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# The Effect of Uniform Commercial Code Article 4A on the Law of International Credit Transfers

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# THE EFFECT OF UNIFORM COMMERCIAL CODE ARTICLE 4A ON THE LAW OF INTERNATIONAL CREDIT TRANSFERS

*Mark Sneddon\**

## I. INTRODUCTION

### *A. Pressure for Certainty and Harmony in the Laws Governing International Commercial Transactions*

The rapid growth of computer and telecommunications technology over the past twenty years has facilitated the growth of global financial markets and twenty-four-hour trading in securities, foreign exchange, and financial instruments. Capital is highly mobile as its managers search worldwide for the best investment opportunities. International trade in goods and services has also expanded in volume and speed. Rapid trading requires rapid settlement of one transaction so that funds are available for the next transaction. The same changes in technology permit faster payments in settlement of these transactions. As a result, more money is moving around the globe more rapidly than ever before.<sup>1</sup>

The internationalization and greater speed of commerce and finance has caused financial institutions to establish operations in several nations. The economic significance of national boundaries to large corporations and financial institutions is being reduced. These trends in transactions, payments, and transnational operation of corporations have led to commercial pressure for greater certainty and

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1. One indicator of this is the number of payment messages passing through SWIFT (Society for Worldwide Interbank Financial Telecommunication). The average daily number of messages carried by SWIFT in 1982 was 317,000; in 1992 the number was 1.6 million. Of the 1992 messages, 25% were customer funds transfers or related to customer checks, 28% were financial institution funds transfers, and 15% related to funds transfers for forex transactions or loans and deposits. Samuel Newman, *Society for Worldwide Interbank Financial Telecommunication (SWIFT)*, in *PAYMENT SYSTEMS OF THE WORLD* 374, 381 (Robert C. Effros ed., 1994).

uniformity in the law governing international transactions. Legal disputes in international transactions may be subject to one or more jurisdictions' laws. The determination of which jurisdiction's laws govern which aspects of the transaction is a matter for the rules of private international law of the forum where the suit is brought. Different fora have different rules of private international law<sup>2</sup> and many of those choice-of-law rules are fact specific;<sup>3</sup> hence, their outcome is not able to be accurately predicted in advance. Some of this uncertainty can be reduced—in legal systems which permit party autonomy in choice of law—by parties including express choice-of-law and choice-of-jurisdiction agreements in their contracts. However, it is not always possible to achieve agreement on governing law and jurisdiction and such agreements do not bind third parties who may be involved in litigation.

Commercial interests are naturally averse to the uncertainty and unpredictability inherent in the application of rules of private international law. They seek certainty as to the legal rules under which international transactions occur in order to accurately measure and minimize legal risk, and they seek uniformity of rules across jurisdictions to minimize compliance costs. Under commercial pressure for greater certainty and uniformity in the legal rules governing international transactions, the rules of private international law are being supplemented or superseded in some areas by a range of initiatives to harmonize the relevant legal rules across nations such as international conventions,<sup>4</sup> model laws for enactment by nation

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2. This may encourage forum shopping.

3. Under the private international law rules of common-law legal systems, the law which governs many aspects of liability under a contract is the law of the jurisdiction with which the contract has the closest and most real connection. *See, e.g., Bonython v. Australia*, 1951 App. Cas. 201, 219 (1950) (appeal taken from Austl.); 2 DICEY & MORRIS, *THE CONFLICT OF LAWS* 1189 (Lawrence Collins ed., 12th ed. 1993). Connecting factors to be considered include: the place of performance, any express choice of forum, place of contracting, place of business of parties, and the currency of payment, although currency would not be a dominant factor if the currency is one commonly used in the market such as the U.S. dollar. 2 G.A. PENN ET AL., *THE LAW & PRACTICE OF INTERNATIONAL BANKING*, *BANKING LAW* § 1.14 (2d ed. 1989). The common law in the United Kingdom has been modified by the Contracts (Applicable Law) Act 1990 which adopts the Rome Convention on the Law Applicable to Contractual Obligations (1980).

4. *See, e.g., United Nations Convention on Contracts for the International Sale of Goods*, Apr. 11, 1980, 19 I.L.M. 668.

states, and model rules promulgated by international commercial associations.<sup>5</sup>

*B. Clarification and Harmonization of the Laws Governing High Value Credit Transfers*

The law governing commercial payments is subject to the same pressure for certainty and uniformity. At a subnational level, the pressure for certainty and uniformity in the law governing large value wire transfers across the fifty states of the United States of America led to the painstaking formulation of Uniform Commercial Code (UCC) Article 4A from 1986 to 1989. Article 4A has since been enacted in forty-nine states and the District of Columbia.<sup>6</sup>

That process was mirrored at an international level in the work of United Nations Commission on International Trade Law (UNCITRAL), which in 1992 finalized a Model Law on International Credit Transfers for nations to consider enacting. No nation has yet enacted it, but it has served as a model in the continuing work of the Commission of the European Communities on promoting efficiency and harmonization of laws concerning cross-border payments within the European Communities (EC). The most recent product of the Commission's work is a proposed Directive on Cross-Border Credit Transfers,<sup>7</sup> which has been influenced but not controlled by the Model Law and Article 4A.

*C. International Commercial Payments by Credit Transfer*

Most commercial payments are made by an account transfer. That is, the payor transfers an amount from its account at its bank to the payee's account at the payee's bank. The transfer may need to pass through one or more intermediary banks if the payor's bank and the payee's bank do not have a direct correspondent relationship.

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5. For example, the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 500 (1993) is so widely used in letter of credit contracts that it is in effect an internationally accepted set of standard rules.

6. South Carolina is the only state that has not officially enacted Article 4A. A bill to enact Article 4A passed the South Carolina State Senate on April 27, 1995 (S.B. 251) and has been introduced into the House. It will be assumed for the purposes of this Essay that South Carolina will enact Article 4A so that it is the law in every jurisdiction in the United States.

7. Published in *Proposal for a European Parliament and Council Directive on Cross-border Credit Transfers*, 10 J. INT'L BANKING L. Supp., at i (1995) [hereinafter *Proposed Directive*].

The account transfer is accomplished by adjusting records of indebtedness at each of the banks in the chain.

An account transfer may be a debit transfer or a credit transfer, according to the party who initiates the transfer.<sup>8</sup> Most high-value domestic and international payments are made by credit transfer through electronic message systems such as the Society for Worldwide Interbank Financial Telecommunication (SWIFT), and through national high-value credit-transfer systems such as Fedwire, CHIPS, SIC, CHAPS, BOJ-NET, and BITS.<sup>9</sup>

Both Article 4A and the UNCITRAL Model Law apply only to credit transfers. Both conceive of such credit transfers as a series of payment orders, beginning with the payor, or originator, giving a payment order to its bank and continuing with each bank in the credit-transfer chain sending a conforming payment order to the next bank in the chain until a payment order reaches the bank of the payee, or beneficiary, which pays the beneficiary. The first sender is the originator (*O*) who sends a payment order to the originator's bank (*OB*). If *OB* accepts the order, it executes the order by sending a new payment order in the same terms to the next bank in the chain, perhaps an intermediary bank (*IB*), which accepts and then sends a new payment order and so on until a payment order reaches the beneficiary's bank (*BB*). The *BB* then accepts the payment order and makes a credit to the account of the beneficiary (*B*). Each bank in the chain is a receiving bank in respect of an incoming payment order and each bank—except for *BB*—is also the sender of the next payment order.

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8. A debit transfer of funds is one initiated by the payee where funds are pulled from the payor's account (for example, the payee presents the payor's check or draft for collection at the creditor's bank—in the collection process the funds are pulled from payor's account to payee's account at payee's initiative). A credit transfer of funds is one initiated by the payor where the funds are pushed to the payee (for example, regarding a wire transfer or a salary or benefit payment by direct deposit, the funds are pushed from the payor's account at the payor's initiative).

9. Fedwire is the large-value U.S. funds and securities transfer system owned and operated by the U.S. Federal Reserve System; Clearing House Interbank Payments System (CHIPS) is the private sector large value U.S. funds transfer system operated by the New York Clearing House Association; Swiss Interbank Clearing (SIC) is operated by the Swiss National Bank and handles both large value and retail interbank payments in Swiss francs; the Bank of Japan Financial Network System (BOJ-NET) for large value interbank payments in yen is operated by the Bank of Japan; the Bank Interchange and Transfer System (BITS) is operated by the principal Australian commercial banks for large value interbank payments in Australian dollars.

Consider the following example of a credit transfer of five million U.S. dollars from an originator in Berne, Switzerland to a beneficiary in Melbourne, Australia, which would very likely be effected through a CHIPS transfer in New York and settled across the accounts of the New York Federal Reserve Bank:

$O \longrightarrow OB \longrightarrow IB1 \longrightarrow \text{CHIPS} \longrightarrow IB2 \longrightarrow BB \longrightarrow B$   
 Berne    Zurich   New York                      New York   Sydney   Melbourne

This credit transfer has five segments.<sup>10</sup> The first four segments consist of payment orders from a sender to a receiving bank; the last is the action of *BB* in making the funds available to *B*.

The sending and accepting of a payment order creates a contractual relationship between the sender and the receiving bank, and may also give rise to other legal obligations such as duties in tort. There is a preexisting contractual relationship between *BB* and *B*. Thus a credit transfer consists of a series of bilateral contractual relationships, which may span different national and subnational jurisdictions, each of which has its own governing law of contract. This law may differ from the law governing other segments. The law governing liability in tort or restitution between immediate parties or between remote parties in the credit-transfer chain may also be different. Clearly, the potential for conflicts of laws is high in international credit transfers.

#### *D. The Impact of Article 4A on International Credit Transfers*

The rules of Article 4A have a significant direct impact on the law governing international commercial credit transfers and Article 4A has been and continues to be an important model in the process of harmonizing the laws governing international commercial payments. Article 4A affects the law governing international commercial credit transfers in three ways:

- (1) *Direct Effect*: It is the law most likely to govern those parts of international credit transfers which are carried out in the United States. Because of the importance of the U.S. economy and the

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10. The credit transfer chain may be more complicated than the example given. If *OB* or *BB* is not a direct correspondent with a New York settling participant in CHIPS, then another intermediary bank will need to be interposed. The conflicts of laws issues may be more complicated if the originator or beneficiary is in a different jurisdiction from its bank.

widespread use of the U.S. dollar as a currency of payment, many large-value international credit transfers originate or terminate in the United States and many others pass through the United States for clearing and settlement. Those segments of a credit transfer, including clearing and settlement, which occur within the United States are likely to be governed by Article 4A.

- (2) *Extended Direct Effect:* By authorizing long-arm choice-of-law rules, Article 4A may govern the whole of an international credit transfer if part of it is carried out through a U.S. funds-transfer system. By its choice-of-law provisions, Article 4A authorizes the imposition of a consistent governing law—in practice, the law of a U.S. jurisdiction which includes Article 4A itself—across an entire credit-transfer-chain from the originator through multiple intermediary banks and countries to the beneficiary if any part of it is carried out through a U.S. funds-transfer system. This produces consistency in governing law but the price is a potentially unwelcome intrusion of U.S. law into relations between non-U.S. parties.

- (3) *Modeling Effect on International Harmonization Initiatives:* By offering a model for national and international laws on commercial payment, Article 4A contends with other models to be the basis for a harmonized international law of commercial payments. Article 4A has had and will have a considerable influence on other national laws and supranational agreements or model laws but in turn will itself be subject to influence and may need to change to achieve greater harmonization of international legislative models.

This Essay will examine each of these three effects of Article 4A on the law of international commercial payments and evaluate the health of Article 4A from an international perspective.

## II. DIRECT EFFECT OF ARTICLE 4A AS THE LAW MOST LIKELY TO GOVERN THOSE PARTS OF INTERNATIONAL CREDIT TRANSFERS CARRIED OUT IN THE UNITED STATES

The major role of the United States in international trade and world financial markets generates a huge volume of credit transfers to and from parties in the United States each business day. These international credit transfers have segments which are carried out in the United States.

In addition, the U.S. dollar is a major currency for international trade payments, foreign exchange transactions, and capital markets

placements occurring outside the United States—even where no U.S.-based entity is involved. Payments by international credit transfer in these transactions, which may have no U.S. connection apart from the currency of payment, will very often be cleared and settled in the United States, usually through a CHIPS payment in New York which is settled across the accounts of the Federal Reserve Bank of New York.<sup>11</sup> Most CHIPS payments are international in nature and originate from financial institution offices outside the United States, including foreign branches of U.S. financial institutions.<sup>12</sup> According to the New York Clearing House Association, CHIPS handles over ninety-five percent of all U.S. dollar payments moving between countries around the world. On a typical business day, CHIPS handles business payments worth more than one trillion U.S. dollars, made up mainly of nearly two hundred thousand international transactions, including foreign trade payments, foreign exchange, securities settlement, and Eurodollar transactions.<sup>13</sup> Thus a very high percentage of large-value credit transfers in U.S. dollars—whatever the domicile of the commercial parties—will have a segment in the United States such as a CHIPS transfer in New York.

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11. Most Eurodollar transactions are settled using CHIPS or Fedwire in New York. *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1 Lloyd's Rep. 259, 275-78 (Q.B. 1988) (Eng.). Transactions outside the United States in dollars may be cleared outside the United States—for example, in the London dollar clearing or Tokyo dollar clearing—but the settlement between the clearing banks involved still requires a CHIPS transfer and settlement on the books of the Federal Reserve Bank of New York. *Id.* This is because account transfers must be settled at an institution which holds an account for the originator or its representative bank—with a credit balance sufficient to cover the amount of the transfer—and for the beneficiary or its representative bank. Large transfers require a large credit balance in the currency of payment and that settling institution will usually be a bank in the country of the currency of the payment, very often the central bank of the country. The case cited involved a claim for payment of 131 million U.S. dollars by a Libyan bank on the London branch of a U.S. bank. The court held that the payment could be made by account transfer and, because of its size, that account transfer would have to be settled in New York or it could be made by paying physical currency in London.

12. A 1986 study of one day's transactions on CHIPS showed that foreign exchange transactions and Eurodollar placements were responsible for 82.4% of the dollar value and 89.4% of the number of payments through CHIPS. See FEDERAL RESERVE BANK, A STUDY OF LARGE-DOLLAR PAYMENT FLOWS THROUGH CHIPS AND FEDWIRE (1987); Andrew T. Hook, *The Clearing House Interbank Payment System (CHIPS)*, in PAYMENT SYSTEMS OF THE WORLD 106, 107 (Robert C. Effros ed., 1994) (analyzing Federal Reserve monograph).

13. NEW YORK CLEARING HOUSE ASS'N, CLEARING HOUSE INTERBANK PAYMENTS SYSTEM 2 (1994).



To what extent does Article 4A govern part or all of these international credit transfers that pass through a U.S. jurisdiction? The determination of the law that governs the legal rights and obligations of parties to a credit-transfer segment or of remote parties in a credit-transfer chain is made according to the rules of private international law of the jurisdiction where suit is brought. The choice of governing law may therefore differ according to the forum of the suit. If the law of a U.S. jurisdiction is chosen by the forum court as the governing law for part or all of a funds transfer, then in the case of commercial-credit transfers<sup>14</sup> Article 4A will be applied. The likelihood of a U.S. jurisdiction's law—and hence Article 4A—being chosen to govern a credit-transfer dispute will be examined from the point of view of courts in three fora: a U.S. jurisdiction, a common-law jurisdiction other than the United Kingdom, and a European jurisdiction subject to the Convention on the Law Applicable to Contractual Obligations, Rome 1980.

*A. Suit Brought in the United States: Article 4A's  
Choice of Law Rules*

If suit is brought in the United States, section 4A-507(a) prescribes three default choice-of-law rules which apply to a credit transfer unless the affected parties otherwise agree or, in some circumstances, a funds-transfer-system rule selects a different governing law. The default rules are as follows:

- (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.<sup>15</sup>

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14. Article 4A does not apply to debit transfers such as checks or drafts. These would be regulated in the United States by Articles 3 and 4 of the UCC and applicable federal regulation. Nor does Article 4A apply to consumer funds transfers which are regulated by the Electronic Fund Transfer Act. 15 U.S.C. §§ 1601, 1693(a)-(r) (1994).

15. U.C.C. § 4A-507(a)(1)-(3) (1990).

Where suit is brought in the United States, the effect of default rules (1) and (2) is that, subject to contrary party agreement or funds-transfer-system rule, Article 4A will govern the rights and obligations of the sender and the receiving bank in any payment-order segment of the credit transfer where the receiving bank is located in the United States. Further, Article 4A will govern the rights and obligations between the beneficiary and its bank where the beneficiary's bank is located in the United States. In the example of the Switzerland-to-Australia credit transfer given above, Article 4A would govern the second and third segments under the rules in section 4A-507(a).

*B. Suit Brought Outside the United States in a Common-Law Jurisdiction*

There are no bright-line choice-of-law rules in the common-law equivalent to section 4A-507(a). One relevant common-law choice-of-law rule is that the account relationship between a bank and its customer is governed by the law of the place where the account is kept.<sup>16</sup> This rule when applied to the relationships between originator and its bank and between beneficiary and its bank would usually produce the same choice of governing law in those relationships as do the rules in section 4A-507(a)(1) and (2). That is, the law of the place of the account, usually the place of business of the bank, governs. But the application of this rule to the relationship between correspondent banks in the credit transfer chain is unclear. Correspondent banks maintain mirror image accounts for each other, called *nostro/vostro* accounts, so prima facie there is not one account or one place where that account is kept to which the rule can apply.

If correspondent banks do not expressly choose a law to govern payment orders between them, it is not clear what system of law a common-law court would choose for them. Presumably a court would turn to the general rule that many aspects of liability under a contract are governed by the law of the jurisdiction with which the contract has the closest and most real connection.<sup>17</sup> Under such a rule it seems obvious that in the Switzerland-to-Australia credit transfer, the third segment—between the two New York banks—would be

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16. *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1 Lloyd's Rep. 259, 270 (Q.B. 1988) (Eng.).

17. See *supra* note 3.

governed under this rule by the law of New York. In any event, the two banks as members of CHIPS have expressly chosen New York law so that that law would govern because the common law upholds party autonomy in choice of law.

The more difficult choice-of-law issue is where a sending bank and a receiving bank are in different jurisdictions. In that case the common law's closest and most real connection rule may be unhelpful in its generality. An analogy might be drawn with the relationship of an issuing bank and beneficiary under a letter of credit, which is presumed to be governed by the law with the closest connection to the performance of the contract; that place is where payment will be made, or initiated, against the presentation of documents, which is usually the place of business of the issuing bank.<sup>18</sup> If this analogy is sound, a payment order between two correspondent banks in a credit transfer may be governed by the law of the place of business of the receiving bank, which is where performance of the payment order—sending the next payment order or, if the receiving bank is the beneficiary bank, paying the beneficiary—occurs. On this basis the second segment in the Switzerland-to-Australia credit transfer, between the Zurich bank and the New York bank, would also be governed by New York law including Article 4A.

Assuming the analogy is sound, common-law choice-of-law rules would likely have the same effect as those in section 4A-507(a)(1) and (2) but the common-law position on the law governing the relationship between correspondent banks in different jurisdictions is not free from doubt.

### *C. Suit Brought Outside the United States in a European Country Subject to the Rome Convention*

The Convention on the Law Applicable to Contractual Obligations, Rome 1980, which is law in some member states of the European Community (EC), including the United Kingdom, may be more helpful. Article 4(1) provides that in the absence of a choice by the parties, a contract is governed by the law of the country with which it is most closely connected. For contracts entered into in the course of a party's trade or profession, Article 4(2) establishes a presumption that the contract is most closely connected with the

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18. *Westpac Banking Corp. v. Commonwealth Steel Co.*, [1983] 1 N.S.W.L.R. 735, 741-42 (Austl.); *Power Curber Int'l Ltd. v. National Bank of Kuwait*, [1981] 1 W.L.R. 1233, 1240 (Eng.).

country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, its principal place of business or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

This Essay is not the place to expound all the shades of meaning in this presumptive rule and its qualifications.<sup>19</sup> The account relationships between *O* and *OB* and between *B* and *BB* are likely to be governed by the law of the place of business of the bank involved. In the case of payment orders between correspondent banks, a rough idea of the effect of Article 4(2) can be gained by making certain simplifying assumptions. Let us assume that the characteristic performance of a contract constituted by the sending and acceptance of a payment order is for the receiving bank—other than the beneficiary's bank—to send a conforming payment order to the next bank in the chain and for the beneficiary's bank to credit the beneficiary's account. Let us also assume that the receiving bank will send that conforming payment order from the same place of business at which it has received the incoming payment order. Then the law of the place of business of the receiving bank will be the governing law of the contract constituted by the accepted payment order. If we also assume that the beneficiary's account is kept at the place of business of the beneficiary's bank where the payment order is received, then the law governing the payment-order contract as between a sending bank and the beneficiary's bank will be the law of the place of business of the beneficiary's bank. Under these assumptions, the convention provides the same rules as section 4A-507(a)(1) and (2).

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19. The Convention does not define what is meant by the performance which is characteristic of the contract. The rules of the Convention do not apply to the issues listed in Article 1(2) including the question whether an agent is able to bind a principal to a third party. The presumptions in Article 4(2) do not apply to certain consumer contracts, Article 5, and may, in the discretion of the forum court, be displaced by mandatory rules of a country with which the situation has a close connection, Article 7. See 2 DICEY & MORRIS, *supra* note 3, at 1230-48. See generally PETER KAYE, *THE NEW PRIVATE INTERNATIONAL LAW OF CONTRACT OF THE EUROPEAN COMMUNITY* (1993) (discussing the implementation of the EEC's Contractual Obligations Convention in England and Wales under the Contracts Act 1990).

*D. Conclusion on Direct Effect of Article 4A in Suits Outside the United States*

If suit is brought outside the U.S. in jurisdictions under the common law or the Rome Convention, it is likely that the rules of private international law of those jurisdictions will determine that the law of a U.S. jurisdiction including Article 4A governs: (1) the relationship between originator and its bank where the originator's bank is located in the United States; (2) the relationship between beneficiary and its bank where the beneficiary's bank is located in the United States; and (3) the relationship between a sending and a receiving bank where both banks are in U.S. jurisdictions.<sup>20</sup>

It is less clear what law would be chosen to govern the relationship between a sending and a receiving bank where the two banks are in different jurisdictions. The choice-of-law rules of the common law and the Rome Convention do not lead to the bright-line certainty of the rules in section 4A-507(a), but in many cases, on the basis of the assumptions made above, the law of the place of business of the receiving bank would govern—as in section 4A-507(a)(1)—so Article 4A would be held to govern where the receiving bank's place of business is in the United States.<sup>21</sup> Given the volume of transactions involving U.S.-based commercial parties and the dominance of CHIPS in processing international U.S. dollar payments, regardless of the location of the commercial parties, Article 4A is therefore very likely to govern at least some segments of most international credit transfers in U.S. dollars and many other international credit transfers.

Article 4A has this major influence not so much by its own virtues or content; rather, Article 4A piggybacks to prominence on the commercial virility of the United States as a trading nation and the importance of the U.S. dollar as a currency for international

20. See U.C.C. § 4A-507 (1990).

21. The UNCITRAL Model Law on International Credit Transfers also provides that in the absence of party agreement, the law of the jurisdiction of the receiving bank governs the rights and obligations arising out of a payment order. Eric E. Bergsten, *UNCITRAL Model Law on International Credit Transfers*, 7 J. INT'L BANKING L. 276, 280 (1991) [hereinafter Bergsten, *Model Law*].

The Hague Conference on Private International Law has outlined the problems of the law applicable to international credit transfers and consulted with banks and funds-transfer systems but has not yet produced a proposed solution. See Gregor C. Heinrich, *Funds Transfers, Payments and Payment Systems—International Initiatives Towards Legal Harmonization*, 28 INT'L LAW. 787, 823-24 (1994).

payments.<sup>22</sup> This direct governing effect on the U.S.-connected segments of so many international credit transfers is enough to pronounce Article 4A alive and well in international commercial law, albeit as only one among many systems of law that may regulate parts of an international credit transfer.

The role of Article 4A described above does nothing to harmonize or make uniform the law governing international credit transfers. However, Article 4A does seek to achieve a unilateral harmonization of laws by regulating more than just the U.S.-connected segments of some international credit transfers.

### III. EXTENDED DIRECT EFFECT OF ARTICLE 4A AS THE UNIFORM GOVERNING LAW OF A CREDIT TRANSFER

Absent a uniform international law or convention to govern the legal relations between parties to an international credit transfer, the best that can be achieved is to bring as many issues in as many legal relations as possible under the same governing law. As western legal systems' conflicts rules allow for party autonomy in choice of law, immediate parties can expressly choose the law to govern their relationship. Conceivably, parties with a community of interests, such as bankers, might choose a standard governing law. But the temptations will be strong to choose the law of their own home jurisdiction. Remote parties are unlikely to agree on a choice of law in advance. UCC section 4A-507(a) prescribes default choice-of-law rules for each bilateral relationship in a credit transfer. These rules are subject to an express choice of law by the parties.

But section 4A-507 goes beyond regulating the aspects of a credit transfer that touch the U.S. and seeks to extend its reach to cover some international credit transfers from end to end. UCC section

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22. The same is true of the law governing the high-value credit-transfer systems of other commonly traded currencies. A large-value credit transfer in yen will likely be cleared and settled using BOJ-NET in Tokyo and that part of the credit transfer will likely be subject to Japanese law. BOJ-NET has a daily average of 14,961 transactions representing 144.8 trillion yen—1.1 trillion U.S. dollars. Similarly Swiss law would likely govern that part of credit transfers in Swiss francs which passes through SIC. SIC handled 64 million payments in 1992 representing a total value of approximately 33 trillion Swiss francs—most of the larger payments on this system are foreign exchange transactions involving Swiss francs. INTERNATIONAL MONETARY FUND, *THE PAYMENT SYSTEM: DESIGN, MANAGEMENT AND SUPERVISION* APPENDICES 1, 3 (B. Summers ed., 1994) (reporting transaction volumes).

4A-507(c) permits a funds-transfer-system rule<sup>23</sup> to select the law of a particular jurisdiction to govern:

- (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system;<sup>24</sup> or
- (ii) rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system.<sup>25</sup>

The law chosen by the funds-transfer-system rule need not bear a reasonable relation to the matter in issue.<sup>26</sup>

The effect of section 4A-507(c) is to permit a funds-transfer-system rule to create end-to-end uniformity of governing law for all relationships in a funds transfer, part of which is carried out over the system. Its effect is subject to: (1) parties other than participants in the funds-transfer system having notice as specified; and (2) any contrary express choice of law agreements between parties to a credit transfer.<sup>27</sup> The purpose of the provision is neatly expressed in the official comment:

The ability of a funds transfer system to make a choice of law by rule is a convenient way of dispensing with individual agreements and to cover cases in which agreements are not feasible. It is probable that funds transfer systems will adopt a governing law to increase the certainty of commercial

23. A "funds-transfer system" is defined in UCC section 4A-105(a)(5) to mean a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

U.C.C. § 4A-105(a)(5) (1990). Examples are CHIPS and SWIFT. *Id.* § 4A-105(a)(5) cmt. 3. Under section 4A-507(c)(i) a funds-transfer-system rule is a rule of an association of banks governing transmission of payment orders through the association's funds-transfer system and governing rights and obligations with respect to those orders. A funds-transfer-system rule may override many of the provisions of Article 4A even if it indirectly affects another party to the funds transfer who does not consent to the rule. *Id.* § 4A-507(c) cmt. 4.

24. This choice of law is binding on participating banks. *Id.* § 4A-507(c).

25. This choice of law is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system at the time when that party issued or accepted a payment order. The beneficiary is bound if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used and of the choice of law by the system. *Id.*

26. *Id.*

27. *Id.* § 4A-507(d).

transactions that are effected over such systems. A system rule might adopt the law of an Article 4A state to govern transfers on the system in order to provide a consistent, unitary law governing all transfers made on the system. To the extent such system rules develop, individual choice-of-law agreements become unnecessary.<sup>28</sup>

The CHIPS funds-transfer system located in New York responded to this invitation by selecting the law of the State of New York—including Article 4A as enacted in New York—to govern the rights and obligations of all the parties to a funds transfer, part of which is carried out across CHIPS.<sup>29</sup>

The publicly-owned Fedwire funds-transfer system which operates under federal law—Regulation J, subpart B<sup>30</sup>—has explicitly incorporated Article 4A and applies it, with some minor variations, as federal law, to funds transfers through Fedwire. Regulation J does not incorporate any one state's version of Article 4A but incorporates the uniform model of Article 4A approved by the National Conference of Commissioners on Uniform State Law (NCCUSL) and the American Law Institute (ALI). Regulation J—including the incorporated Article 4A—governs:

(1) the Federal Reserve Banks that send and receive payment orders; (2) senders that send payment orders directly to a Federal Reserve Bank; (3) receiving banks that receive payment orders directly from a Federal Reserve Bank; (4) beneficiaries that receive payment by means of a credit to an account at a Federal Reserve Bank; and (5) *all other parties to a funds transfer any part of which is carried out through Fedwire, on the same terms as section 4A-507(c)—for example, subject to that party having notice*

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28. *Id.* § 4A-507 cmt. 4. If a credit transfer is made by use of more than one funds-transfer system and there is inconsistency between the choice-of-law rules of the systems, § 4A-507(e) provides that the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue. *Id.* § 4A-507(e). However, if one of those funds-transfer systems is Fedwire, then under U.S. law, Regulation J, subpart B, will take precedence according to its terms over any other funds-transfer system's choice of law. 12 C.F.R. § 210.25(a) (1995).

29. CHIPS Rule 3 provides in part: "The rights and obligations of [CHIPS] participants and all other parties to a funds transfer of which a CHIPS payment message is a part, arising from the funds transfer or from these Rules, shall be governed by the law of the State of New York." BENJAMIN GEVA, *THE LAW OF ELECTRONIC FUNDS TRANSFERS* § 3.03[1] n.15 (1995).

30. 12 C.F.R. §§ 210.25-.32.



*that Fedwire might be used in the funds transfer and that Fedwire is governed by Regulation J and subject to any contrary express choice of law agreements by that party.*<sup>31</sup>

Thus the two principal large-value funds-transfer systems in the United States apply Article 4A rules, subject to the notice requirement, to all parties to a credit transfer, any part of which is carried out using those systems. In the example of the Switzerland-to-Australia credit transfer, because the credit transfer passed through CHIPS, under section 4A-507(c) the relationships between the Berne originator and its Zurich bank and between the Melbourne beneficiary and its Sydney bank would be governed by Article 4A if notice had been given and there was not a contrary express choice of law.

Section 4A-507(c) thus allows funds-transfer-system rules to maximize the coverage of one system of law over the entire length of a credit transfer. While this produces a desirable uniformity in the law governing a credit transfer, in practice it does so by giving an extended extra-territorial operation to U.S. law which may be viewed with some reservations by foreign parties to a credit transfer as a somewhat imperialistic extension of U.S. law far beyond its borders.

Such international concern has been demonstrated on two occasions. When the United States suggested adding to the UNCITRAL Model Law a provision equivalent to section 4A-507(c), the UNCITRAL working group thought the proposal might be reasonable if it was restricted to the relationships between banks in the funds-transfer chain, but rejected the proposal because

it was excessive when it attempted to impose a law upon nonbank originators and beneficiaries that was different

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31. *Id.* § 210.25(b)(2) (emphasis added). Regulation J, subpart B is not a funds-transfer system rule. *Id.* § 210.25(a). However, it applies to "[o]ther parties to a funds transfer any part of which is carried out through Fedwire to the same extent as if this subpart were considered a funds-transfer-system rule under Article 4A." *Id.* § 210.25(b)(2)(v). It appears that this provision seeks to activate UCC § 4A-507(c) by reference, so that any choice of law in subpart B is applied to other parties by virtue of § 4A-507(c) as if it were a choice of law in a funds-transfer-system rule. There is a technical problem with this drafting method. Section 4A-507(c) permits a funds-transfer-system rule to select the law of a particular jurisdiction to govern remote parties. But subpart B does not select the law of a particular jurisdiction; it simply states that it governs Fedwire funds transfers, and it incorporates the model version of Article 4A. Under a strict construction then, § 4A-507(c) would not apply subpart B to remote parties to a Fedwire funds transfer. However, the purpose of the provision is clearly otherwise and a court using a purposive interpretation could overlook this technical objection. The Federal Reserve could easily rewrite § 210.25(b)(2)(v) to directly apply subpart B to remote parties who had notice, rather than relying on the reference to Article 4A.

from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen. The proposal would give the funds-transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds-transfer system might choose a law that was particularly favorable to the banks and unfavorable to the nonbank originators and beneficiaries.<sup>32</sup>

The second expression of international concern occurred when the Federal Reserve Board sought to maximize the extraterritorial application of Article 4A envisaged by section 4A-507(c). In June 1990, when revising Regulation J, subpart B, the Board proposed to require any bank that sent or received payment orders through Fedwire to warrant that it had given the notice required by section 4A-507(c) to all remote parties to the funds transfer.<sup>33</sup> Several commentators on the proposed regulation objected to this requirement. Some commentators, including a foreign central bank, objected that it would be inconsistent with international payments practice for Regulation J to purport to govern the relationship between foreign banks and their customers outside the United States merely because part of the funds transfer went through Fedwire. Another argued that the warranty scheme would encourage retaliation against U.S. banks through other countries enacting similar laws to export their own payments law offshore, thereby creating greater legal uncertainty for the domestic U.S. funds-transfer user community.<sup>34</sup> The Board deleted the warranty provisions from the final rule. In reply to the objections described above, the Board noted that even if the remote parties had received the notices contemplated by Article 4A, those parties could expressly agree on an alternative law to govern the rights and obligations between them.<sup>35</sup>

Apparently, notices have been given to foreign correspondents of U.S. banks in respect to both Fedwire and CHIPS funds transfers.<sup>36</sup> As a result, Article 4A would be extended to govern the relationship

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32. *Report of the Working Group on International Payments on the Work of Its Twenty-First Session*, [1991] 22 UNCITRAL Y.B. art. 15, para. 29, at 147-48, U.N. Doc. A/CN.9/341 [hereinafter *Working Group Report on International Payments*].

33. 55 Fed. Reg. 40,791, 40,795 (1990) (codified at 12 C.F.R. pt. 210).

34. *Id.*; see Bergsten, *Model Law*, *supra* note 21, at 280. Professor Bergsten suggests the central bank was the Bundesbank. *Id.*

35. 55 Fed. Reg. at 40,796.

36. Bergsten, *Model Law*, *supra* note 21, at 279-80.

between a U.S. bank and its foreign correspondent in relation to credit transfers that pass through CHIPS or Fedwire, subject to contrary agreement. It is not known whether those foreign banks passed on the notice to their customers and hence extended the reach of Article 4A even further.

*A. Long-Arm Operation of Section 4A-507(c) Can Only Be Guaranteed if Suit Is Brought in a United States Court*

In practice this long-arm application of Article 4A is only binding on courts in a jurisdiction that enacts Article 4A. If a remote party to a funds transfer which went through CHIPS or Fedwire brings a suit in a U.S. court bound by Article 4A rules, then section 4A-507(c) will apply and may subject that party's rights and liabilities to determination under Article 4A. But if the party brings suit outside the United States, the forum court will apply the choice-of-law rules of the forum which will not include section 4A-507. Thus, some forum shopping may be in order if a party does not want Article 4A rules to govern or requires a forum whose conflict rules will not lead to the application of Article 4A as part of the law governing the issue being litigated.

It may be thought unlikely that a court outside the United States would hold a nonbank foreign national subject to the law of a U.S. jurisdiction in its relations with a non-U.S. bank unless there was an agreement between the bank and the nonbank party to be so bound. An interesting question<sup>37</sup> is whether a foreign nonbank originator or beneficiary that has been given the requisite notice by its bank about the possible use of CHIPS or Fedwire and those systems' choice-of-law rules, is to be taken as having *agreed to be bound* by that choice of law. If so, then in those legal systems that recognize party autonomy in choice of law, that agreement would be upheld and the law of the U.S. jurisdiction—including Article 4A—would be applied. On the other hand, a notice in the bank's boilerplate terms that a particular funds-transfer system and the choice-of-law provision might be used, might reasonably be viewed merely as information about what law may govern remote aspects of the funds transfer and as having no relevance to the law governing the relationship between the customer and its own bank. Presumably the answer would depend upon the wording of the notice and a consideration of whether the

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37. *Id.* at 280 n.22.

nonbank party would reasonably understand that the purpose of the notice was to determine the system of law that governed its rights vis-à-vis its bank.

Section 4A-507(c) goes as far as a national law can in seeking to ensure that the same law governs an international funds transfer from end to end. The funds-transfer systems to whom the section is primarily addressed are U.S. systems, so rationally they will choose the law of a U.S. jurisdiction and Article 4A as the extended governing law. The practical effect of the section is thus to apply Article 4A rules to parties whose funds transfer pass through Fedwire or CHIPS. But the section will only have this effect on parties not in immediate relation with the funds-transfer system if they have notice as required and it cannot be guaranteed that Article 4A will be applied if suit is brought in a non-U.S. jurisdiction. The harmonizing effect of section 4A-507(c) may be avoided by forum shopping outside the United States. Nevertheless, the long-arm choice-of-law rules in section 4A-507(c) are enough to conclude that Article 4A is not only alive and well, but has a surprisingly long arm and healthy grip to govern all disputes within the U.S. domestic and some foreign disputes over international-dollar transfers that pass through Fedwire and CHIPS.

The extraterritorial extension of national law authorized by section 4A-507(c) is the only type of harmonization of laws governing international credit transfers that can be achieved by one nation acting unilaterally. This type of unilateral harmonization has a potential cost in alienating other nations because of its imperialist overtones. Its efficacy may also be limited in litigation outside the enacting nation.

#### IV. THE MODELING EFFECT OF ARTICLE 4A IN HARMONIZING INTERNATIONAL LAWS ON COMMERCIAL PAYMENTS

More powerful harmonization of laws for international funds transfers requires cooperation by other nations. In that process, Article 4A provides a model which may influence individual nations to adopt a compatible funds-transfer law or influence supranational efforts to develop funds-transfer laws. Two such supranational efforts are the UNCITRAL Model Law on International Credit Transfers adopted in May 1992<sup>38</sup> and ongoing work by the Commission of the

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38. UNCITRAL Model Law on International Credit Transfers, Nov. 25, 1992, 32 I.L.M. 587 (1993) [hereinafter Model Law]. Apart from the United States, no nation has

European Communities on harmonizing European Community member states' laws on cross-border credit transfers. The Commission has recently produced a proposed Directive on Cross-Border Credit Transfers.<sup>39</sup>

### A. *UNCITRAL Model Law*

The Model Law applies only to international credit transfers, that is, credit transfers where any sending bank and its receiving bank are in different nations. It has not been drafted to apply to purely domestic credit transfers. Article 4A covers both domestic and international credit transfers.

The Model Law and Article 4A were developed over approximately the same period, although Article 4A took shape before the Model Law, and was completed before the drafting of the Model Law.<sup>40</sup> The preparation of the Model Law was significantly influenced by the drafts of Article 4A because Article 4A was: (1) the only statutory text to cover the banking law issues in credit transfers, as all other countries rely on an uncodified body of general principles, contracts, and judicial decisions; and (2) the only text to have systematically considered the impact of the use of electronics on funds transfers.<sup>41</sup> Moreover, the United States is a significant player in international funds transfer and the harmonization of U.S. law and the Model Law would be an important step towards broad international harmonization of funds-transfer laws.

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a comprehensive funds-transfer statute. The Model Law is not a convention but model legislation, part or all of which legislators may adopt for their own jurisdiction. To date, no nation has adopted legislation based on the Model Law. The European proposed Directive, if adopted, will be the first legislation influenced by the Model Law. In Australia adoption of the Model Law is not currently under active consideration; the attitude of other nations is being monitored.

39. *Proposed Directive*, *supra* note 7, *supp.*, at i.

40. Article 4A was prepared under the auspices of the NCCUSL and the ALI as part of a wider package of UCC law reform involving revisions of Articles 3 and 4. A drafting committee was formed by NCCUSL in 1986 and a final draft was adopted by NCCUSL and ALI in August 1989. Since then, Article 4A has been enacted in the District of Columbia and every state other than South Carolina. The UNCITRAL Working Group on International Payments met for the first time to consider the preparation of model rules in November 1987. A draft was adopted by the working group in December 1990 and ultimately by UNCITRAL in May 1992. Bergsten, *Model Law*, *supra* note 21; Eric E. Bergsten, *A Payments Law for the World: UNCITRAL Model Law on International Credit Transfers*, in *PAYMENT SYSTEMS OF THE WORLD* 408, 413 (Robert C. Effros ed., 1994) [hereinafter Bergsten, *A Payments Law*].

41. Bergsten, *A Payments Law*, *supra* note 40, at 416.

After the form of Article 4A was finalized, the U.S. delegation to UNCITRAL expended great efforts in seeking to conform the Model Law to Article 4A.<sup>42</sup> These efforts met considerable but not total success. After the Model Law was finalized by the working party, the U.S. delegation expressed continuing concerns about points at which the Model Law diverged from Article 4A and warned that these concerns would prevent the United States from adopting the Model Law. That criticism has continued.<sup>43</sup>

Points of divergence which concern the United States include the following: (1) The Model Law imposes an obligation on receiving banks to assist a prior sender whereas Article 4A does not; (2) the Model Law imposes requirements on a receiving bank to give notice of certain matters or errors to a sender, and in some cases deems a receiving bank to have accepted a payment order by failure to give notice of rejection—whereas Article 4A does neither; (3) the Model Law does not preclude consequential damages for improper execution of payment orders or failure to execute as comprehensively as does Article 4A; (4) the Model Law does not allow a funds-transfer-system rule to vary its provisions or make an effective long-arm choice of law binding on third parties as Article 4A does; and (5) the Model Law does not require finality of payment by a beneficiary's bank to a beneficiary—for example, an unconditional credit of funds—as Article 4A does. It is not the purpose of this Essay to explore these differences in detail. They have been traversed by other writers.<sup>44</sup>

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42. Carl Felsenfeld, *The Compatibility of the UNCITRAL Model Law on International Credit Transfers with Article 4A of the UCC*, 60 *FORDHAM L. REV.* S53, S53 (1992) [hereinafter Felsenfeld, *Compatibility*]. Professor Felsenfeld served with the U.S. delegation to UNCITRAL.

43. The concerns are stated in 1991 U.N. Int'l Trade L. Y.B. 137-42, U.N. Doc. A/CN.9/WG.IV/WP.42. For an earlier account of the concerns of the United States see Ernest T. Patrikis, *UNCITRAL Payment Efforts*, 15 *BROOK. J. INT'L L.* 45 (1989). For a later and critical analysis of the Model Law, see ERNEST T. PATRIKIS ET AL., *WIRE TRANSFERS: A GUIDE TO U.S. AND INTERNATIONAL LAWS GOVERNING FUNDS TRANSFERS* (1993) (authors were senior legal counsel with Federal Reserve Bank of New York and participated in drafting Article 4A and in the U.S. delegation to the UNCITRAL Working Party). For a law and economics analysis see Raj Bhala, *Paying for the Deal: An Analysis of Wire Transfer Law and International Financial Market Interest Groups*, 42 *KAN. L. REV.* 667 (1994).

44. Felsenfeld, *Compatibility*, *supra* note 42; see Carl Felsenfeld, *Strange Bedfellows for Electronics Funds: Proposed Article 4A of the Uniform Commercial Code and the UNCITRAL Model Law*, 42 *ALA. L. REV.* 723, 723 (1991) [hereinafter Felsenfeld, *Strange Bedfellows*]; Luc Thevenoz, *Error and Fraud in Wholesale Funds Transfers: UCC Article 4A and the UNCITRAL Harmonization Process*, 42 *ALA. L. REV.* 881 (1991); see also sources cited *supra* note 43 (expressing concerns over differences between Model Law and

This part of the Essay considers what future influence Article 4A and the Model Law may have on each other and on other international harmonization efforts.

The sponsors of Article 4A are fairly blunt on the prospects of Article 4A being displaced by the Model Law in the United States. The Permanent Editorial Board for the UCC in its commentary on Article 4A and the Model Law has said:

The Model Law was drafted for world-wide enactment. It is, however, unlikely in the extreme that it will be enacted in the United States in the foreseeable future. It was generally accepted by the foreign states in UNCITRAL that there would be no movement to repeal Article 4A in the United States and adopt the Model Law in its stead. The two laws basically live together in harmony, but to the extent there are differences they must be recognized and, to the extent possible, avoided or adjusted by agreement.<sup>45</sup>

The differences between Article 4A and the Model Law stem from different conceptions of their framers. Professor Felsenfeld, who participated in the drafting of both laws, states that the drafters of Article 4A took as their model an electronic, high-speed, high-volume, low-cost credit-transfer system and funds-transfer system such as CHIPS. For example, they were motivated by the need to maximize speed of transactions and minimize cost and so preferred rules that minimized any obligation on receiving banks to operate human checks on payment orders for errors or authorization. The framers of the Model Law, from many different countries, had in their minds a much wider range of credit-transfer systems including ones based on paper, telex, and magnetic tape and were not driven principally by high-speed and low-cost considerations. Thus, there are more customer-protection error-checking requirements in the Model Law than in Article 4A.<sup>46</sup>

The United States seems intent on ignoring the Model Law for the time being and it can afford to do so while no other nation adopts a credit-transfer law based upon it. If other nations—especially economically significant nations—do adopt their own credit-transfer

Article 4A which may hinder adoption of Model Law by United States).

45. *PEB Commentary* No. 13, [PEB Commentaries] U.C.C. Rep. Serv. 2d (Callaghan) (Feb. 16, 1994).

46. Bergsten, *A Payments Law*, *supra* note 40, at 428-30; Felsenfeld, *Strange Bedfellows*, *supra* note 44, at 738-40.

laws based on the Model Law there will be two or more "live" statutory models competing to govern the international aspects of credit transfers that involve both the United States—or the U.S. dollar—and those other nations—or those nations' currencies. The choice of governing law in any particular segment of such an international credit transfer will depend upon the conflicts-of-law rules of the forum where suit is brought.

Under that scenario it is possible that some conflicts of law détente may be reached without further harmonization of the substance of the different laws. For example, each jurisdiction could accept that the governing law of each segment of the credit transfer is the law of the place of the receiving bank. The existence of section 4A-507(c) could threaten such a détente by encouraging other nations to also export their payments law. Much will depend on how far apart the other national laws are from Article 4A. If there are significant differences leading to significant conflicts, it is likely that there will be commercial pressure to harmonize the competing models and another round of harmonization bargaining will begin.

#### *B. European Commission Initiatives on Cross-Border Transfers*

The first potential international competitor to Article 4A is currently taking shape in Europe. The Commission of the European Communities has been working on payment-system issues in the single market for some time.<sup>47</sup> In October 1994 the Commission issued a proposed Directive on Cross-Border Transfers within the EC.<sup>48</sup>

The proposed Directive applies to credit institutions within the member states of the EC and covers cross-border credit transfers within the EC.<sup>49</sup> The proposed Directive is not a comprehensive regulation of legal issues relating to credit transfers like Article 4A or the Model Law. Rather it deals with particular issues of efficiency, such as timely execution and consumer/customer concerns about

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47. Other work has concerned regulation of the relationship between cardholder and card issuer. Work continues on the use of collateral and securities and a harmonized European law on netting and set-off to minimize systemic risk in the payments system.

48. The adoption process for the proposed Directive involves lengthy consultation and the possibility of amendment. It is expected to be implemented in member states in 1997. Lotte Bøjer, *International Credit Transfers: The Proposed EC Directive Compared With the UNCITRAL Model Law*, 6 J. INT'L BANKING L. 223, 227-28 (1995).

49. The transfer must be from an account held at an institution or branch in one member state to be made available to a beneficiary at an institution or its branch in another member state. *Proposed Directive*, *supra* note 7, at ii (art. 2(f)).



transparency of conditions and charges, which have been a source of contention for some years.<sup>50</sup> The proposed Directive: (1) requires credit institutions to provide customers with clear written information about their credit transfer services including the time needed for funds to be credited to the beneficiary's account, the amount of charges payable for the transfer and the basis for their calculation, the value date, if any, applied by the institution, and redress procedures in case of complaint; (2) prohibits unauthorized deductions by institutions from the principal amount transferred;<sup>51</sup> (3) promotes the timely execution of payment orders by requiring a time scale to be agreed and setting default standards of execution<sup>52</sup> with interest payable to both the originator and the beneficiary for late payment but no damages for consequential loss; and (4) provides for a money-back guarantee—if the credit transfer is not completed for any reason, all institutions which accepted payment orders must refund the amount of the credit transfer and the originator's institution must refund the amount to the originator with interest and charges. There is no express exclusion of consequential loss.<sup>53</sup> The money-back guarantee may be excluded by agreement where noncompletion is due to force majeure or the payment amount exceeds E.C.U. 10,000.

The proposed Directive has clearly been influenced by the Model Law, and through it Article 4A, in regard to timely execution and the money-back guarantee. However, the money-back guarantee in the proposed Directive was designed to encourage confidence in the use of credit transfers whereas in Article 4A it was a trade off for the almost total exclusion of recovery for consequential loss. The proposed Directive does not exclude recovery for consequential loss to the same extent as Article 4A.

The proposed Directive's provisions on disclosure of terms and charges, based on European customer protection concerns, have no parallels in the Model Law or Article 4A, although there are some

50. Bøjer, *supra* note 48, at 223-24.

51. This is a response to the problem of "double charging" where multiple institutions took charges out of the principal amount.

52. A receiving bank that accepts a payment order must execute it by the next business day after receipt, the overall transfer must be completed within five business days, and a beneficiary's bank that accepts a payment order must put the funds at the disposal of the beneficiary by the end of the business day following acceptance by the beneficiary's institution. *Proposed Directive, supra* note 7, at iii (art. 5(1)). Note that the beneficiary's institution may accept a payment order subject to conditions. *Id.* at iii (art. 2(o)).

53. *Id.* at iv (art. 7); cf. U.C.C. § 4A-104 (1990); Model Law, *supra* note 38, arts. 17, 18, at 596-97.

parallel disclosure provisions in the Electronic Funds Transfer Act.<sup>54</sup> The provisions preventing unauthorized deductions from the principal amount of the transfer are similar to, although more elaborate than section 4A-302(d). By contrast, the Model Law appears to permit unauthorized deduction of charges.<sup>55</sup>

The Commission's proposed Directive would apply to all cross-border transfers within the EC in any currency and any amount. The proposed Directive therefore does not apply to transfers to or from accounts in the United States. A committee of the European Parliament has since recommended limiting the Directive to transfers in EC currencies and to amounts not exceeding E.C.U. 50,000. If the limitation to EC currencies is accepted, a direct conflict of laws between the proposed Directive and Article 4A is very unlikely because the proposed Directive would not then cover European-origin transfers in U.S. dollars which might pass through Fedwire or CHIPS. But if the proposed Directive does apply to European-origin U.S.-dollar transfers, there will be a potential conflict as to the governing law between the proposed Directive and Article 4A, which would be decided according to the conflicts rules of the jurisdiction in which suit is brought. There is relatively little substantive conflict between the terms of the proposed Directive and Article 4A—for example, the standards for timely execution—but there may be significant conflict between other aspects of an applicable European state's governing law and Article 4A rules on the recovery of consequential loss. Such conflicts might force further bargaining on harmonization.

If further harmonization discussions do occur, the differences between the proposed Directive, the Model Law, and Article 4A counsel against any optimism that Article 4A can be exported internationally in pristine form. This is because certain assumptions underlying Article 4A are not universal but are limited to the legal, economic, and historical circumstances in the United States out of which Article 4A was created.

The terms of Article 4A are based on: (1) practices and assumptions of U.S. high-value electronic credit-transfer systems which are mainly used for business and financial institution transfers in sophisticated market transactions; (2) the pre-existing legal framework of U.S. consumer law—mainly the Electronic Funds

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54. 15 U.S.C. §§ 1601, 1693(a)-(r) (1994).

55. See Model Law, *supra* note 38, arts. 15, 19(2), at 596-97.

Transfer Act, which allowed the drafters of Article 4A to ignore consumer credit transfers—and U.S. tort law—the threat of consequential damages in *Evra v. Swiss Bank Corporation*<sup>56</sup> drove the banks to the law reform bargaining table; and (3) certain compromises negotiated in the Article 4A drafting process such as the trade-off of the money back guarantee for the exclusion of consequential loss liability and the careful balancing of liability for losses caused by interloper fraud in sections 4A-202 and 4A-203.

These elements may not apply in other countries or to other types of credit-transfer systems or to market segments other than commercial high-value transfers. Accordingly, legislation on credit transfers in other jurisdictions may be driven by quite different considerations to those that drove Article 4A, and the legislative product may address different issues or be less comprehensive or find different solutions. Article 4A is a high-quality piece of legislation for the targets at which it was aimed but it would be highly unrealistic to expect Article 4A to be a one-size-fits-all solution.

A more realistic view of the export potential of Article 4A was the suggestion the Model Law could be split into two regimes: a specialist one to deal with commercial high-value electronic credit transfers where Article 4A rules would apply, and a more generalist regime for other credit transfers and systems as Professor Felsenfeld and the U.S. delegation to UNCITRAL suggested.<sup>57</sup> Limited export of Article 4A on that basis may assuage some concerns that led to differences in the UNCITRAL Model Law but it still involves the assumption that compromises negotiated in the Article 4A drafting process against the background of U.S. law are the best solution for different countries with different legal liability frameworks. Attempts to make universal the justifications for Article 4A rules by a law and economics analysis based on common needs of international market players are more persuasive.<sup>58</sup> But before there can be widespread agreement with the prescriptions of such an analysis, there must be a widespread acceptance of the ranking of values that underlie the

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56. 673 F.2d 951 (7th Cir. 1982).

57. Felsenfeld, *Strange Bedfellows*, *supra* note 44, at 771. The U.S. delegation to UNCITRAL argued that the Model Law was based on slow speed credit transfers and did not adequately deal with the needs of high-speed electronic transfers. One suggestion to redress this problem was to add special rules for high-speed transfers. *Working Group Report on International Payments*, *supra* note 32, art. 15, para. 26, at 147.

58. See, e.g., Bhala, *supra* note 43, at 667.

analysis.<sup>59</sup> The evidence of the UNCITRAL negotiations is that currently there is not.

Accordingly, it seems likely that different legislative regimes will grow up to apply to credit transfers in different jurisdictions. The Model Law is likely to have the effect of streaming these in particular directions but not of controlling their ambit or terms if the proposed Directive is any guide.

If that prediction is correct and Europe, Japan, or other major common-law countries adopt a credit-transfer law—even using the Model Law or something like it—and the differences between those laws and Article 4A are significant enough to trouble market players, it is likely that pressure will build for a new bargaining round of harmonization of laws. If the U.S. comes to the international harmonization table again, it may again assert the virtues of Article 4A, but if there are competing models on the field, it is likely the United States will have to give some ground to achieve the agreement of other nations to a harmonized international approach. If that is so, we will see Article 4A and the UCC being influenced by the market practices and concerns of other nations. Today it is difficult to envisage such pressures bringing radical change to Article 4A but new technologies and market practices may lead to significant change.

## V. CONCLUSION

Today Article 4A stands alone in the world as an operational set of statutory rules governing credit transfers. It reaches as far as one nation's law can up and down the credit transfer chain through section 4A-507(c) and it is clearly a leading model for other national and international laws. But its long-arm reach has created some rumblings of resentment and U.S. diplomatic efforts to conform international legislative models to Article 4A seem to have had their maximum effect.

The United States competes in an international marketplace. It is a significant economic and political player in that marketplace which can influence but not control the marketplace. For the time being Article 4A will exert a great deal of direct influence as the law most likely to govern those parts of funds transfers that pass through

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59. For example, that high-speed and low transaction costs of funds transfers are superior goals to ensuring better fraud prevention and more accurate processing of payment orders through additional error checks by receiving banks.

the United States and, in the case of U.S.-dollar transfers that pass through U.S.-funds-transfer systems, as the law that seeks to govern the whole credit-transfer chain. But if the international marketplace becomes significantly troubled by uncertainty as to the substantive rules<sup>60</sup> or by conflicts of laws in international credit transfers—perhaps because of the rise of competitor laws to Article 4A in other jurisdictions—there will be new demands for the international harmonization of funds transfer laws. The United States will be able to influence but not control the design of those laws. Like every nation its domestic commercial laws—including the UCC—will be affected by the developing laws of the international marketplace. Unlike many nations, its domestic commercial laws may be a significant model for the laws of the international marketplace but they will be transformed to some degree in the process of their internationalization.

Finally, the status of Article 4A—and the UCC—as state law puts it in a more precarious position in an era of international harmonization of commercial law. The process of harmonization requires national representation at the bargaining table and, in the case of treaties and conventions, a national commitment to implement. If a national government has the constitutional power to enact that to which it commits the nation, the international community is unlikely to accept amendments and vetoes of international agreements or significant delays in implementation by subnational jurisdictions within that nation. If the United States commits to an international agreement to harmonize commercial law, there will be international pressure on the federal government and Congress to implement the agreement as uniform federal law, thus preempting state law to the extent of the agreement, rather than have it wind its way through the NCCUSL and the ALI and fifty state legislatures. This has already occurred with the United States ratification of the United Nations Convention on Contracts for the International Sale of Goods. This phenomenon is well established in Australia where the federal parliament regularly uses its power to implement international

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60. Uncertainty could arise in issues not covered in Article 4A. For example, the applicable laws for recovery of mistaken payments which Article 4A and the Model Law leave to the governing law. In *Swiss Bank Corp. v. State Bank of New South Wales* (Unreported, N.S.W.S. Ct. Cas. 50693) (1989) (Aust.), an Australian court considered a restitution claim made by a Swiss originator against an Australian receiving bank in respect of a fraudulently initiated funds transfer which passed through CHIPS. Neither Article 4A nor the Model Law would have provided any substantive rules to resolve the dispute.

agreements to legislate in areas previously thought to be the domain of the states. Federal preemption of credit transfer law did not occur in the United States because the NCCUSL and the ALI were first in the field with Article 4A and secured the Federal Reserve Board's agreement to stay its regulatory hand and work with them on the new law. The reason it is not now occurring is because there is no move in the United States to adopt UNCITRAL's model law. But if, in a future round of harmonization bargaining, the United States did agree to some new harmonized international law of credit transfers, federal implementation and hence preemption of Article 4A would be a strong possibility.

