. 1990).

43. *UNCITRAL Report, supra* note 3, art. 6(4), at 97.

44. See *id.*, *supra* note 3, art. 16(1), at 97.

45. See U.C.C. § 4A-210(b) (Supp. 1990).

the funds, however, the differing interest penalty does not seem burdensome.

G. *Article 7: Obligations of Receiving Bank That Is Not the Beneficiary's Bank*

A receiving bank that is not the beneficiary's bank and that accepts an order has an obligation to issue its own payment order to move the funds transfer to the beneficiary's bank. In so doing, it generally must comply with the terms of the order it has received.⁴⁶ This obligation is equivalent to the receiving bank's obligation under Article 4A.⁴⁷

The Model Law, however, places additional obligations upon the receiver. Where "an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order[;] or[,] being a payment order[,] it cannot be executed because of insufficient data, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency."⁴⁸

Model Law Article 7(5) contains a similar requirement that the receiving bank give notice to the sender when the receiving bank "detects that there is an inconsistency in the information relating to the amount of money to be transferred."⁴⁹ This is also not required by Article 4A.

These differences between the Model Law and 4A reflect the divergent philosophies between UNCITRAL and the drafters of Article 4A. Article 4A was clearly designed to govern a high-speed, low-cost system of moving large sums of money,⁵⁰ and the drafters attempted to minimize the inefficiencies resulting from a statutory framework. Although the Model Law is consistent with the goals of speed and cost-efficiency, it is also compatible with funds transfer systems that are regularly used to send lower balance sums, perhaps more slowly, perhaps for consumers. Thus, the Model Law places obligations upon receiving banks that might otherwise slow down the process and increase costs.

Article 7 of the Model Law places other burdens on the receiver as well. While Article 4A obligates the sender to ensure that his money gets where it is supposed to go,⁵¹ the Model Law shifts this burden to the receiver.⁵² Whether a message has reached its intended recipient is seen under Article 4A as the ultimate responsibility of the sender. By contrast, the Model Law requires that a receiver inform the sender when the receiver determines that a payment order contains insufficient data or inconsistent information.⁵³

46. See *UNCITRAL Report*, *supra* note 3, art. 7(2), at 91-92.

47. See U.C.C. § 4A-302 (Supp. 1990).

48. *UNCITRAL Report*, *supra* note 3, art. 7, ¶ 161, at 41.

49. *Id.* ¶ 167, at 41.

50. See U.C.C. § 4A-101 Comment 3 (Supp. 1990).

51. See U.C.C. § 4A-205(b) (Supp. 1990).

52. See *UNCITRAL Report*, *supra* note 3, art. 7(3), at 38.

53. See *id.* Until the Vienna Session in June 1991, the Model Law had a further

The notice requirement of the Model Law is palatable to those committed to the Article 4A model because, as a practical matter, banks already give the notice without a statutory requirement. Others, however, find it less than acceptable. Where the commitment is to high speed and low cost, Article 4A is better; where these considerations are less important, the Model Law is better.

The inconsistency between the laws, however, may create a regulatory problem. That is, the notice requirements of Model Law Article 7 will be under the auspices of one or more administrative agencies of the United States banking system. Therefore, United States banking officials may engage in regulation and enforcement activities in connection with those notice provisions. The involvement of these regulators can conceivably create a problem that is more complex than it looks on paper.

H. *Article 8: Acceptance or Rejection by the Beneficiary's Bank*

Both the Model Law and Article 4A distinguish the acceptance and rejection of an order by the beneficiary's bank (Bank BB) from acceptance and rejection by other banks (Banks OB and I). This is appropriate because a receiving bank that is *not* the beneficiary's has as its principal function the execution of the order it has received from the preceding bank. The beneficiary's bank, conversely, will typically put the funds in the beneficiary's account and dispose of them as the beneficiary directs; execution at this stage is not a meaningful concept.

The two laws approach the problem with almost complete consistency. Both find that BB will have accepted the order when it pays B or notifies B that B has the funds. This is a voluntary act by BB and confirms that it has accepted the transfer.

In the absence of such acts, however, if BB receives the order *and* is paid the amount of the order, the results differ slightly. The Model Law gives BB a time for rejection, even if it receives full payment. For the Model Law, the right of rejection admits of no exceptions. Article 4A likewise considers acceptance to occur after the passage of a brief time within which BB has an opportunity to reject.⁵⁴ In one narrow instance, however, BB has no such opportunity. If payment is made to BB as a result of a final settlement through a Federal Reserve Bank, acceptance occurs upon the payment to BB and there is no opportunity for rejection.⁵⁵

This exception for a Fed funds payment under Article 4A, however, does not seem to create a problem for a New York bank vis-a-vis the

requirement in Article 7 that notice must be given to the sender if a receiver notes that a payment order has been misdirected. As to its deletion, see *id.* Art. 7(3), at 39-40.

54. See U.C.C. § 4A-209(b)(3) (Supp. 1990). In order to describe the overall scheme, we do not attempt to describe this period. It may be the time between payment and the withdrawal of the credit under 4A-403(a)(2). It may simply be the passage of time under 4A-209(b)(3).

55. See U.C.C. §§ 4A-209(b)(2), 4A-403(a)(1) (Supp. 1990).

Model Law. Indeed, the Model Law would represent a slight loosening of an existing restriction, rather than the addition of a new restrictive provision.

I. *Article 9: Obligations of the Beneficiary's Bank*

Both Article 9 and Section 4A-404 obligate the beneficiary's bank to put the funds at the disposal of the beneficiary when the bank accepts the payment order. Article 9 imposes additional duties on a beneficiary's bank to give notice similar to the notice required by Article 7 for banks earlier in the credit transfer. The earlier comments on Article 7, particularly regarding the regulatory process, apply here as well.⁵⁶ There is no other significant inconsistency between Article 9 of the Model Law and Article 4A.⁵⁷

J. *Article 10: Time for Receiving Bank to Execute Payment Order and Give Notices*

Article 10 of the Model Law is designed to establish time periods for the execution of payment orders and for the giving of notices. One senses, however, that Article 10 is still somewhat less than precise, and that more thought must be given to it in May 1992. Nevertheless, its broad outlines are clear enough to suggest that at this time it does not conflict with Article 4A and, indeed, may provide some liberalization of the Article 4A time periods.

If we assume that Intermediary Bank I in the above example receives a payment order on July 1 during normal banking hours, both the Model Law and Article 4A contemplate that the order will be executed by Bank I on the same day.⁵⁸ If, under Article 4A, the bank is late, it must pay interest for the delay.⁵⁹ By contrast, the Model Law automatically gives the bank one additional day to execute,⁶⁰ but this may be a distinction without a difference. Although Bank I may execute on the additional day, UNCITRAL is currently contemplating a provision in the Model Law that would nevertheless require Bank I to give value as of the receipt date.⁶¹ Thus, under both 4A and the proposed addition to the Model Law, the result to Bank I is the same.

If Bank I receives the order on July 1, but after its cut-off time for receiving and processing such orders, both the Model Law and Article

56. See *supra* notes 47-52 and accompanying text.

57. See *infra* text accompanying note 100-102.

58. See U.C.C. § 4A-301(b) & Comment 2 (Supp. 1990); *UNCITRAL Report, supra* note 3, art. 10(1), at 94.

59. Section 4A-305 directs the reader to § 4A-302, which in turn leads to § 4A-209(a), which describes the act of execution. Execution must, however, still be on the execution date, which, as § 4A-301(b) indicates, is the same date the order is received.

60. See *UNCITRAL Report, supra* note 3, art. 10(1), at 94.

61. See *id.* art. 10(1 bis), at 94.

4A extend Bank I's time to act for one day.⁶² The provisions of Article 10(1),⁶³ however, would give Bank I yet another day forward to execute the order. This occurs because of the interaction between Article 10 and other sections of the Model Law.

It is not clear that UNCITRAL intended either the two-day delay period or the effect this delay will have on other provisions of the Model Law. For example, the notice provisions of Articles 7 and 9 must be given on or before the day following the "execution period."⁶⁴ Thus, the payment order is deemed to have arrived on July 2, the execution period moves the time to July 3, and the one extra day, given by Article 10(1), shifts it to July 4. When is notice due? This aspect of Article 10 probably needs reexamination in May to determine the intent of the Model Law's drafters.

K. Article 11: Revocation

The underlying concepts of the Model Law and Article 4A⁶⁵ are comparable when a payment order is revoked. Article 4A speaks of "cancellation and amendment"⁶⁶ instead of "revocation," but the results seem to be the same. Both laws require that the recipient receive the revocation in time for it to avoid taking definitive action (acceptance under 4A, the series of steps constituting acceptance under the Model Law). Article 4A deals with certain revocations that may take place after acceptance, and we will deal with these in Part III of this article.⁶⁷

L. Article 12: Consequences of Failed, Erroneous, or Delayed Credit Transfers

Article 12 is sufficiently brief to set out in full: "Until the credit transfer is completed, each receiving bank is under a duty to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the banking procedure of the credit transfer."⁶⁸

Once again we see vestiges of the difference in the underlying philosophy between Article 4A and the Model Law described previously.⁶⁹ No such responsibility is placed upon a receiving bank by Article 4A. It is difficult to determine how much incompatibility results from the degrees of obligation imposed by Article 12 of the Model Law and Article 4A.

62. See U.C.C. § 4A-106(a) (Supp. 1990); *UNCITRAL Report, supra* note 3, art. 10(4), at 94.

63. See *UNCITRAL Report, supra* note 3, art. 10(1), at 94.

64. "Execution period" is defined in Article 2(k) as the two-day period prescribe by Article 10. See *UNCITRAL Report, supra* note 3, art. 2(k), at 9.

65. For a discussion of revocation under Article 4A, see U.C.C. § 4A-211 (Supp. 1990).

66. See U.C.C. § 4A-211 (Supp. 1990).

67. See *infra* text accompanying notes 107-08.

68. *UNCITRAL Report, supra* note 3, art. 12, at 96.

69. See *supra* text accompanying notes 21-23, 49.

United States banking lawyers appear unconcerned with a duty of assistance in general, primarily because banks already assume this responsibility, whether or not it is codified.

Conversely, the specificity of Article 12 can create a regulatory problem as bank examiners attempt to reduce this duty to a formal rule rather than relying on reasonable business practice. This problem was noted previously in connection with Articles 7 and 9 above.⁷⁰

M. *Article 13: Refund*

Article 13 is built around the "money back guaranty" that is essentially contained in Article 4A as well.⁷¹ The nature of this guaranty is that the originator is assured by the banking system that when it starts a credit transfer, the transfer will be completed by the beneficiary's bank.⁷² In the event that the beneficiary bank's acceptance is not obtained, the money must be returned to the originator with interest from the date of the originator's payment.

Subject to some details that are not central to the scheme, the Model Law and Article 4A are comparable. One of those details is that the money back guaranty may be varied by agreement under the Model Law if "a prudent originator's bank"⁷³ can show that it would not, but for such agreement, have assumed the "significant risk involved in the credit transfers."⁷⁴ Thus, an originator's bank is forced to show that it had perceived risks in a credit transfer (as, for example, passage through countries at war) and would not have accepted the originator's order but for an agreement nullifying or modifying the money back guaranty. This provision is not in Article 4A, but its absence should not upset the harmony of the two laws. The agreement is a special event and will always be specially considered by the originator's bank.

N. *Articles 14 and 15: Underpayment and Restitution of Overpayment*

Article 14 requires a receiving bank that has executed an order for less than the amount it accepted to issue an order for the difference. When the amount of an order exceeds the amount ultimately accepted by the bank, Article 15 entitles the bank to recover from the beneficiary the difference between the amount of the order and the amount it has accepted. Both Articles 14 and 15 of the Model Law have their counter-

70. See *supra* notes 52, 55 and accompanying text.

71. See U.C.C. § 4A-402(d)-(f) (Supp. 1990).

72. As we shall see, acceptance by the beneficiary's bank is completion of the credit/funds transfer, because such acceptance is "money in the bank" for the beneficiary. See *infra* notes 88-89 and accompanying text.

73. *UNCITRAL Report*, *supra* note 3, art. 13(2), at 96.

74. *Id.*

parts in Article 4A without significant difference.⁷⁵

O. Article 16: Liability and Damages

Article 16 establishes a system of damages that is generally harmonious with that of Article 4A. Both establish a basic standard that damages shall be measured in interest paid to the party who is injured by a failure of a bank to conform to the dictates of the law.⁷⁶

The Model Law permits the liability of one bank to another to be increased or reduced by agreement of the affected banks.⁷⁷ Article 4A does not permit reduction of damages for a late or improper order,⁷⁸ but damages may be increased by agreement.⁷⁹ A difference of this sort between the two laws is not consequential; it merely affects the negotiations that individual banks will conduct for a particular transfer.

The Model Law of course contains damage provisions for failure to give the notices required by Articles 7 and 9. The damages are interest charges that accrue from the time that the violating bank has held a payment received.⁸⁰ (The interest penalty for a failure to give an Article 9 notice ceases when the notice is given.) A penalty of this sort cannot be considered unduly offensive, since the funds are being held, and presumably are benefiting, the violating bank. As noted earlier, any major impact of the notices will probably be on the regulatory side.⁸¹

Probably the most controversial single aspect of the Model Law and Article 4A is contained in Model Law Article 16(8) and Article 4A subsections 4A-305(c) and (d). The underlying problem stems from *Evra Corp. v. Swiss Bank Corp.*,⁸² in which a receiving bank, found to be negligent in its handling of a funds transfer, was held not liable for consequential damages suffered by the originator. The case preceded both Article 4A and the Model Law, and the decision was based upon common-law principles. Although the result of the case was satisfactory to the banking bar, it dealt with an issue that was generally considered to pose a threat in future transactions and that was, consequently, best covered by legislation. The *Evra* case is usually cited as the spark that ignited the drafting of both Article 4A and the Model Law.

Article 4A does not provide for consequential damages,⁸³ and the subject of consequential damages under the Model Law was hotly disputed in successive UNCITRAL sessions. The United States delegation in particular sought conformity with the Article 4A approach, partly in the

75. See generally U.C.C. § 4A-303(b) (Supp. 1990)(discussing erroneous underpayments); U.C.C. § 4A-303(a) (Supp. 1990)(discussing erroneous overpayments).

76. For a discussion of the rate of interest, see *infra* note 109 and accompanying text.

77. See *UNCITRAL Report*, *supra* note 3, Annex I, art. 16(7), at 98.

78. See U.C.C. § 4A-305(f) & Comment 5 (Supp. 1990).

79. See U.C.C. § 4A-305(c) & Comment 2 (Supp. 1990).

80. See *UNCITRAL Report*, *supra* note 3, Annex I, art. 16(3), at 99.

81. See *supra* notes 45-52 and accompanying text.

82. 673 F.2d 951 (7th Cir. 1982).

83. See U.C.C. § 4A-404(a) (Supp. 1990).

fear that a consequential damages provision would never be acceptable to United States banks. Delegations from other countries felt that consequential damages have as much place in funds transfer law as in any other law establishing relationships among parties. Some delegations expressed the view that their home laws required a consequential damage concept, and that it would be deemed to be in the law whether expressed or not.

The UNCITRAL sessions strove to reconcile these differing points of view. We see, as an example, the position of an early 1989 draft, showing by brackets the points that were acknowledged to be at issue:

[liability shall include] any other loss that may have occurred as a result, if the improper [or late] execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result.⁸⁴

The current exposition of the concept in the Model Law is as follows:

[liability shall include] any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order (a) with the intent to cause loss, or (b) recklessly and with knowledge that loss might result.⁸⁵

The slightest suggestion of consequential damages has so far been anathema to the United States banking system. Its structure of low charges, typically less than twenty dollars for a funds transfer of any size, has made United States banks resistant to the concept that they might be found liable for consequential damages as a result of an error. The current language of the Model Law reduces the risk that there may be consequential damage liability in a situation where there is a remedy under local law for consequential damages outside the Model Law, *and* either (a) there was intent to cause the damage or (b) the damage was caused recklessly and "with knowledge that loss might result."⁸⁶

It must be conceded that consequential damages will exist only in very narrow circumstances. The provision makes clear that much more is required than mere error. Whether the application of the "reasonable man" standard of tort law⁸⁷ will satisfy the United States banks, however, remains to be seen.

84. UN Doc. A/CN.9/318, at 39 (1989).

85. *UNCITRAL Report*, *supra* note 3, Annex 1, art. 16(8), at 98.

86. *Id.*

87. Section 8A of the Restatement (Second) of Torts defines "intent" "to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." The Restatement has a definition at § 500 of conduct "in reckless disregard of the safety of another." The meaning of "with knowledge that loss might result" seems to defy United States lawyers.

P. *Article 17: Completion of Credit Transfer and Discharge of Obligation*

Both the Model Law and Article 4A consider the credit/funds transfer to be complete when the beneficiary's bank accepts the payment order directed to it. That bank, BB in the hypothetical, then has an obligation to the beneficiary that, in the normal case, is a bank deposit. By causing this deposit to be created, the originator, O in the hypothetical, has paid B, to whom it had been indebted.

The laws differ in a minor respect where the payment to B is less than the amount sent by O because a bank in the chain has deducted its own charges as it passed the funds along. The Model Law says that the original transfer is complete, but B has a claim against O for the difference.⁸⁸ Article 4A provides that the transfer shall not be complete if B makes a claim against O for the difference and the claim is not honored.⁸⁹ This difference is not a dispute involving the transferring banks and does not seem to represent the kind of significant difference that would make the Model Law unacceptable in the United States.

Q. *Article 18: Conflict of Laws*

The basic rule adopted by Article 18, that the law of the receiving bank governs, is the same rule contained in Article 4A.⁹⁰ Both laws allow the parties to vary this law by agreement.⁹¹ Article 4A contains a more elaborate set of rules that do not vary greatly from the Model Law.

As an exception to this fundamental rule, Article 4A provides that in a dispute between a beneficiary's bank and the beneficiary, the law of the bank's home state shall govern. This may be deemed implicit in the Model Law because Article 9, which deals with that relationship, provides that the obligation of the bank to the beneficiary is determined by the law "governing the relationship between the bank and the beneficiary."⁹²

III. ARTICLE 4A PROVISIONS NOT INCLUDED IN THE MODEL LAW

Article 4A is more elaborate than the Model Law, and in fact, has over twice the number of sections. It thus behooves us to determine whether anything was omitted in drafting the Model Law that might create conflict if it is ultimately adopted in the United States. We conclude that there is no substantial short-fall in the Model Law. Some Article 4A provisions that are not contained in the Model Law are examined below.

88. See *UNCITRAL Report, supra* note 3, Annex I, art. 17(3), at 99.

89. See U.C.C. § 4A-406(c) (Supp. 1990). Section 4A-302(d) provides that a receiving bank may not deduct its own charges when executing a payment order unless instructed by the sender. See U.C.C. § 4A-302(d) (Supp. 1990).

90. See U.C.C. § 4A-507(a)(1) (Supp. 1990).

91. See *supra* notes 19-23 and accompanying text.

92. *UNCITRAL Report, supra* note 3, Annex I, art. 9(1), at 93.

Perhaps the greatest single omission from the Model Law is its failure to address funds transfer systems adequately. These systems⁹³ affect in many ways a funds transfer from O to B. For example, a system normally has a set of rules to which members of the system subscribe. The effect of these rules is established by Article 4A, especially the extent to which agreements may affect third parties.⁹⁴ The system rules may eventually procure an agreement that establishes choice of law.⁹⁵ The system may vary a message sent to it, in which case the effect of the variation should be ascribed to some party.⁹⁶

Although the Model Law acknowledges the use of funds transfer systems,⁹⁷ it barely goes into their operation or their effect upon credit funds transfers. The essential elimination of funds transfer systems from the Model Law is not an inconsequential matter. As suggested in the preceding paragraph, issues may arise that will be covered if Article 4A is in place, but not if it is replaced by the Model Law. In this sense, adoption of the Model Law cannot unfairly be criticized as a reduction in legal coverage. Conversely, the issues involved typically arise after the fact and are negotiated separately among the parties. Most of these would seem to flow naturally from the underlying factual pattern and will probably be considered law, despite the absence of a specific statute on point. The elimination of this area from the Model Law does not seem to be sufficiently serious or fundamental to justify its rejection.

Borrowing from Article 4 of the UCC, Article 4A imposes an ordinary care obligation upon a bank customer to inform the bank if an unauthorized and ineffective payment order has been issued.⁹⁸ Normally, the bank is required to pay interest to the customer on such an order. But interest is not payable under Article 4A if the customer has failed to inform the bank that the order was in fact improper after the customer has received notice from the bank that the order had been accepted. Such a requirement, while desirable in principle, hardly seems a key element of an international funds transfer law.

Reference was made above to the underlying shift of responsibilities

93. One may include the Federal Reserve payment system ("FedWire"), the Clearing House International Payment System ("CHIPS"), the Society of Worldwide Interbank Financial Telecommunication ("SWIFT"), the United Kingdom Clearing House Automated Payments System ("CHAPS"), the Japanese BOJ-NET, FEYESS or Zengin systems, and the French SAGITTAIRE system.

94. See U.C.C. § 4A-501(b) (Supp. 1990).

95. *Id.* § 4A-507(c) (Supp. 1990).

96. See *id.* § 4A-206 (Supp. 1990), which makes the funds transfer system the agent of the sender.

97. See, e.g., *UNCITRAL Report, supra* note 3, Annex I, art. 5(b)(iv)a, at 90 (regarding the making of a final settlement in favor of the receiving bank); art. 7(3), at 92 (providing a safe harbor for the receiving bank).

98. See U.C.C. §§ 4A-204(a), 205(b) (Supp. 1990). One may assume that inspiration for this requirement came from U.C.C. § 4-406 (Supp. 1990), which imposes a similar obligation upon a bank customer who is wrongfully considered by his bank to have drawn a check.

under the Model Law from sender to receiver.⁹⁹ This is further illustrated by material in 4A-207(b) of the UCC, which has not been formally adopted as part of the Model Law. When a beneficiary is referred to in one way by its name and in another by its number, Article 4A contains a specific provision that is absent from the Model Law that allows the beneficiary's bank to rely upon number.¹⁰⁰ The Model Law, however, also seems to allow the beneficiary's bank to rely upon the number even in the absence of explicit authorization.¹⁰¹

When the bank becomes *aware* of an inconsistency between name and number identification, the Model Law requires that the receiver notify the sender of the confusion.¹⁰² But, under Article 4A, if the beneficiary's bank learns that there is a discrepancy, it is simply deemed not to have accepted the payment order (unless it fortuitously pays the correct beneficiary), and it need not notify the sender.

A similar set of provisions appears in Section 4A-208. Article 4A allows a receiving bank other than a beneficiary's bank to rely upon numbers. If, however, the receiver is aware of a difference between name and number, it may violate its basic obligation to comply with the sender's order¹⁰³ if it executes wrongly. Pursuant to the Model Law, appropriate notice again must be sent.¹⁰⁴ As stated in the previous paragraph, the liability of the receiving bank is limited to payment of interest.¹⁰⁵ To put the applicable provisions into effect under either law, the receiving bank must be aware of the problem, and although the interest penalties are similar in effect,¹⁰⁶ the absence of specific authorization to rely upon the number may not be consequential.

As noted previously, both laws provide for the cancellation of a payment order before acceptance by the receiving bank.¹⁰⁷ Article 4A, in contrast to the Model Law, promulgates a system whereby a receiving bank may accept a cancellation *after* accepting the payment order. This may occur only through its agreement or pursuant to a rule of a funds transfer system. This is supplemented, both for beneficiary and non-beneficiary banks, by statutory provisions designed to make the "late" revocation work in practice. For example, for the non-beneficiary bank, the revocation must be accompanied by a "conforming cancellation" down the line. For a beneficiary's bank, the "late" revocation gives the bank the right to recover from the beneficiary "to the extent allowed by the law governing mistake and restitution."¹⁰⁸ These supplementary provi-

99. See *supra* notes 25-74 and accompanying text.

100. See U.C.C. § 4A-207(b)(1) (Supp. 1990).

101. See *UNCITRAL Report, supra* note 3, art. 9, at 93-94.

102. See *UNCITRAL Report, supra* note 3, art. 9(4), at 93.

103. See U.C.C. § 4A-302(a)(1) (Supp. 1990).

104. See *UNCITRAL Report, supra* note 3, art. 7(3), at 92.

105. See U.C.C. § 4A-305(a)(Supp. 1990).

106. See *supra* notes 43-44 and accompanying text.

107. See *supra* notes 64-65 and accompanying text.

108. U.C.C. § 4A-211(c)(2) (Supp. 1990).

sions, and the basic provision that a "late" revocation must be accepted by agreement or allowed by a funds transfer system rule, provide sufficient limitations and restrictions upon late cancellation for the two laws to live harmoniously with each other.

A number of provisions of both Article 4A and the Model Law impose an interest obligation on a party. Article 4A specifies what the measure for interest shall be,¹⁰⁹ while the Model Law does not. Since the Article 4A measure is one of the Federal Reserve rates, it is clearly not suited to world wide application and does not belong in the Model Law. Whether a measure could be described with sufficient specificity so that it will be effective for all countries is a fair question. In any case, the establishment of an interest rate is, once again, a problem that arises only after a dereliction that causes interest to be paid. It need not stand in the way of adoption of the Model Law.

In one instance, Article 4A accepts the concept of consequential damages. Section 4A-404 provides that if a beneficiary's bank, having accepted a payment order, refuses to pay the beneficiary after the bank has received "notice of particular circumstances that will give rise to consequential damages as a result of nonpayment,"¹¹⁰ the beneficiary may recover such damages from the bank. This is, of course, in stark contrast to the other rules of 4A-305 that clearly mandate against consequential damages in the absence of an agreement to that effect. The Model Law more freely accepts the concept that consequential damages may be recoverable under some circumstances.¹¹¹ For the beneficiary's bank, however, it does not impose such damages as clearly as Article 4A. The Model Law provides¹¹² that the beneficiary's bank "is liable to the beneficiary to the extent provided by the law governing the relationship between the beneficiary and the bank for its failure to perform."¹¹³ One's intuition is that the law outside the Model Law will typically provide for consequential damages in some form for a breach of this relationship. Even if it does not, however, there does not appear to be any reason to reject the Model Law based on this variance from 4A.

IV. CONCLUSION: UNITED STATES ATTITUDE TOWARD THE MODEL LAW

If we establish to the satisfaction of the United States banking community that the Model Law is harmonious with Article 4A, what then? Should we adopt Article 4A as the law of the United States? Should it be adopted as the equivalent of a Uniform Law in separate states? Before we turn to the question of domestic adoption, let us evaluate benefits that

109. U.C.C. § 4A-506 selects the Federal Funds rate as the appropriate measure where there is no agreement or rule to the contrary.

110. U.C.C. § 4A-404(a) (Supp. 1990).

111. See *supra* notes 81-87.

112. See *UNCITRAL Report, supra* note 3, art. 16(6), at 98.

113. *UNCITRAL Report, supra* note 3, art. 16(6), at 98.

are easier to see from the creation of a harmonious Model Law short of United States adoption. We have previously discussed the obvious benefits to Bank BB in the London-Chicago situation. There are, however, other benefits.

In the short run, the clearest additional benefit to the United States banks that will result from a Model Law is that United States funds transfers going abroad will receive the same treatment as those of a purely domestic nature. If we reverse the London-Chicago transactions that have been the core of our earlier discussions and think in terms of money sent *from* New York *to* those two places, we find new problems. The transfer to Chicago will still be governed by Article 4A, the same as if a payment order had been received in New York. This is, of course, the benefit of a system of uniform laws. The choice of law provisions¹¹⁴ will be the same in the two states, the law of the receiving state (Illinois) will govern, but its law will be the same as that of New York. A New York bank will have no trouble with this.

For the transfer to London, we are currently in the dark. As the core *Eyra* case¹¹⁵ demonstrates, there is no governing statutory law for the typical international funds transfer. Some foreign countries have statutes dealing with one aspect or another of electronic transfers, but there is none today that has an umbrella statute of the nature of Article 4A or the Model Law.¹¹⁶ With the Model Law in England, there would be no question but that its choice of law rules¹¹⁷ would govern and that, with a harmonious law, the transaction would be treated in essentially the manner that would have been imposed by Article 4A. The message of the preceding paragraphs is, of course, reinforced throughout the world to the extent that the Model Law is enacted. Substantially identical treatment is accorded regardless of which country is sending and which is receiving. Legal problems are diminished as an international understanding grows and precedents may become applicable from one country to another.¹¹⁸ An international pattern can benefit in other ways: bank internal systems can become more uniform, thereby decreasing costs and other frictions; prices can be better established if based upon more complete information; and customers can be better aware of their risks and benefits.

The subtle and often indeterminate rules of conflicts of laws make the benefits of essential uniformity even more apparent. If we take a transfer made from Toronto through New York to a London bank and an error is made in transmission, what law governs? Today it basically turns on the jurisdiction where the suit is brought. If that jurisdiction is Canada, it

114. See U.C.C. § 4A-507 (Supp. 1990).

115. 673 F.2d 951 (7th Cir. 1982).

116. See Bergston, *supra* note 2, at 277.

117. See *UNCITRAL Report*, *supra* note 3, art. 18(1), at 99.

118. The ability to apply precedent across borders will depend on the extent to which each country's legal system values precedent.

has three legal systems within which to make its selection: Canada, the United States, or England. The same applies if the suit is brought in England. Legal liabilities may well differ based upon the applicable law.

Further complicating the matter—and fundamental to a discussion of choice of law issues—is the fact that so many transactions flow through several countries. If we assume that the foregoing funds transfer begins properly in Toronto but (for reasons that do not have to be identified here) does not reach the beneficiary's bank in London, application of the principle of the money back guaranty¹¹⁹ illustrates the type of problem germinated by the present legal system. If suit is brought in Toronto, the Canadian court may or may not find that the guaranty protects the Canadian originator, depending upon its choice of law. If suit is brought in New York, a court should find the guaranty applicable¹²⁰ and the New York bank liable to the Toronto bank, which, in turn, is liable to its customer, the originator. But, is the London bank responsible to the New York bank that (let us assume) was blameless and is forced by law to expend funds? Such problems and many more cannot be answered today. Under an international system with an essential uniformity, however, they can be handled.

Finally, assuming a basic equivalence between the Model Law and Article 4A, and assuming a high level of confidence of the American bankers in the Model Law, should it be enacted in the United States? To deal with this question, it makes little difference whether it is enacted as federal law (which will supersede state law to the extent of the inconsistency and thereby cover international transfers¹²¹) or molded into the state system.

Our question is whether there is any benefit to the United States banking system if a transfer already covered by law¹²² is governed by a new law that is essentially the same as the old. We may first say that not only is an obvious benefit difficult to discern, but there may be losses because, in general, the Model Law is simply not as complete in its coverage as is Article 4A. We note this when we evaluate the areas covered by Article 4A, but not the Model Law, as illustrated in Part II of this Article.

An additional consideration is the extent that institutions other than banks might be affected by the Model Law if it were adopted domestically. This has received little study. The extent to which investment banks, stock brokers, insurance companies, and others who execute what are defined as "payment orders" as part of their regular business and might be included under the Model Law's coverage¹²³ has regularly been

119. See U.C.C. § 4A-402(c)-(d) (Supp. 1990).

120. The law of the jurisdiction of the receiving bank would govern pursuant to U.C.C. § 4A-507(a)(1) (Supp. 1990).

121. See *UNCITRAL Report, supra* note 3, art. 1(1), at 87.

122. U.C.C. § 4A-507 pertains to international transfers. See U.C.C. § 4A-507(2) (Supp. 1990)(Official comment).

123. See *UNCITRAL Report, supra* note 3, art. 1(2), at 87.

an item of concern. One example of the concern is the substantial reduction in liability under the Model Law¹²⁴ and whether this, while appropriate for banks, is also appropriate for the other types of entities. Concerns like this have always been on the periphery of the discussions. This is simply a subject that needs more study before any decision is made about local adoption. Certainly, for the additional groups that would be affected and that were not considered in the Model Law (nor, for that matter, Article 4A), deliberations must be conducted to identify problems that might not have been evident to the drafting groups.

To the extent there is an identifiable benefit that comes from local adoption of the Model Law, it is probably the United States whole-heartedly joining the international community on subjects relating to the movement of money. As a participant who accepts the model international law, we will be accepted as a player and certainly made a part of any further developments in the evolution of that law. As Article 4A changes, we can, without reservation or apology, seek conforming changes in the Model Law. Decisions here will be given due recognition elsewhere and we can benefit from decisions made abroad. The weight of such benefits against the detriments are not clear. They can, however, be measured as time passes.

Whatever Model Law is finally produced by the United Nations, time will pass before it is seriously considered for adoption by the United States. That time can be spent usefully, to learn about the Model Law, to evaluate it in light of growing experience, and to compare its effects to Article 4A. If the Model Law is adopted by the United States, it almost certainly will be after it is widely adopted elsewhere. Such adoption will be based upon a belief that it will improve our legal system for international funds transfers.

124. See *UNCITRAL Report*, *supra* note 3, art. 16(8), at 98.

