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REVISTA DE DIREITO MERCANTIL INDUSTRIAL, ECONÔMICO E FINANCEIRO

Publicação do
Instituto Brasileiro de Direito Comercial Comparado
e Biblioteca Tullio Ascarelli
e do Instituto de Direito Econômico e Financeiro,
respectivamente anexos aos
Departamentos de Direito Comercial e de
Direito Econômico e Financeiro da
Faculdade de Direito da Universidade de São Paulo

Edição da
Editora Revista dos Tribunais Ltda.

REVISTA DE DIREITO MERCANTIL INDUSTRIAL, ECONÔMICO E FINANCEIRO

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Serviços gráficos: Editora Parma Ltda., Av. Antonio Bardella, 280
— CEP 07220-020 - Guarulhos, SP, Brasil.

Edição e distribuição da

EDITORA 
REVISTA DOS TRIBUNAIS

Rua Conde do Pinhal, 78 — Caixa Postal 678
Tel. (011) 37-2433 — Fax (011) 37-5802
01501-060 - São Paulo, SP, Brasil

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ATUALIDADES

INTERNATIONAL INITIATIVES

Regarding the harmonisation of rules having an effect on payment, funds transfers, and bankruptcy *

GREGOR HEINRICH

A) INTRODUCTION

In the summer of 1991 the United Nations Commission for International Trade Law (UNCITRAL) discussed a Model Law on International Credit Transfers;¹ its adoption is envisaged for 1992.

This endeavour by the UNCITRAL Working Group on International Payments is probably the most thorough law reform initiative regarding payments currently under discussion in an international framework. The Model Law is designed to produce a comprehensive body of rules to govern relations between parties to funds transfer transactions. These rules are not intended to be part of an international convention, but will be addressed to legislative bodies for adoption as statutory law. As discussed in the Working Group, a Model Law would be more flexible than a convention because countries would be able to take those parts of it which they find useful and adapt them to their needs.²

In 1986 UNCITRAL decided to begin preparing model rules which

were at first limited to electronic funds transfers.³ Later, the draft Model Law was expanded to cover to any form of credit transfer as long as such a transfer was "international", which, under art. 1 of the present draft, applies to "a credit transfer where a sending bank and its receiving bank are in different States".⁴ A "credit transfer" (as distinguished from a "debit transfer") is understood to include "one or more payment orders, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary".

UNCITRAL's international undertaking paralleled the United States domestic project to incorporate a new article — 4A "Funds Transfers" — into the Uniform Commercial Code (UCC).⁵ Art. 4A has, to a certain degree, had an impact on UNCITRAL's Model Law. On the one hand, the US legislative initiative had begun earlier and was always "ahead" of the discussions at UNCITRAL; on the other hand, both sets of rules address similar problems and have resulted from the desire to eliminate the uncertainties that exist with regard to the judicial nature of a funds transfer, and consequently the rights and obligations that are created as soon as more than one national jurisdiction is involved.⁶

* This presentation reflects the personal opinion of the author and not necessarily that of the Bank for International Settlements. This aug text is an up-dated version of an article published in *RDAl/IBLJ* (Paris), 1991, pp. 315-327.

UNCITRAL's Model Law and Art. 4A are not the first and only initiatives that aim to standardise certain questions arising in the context of international payments.⁷ Particularly in the light of rapid technological changes in the banking world and the increasing automatisisation of payment transactions, there is an increasing need for information⁸ and harmonisation at an international level.

A number of initiatives exist with a view to harmonising rules that directly address such issues as payments or funds transfers; others, such as those regarding bankruptcy or consumer protection, have a more indirect effect on payment issues. Some are in the form of conventions, others in the form of standard contractual clauses, recommendations or guidelines. Some of the initiatives have not been as successful as others and have not been adopted as national laws. However, some of the draft conventions have had an important indirect impact insofar as they have served as models for some of the rules laid down in other conventions or national statutes.

The following list — which does not claim to be exhaustive — is meant to serve as a quick reminder of such initiatives. The presentation is systematic, providing information — where available — on the title of the initiative, the place and date of its conclusion, a brief description of its contents, and a selection of essential bibliographical references.

B) INTERNATIONAL INITIATIVES **

I — Place of payment / Time of payment / Time limits⁹

** (a) Title; (b) place and date; (c) in force?; (d) ratification; (e) (further) signatures; (f) contents; (g) source; (h) literature.

1. Council of Europe:

a) European Convention on the Place of Payment of money Liabilities / Convention Européenne relative au lieu de paiement des obligations monétaires.

b) Basle, 16.5.72.

c) Not in force; requirement: 3 ratifications. However, the clauses were incorporated into other Conventions, such as the UNCITRAL and Hague Conventions on sale of goods.

e) A, D, NL.

f) The Convention consists of five articles. Payment shall be made at the creditor's habitual residence at the time of payment (art. 2.1); where payment is to be made at a different place, any increase in the expenses or any financial loss resulting from the change in the place of payment shall be borne by the creditor (art. 4).

g) *Council of Europe*, Explanatory Report on the European Convention on the Place of Payment of Money Liabilities (Strasbourg, 1972; ISBN 92-871-0457-3).

2. Council of Europe:

a) European Convention on the Calculation of Time Limits / Convention Européenne sur la computation des délais.

b) Basle, 16.5.72.

c) In force: 28.4.83 (requirement: 3 ratifications).

d) A = 11.8.77; FL = 27.1.83; LUX = 10.10.84; P = 20.11.79; CH = 20.5.80;

e) B, F, D, I, S.

f) The Convention consists of seven articles. Time-limits expressed in days, weeks, months or years shall run from the *dies a quo* at midnight to the *dies ad quem* at midnight (art. 3.1).

g) *Council of Europe*, Explanatory report on the European Convention on the Calculation of Time-Limits (Strasbourg, 1973; ISBN 92-871-0458-1).

3. *Hague Diplomatic Conference:* °

a) Convention relating to a Uniform Law on the International Sale of Goods / Convention portant sur la vente internationale des objets mobiliers corporels.

b) The Hague, 1.7.64.

c) In force 18.8.72, following ratification by five States:

d) B, GB, Israel, NL, San Marino.

e) Further signatures, ratifications or adhesions: D, Gambia, I (Italy notified the denunciation on 11.12.86 but declared that the Convention was to remain valid until 31.12.87; also in Germany, the Act by which it acceded to the UN-Sales Convention, repealed the Hague Conventions of 1964; see below I.5.c).

f) The purpose of the Uniform Law (104 articles) — that was elaborated together with a Convention and uniform law on the formation of contracts for the international sale of goods — was to eliminate as far as possible the application of rules of private international law (art. 2). The law applies to contracts of sale of goods entered into by parties whose places of business are in the territories of different states, independent of the nationality of the parties (art. 1). The application of the law may, however, be excluded by express or implied agreement (art. 3). With regard to the *place of payment*, the buyer shall in principle pay at the seller's place of business/habitual residence, "or, where payment is to be made against the handing over of the goods or of documents, at the place where such handing over takes place" (art. 59.1).

"Where, in consequence of a change in the place of business or habitual residence of the seller subsequent to the conclusion of the contract, the expenses incidental to payment are increased, such increase shall be borne by the seller" (art. 59.2). Where the parties have agreed upon a *date for the payment* or where such date is fixed by usage, the buyer shall, without need for any other formality, pay at that date (art. 60).

g) *UNTS* 834/169.

h) Dölle, *Kommentar zum Einheitlichen Kaufrecht* (München, 1976) (with a reprint of the Convention and Uniform Law in English, French, and German on pp. 771-803); Graveson/Cohn/Graveson, "The Uniform Laws on International Sales Act 1967" (London, 1968); Honnold, "The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods": *Am. J. Comp. L.* 13 (196) 326 ff.; Ndulo, "The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A comparative analysis", *I.C.L.Q.* 38 (1989) 1-25; Padovini, "La vendita internazionale dalle convenzioni dell'Aja alla convenzione di Vienna", *Riv. Dir. Int. Priv. Proc.* 23 (1987) 47-58.

4. *International Law Association:*

a) Model rules on the time of payment of monetary obligations.

b) Seoul, (62nd Conference) aug./1986.

f) Four rules were laid down. Basic rule: payment is deemed to be made at the moment when the amount due is effectively put at the disposal of the creditor (Rule 1). Payment by bank or giro transfer, including electronic funds transfer, is deemed to be made at the moment when the amount due has been unconditionally credited

to the creditor's account (Rule 2). Rule 3 concerns payment by cheque, rule 4 payment by unconditionally guaranteed instrument of payment.

g) International Law Association (ILA), Report of the 62nd Conference held at Seoul, august 24th to august 30th 1986 (ILA: London, 1987) 24-25 (explanatory notes to draft model rules: 497-510, minutes of working session: 511-514); *ILA*, Report of the 63rd Conference held at Warsaw, august 21st to august 27th 1988 (ILA: London, 1988) 457 (remarks, definition and notes by Boechoten/Smits: 440-453).

h) The model rules draw heavily upon the Report by Prof. Schönle of Geneva University, which MOCOMILA presented to the 1984 ILA Conference: *ILA*, Report of the Sixty-first Conference, Paris, 1984 (London, 1985) 162-168; see also above, note 8.

5. United Nations — UNCITRAL:

a) United Nations Convention on Contracts for the International Sale of Goods/Convention des Nations Unies sur les contrats de vente internationale de marchandises.

b) Vienna, 11.4.80.

c) In force 1.1.88, following ratification by ten States: Argentina, China, Egypt, F, H, I, Lesotho, Syria, USA, YUG and Zambia.

d) Further ratifications, accessions or approvals (as of 16.8.90) by: Byelorussian SSR, BG, CH, Chile, CSFR, D, DK, (DDR), E, USSR.

e) Signatures only: Ghana = 11.4.80, NL = 29.5.81, PL = 28.9.81, Venezuela = 28.9.81.

f) The Convention (101 articles) applies to contracts of sale of goods between parties whose places of business are in different States and either both of these States are Contracting

States or the rules of Private International Law lead to the law of a Contracting State. The rules do not override domestic law that outlaws proscribed transactions and invalidates proscribed contracts. It deals with two basic aspects of the sales transaction: formation of the contract and obligations of the parties under the contract. The *place for payment* is in principle at the "seller's place of business; or if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place" (art. 57.1). "The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract" (art. 57.2). With regard to the *time of payment*, art. 58 (1) specifies: "If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the Contract and this Conventions...".

g) *United Nations*, Final Act of the UN Conference on Contracts for the International Sale of Goods, A/CONF.97/18, 10.4.80, Annex I.

h)¹⁰ Bianca/Bonell (eds.), *Commentary on the International Sales Law: the 1980 Vienna Sales Convention* (Milan, 1987); (Convention reprinted in all six UN official languages on pp. 683-806, German: pp. 807-823, Italian: pp. 825-840); Bonell, "L'entrata in vigore della convenzione di Vienna sulla vendita e le sue conseguenze nella prassi delle contrattazioni commerciali internazionali", *Dir. Comm. Int.* (1987) 415-427 (Italian text of Convention on pp. 428-451); Caemmerer/Schlechtriem, *Kommentar zum UN-Kaufrecht*, München, 1990;

Conseil Fédéral Suisse, "Message (du 11.1.89) concernant la Convention de Vienne sur les contrats de vente internationale de marchandises", *Feuille Fédérale*, 21.3.89, pp. 709-830; Gert, *Kommentar zum Übereinkommen ... über den internationalen Warenkauf* (Heidelberg, 1991); Hännold, "Uniform Law for International Sales under the 1980-United Nations Convention" (Deventer, 1982); Convention reprinted on pp. 469-503; Ndulo, (ob. cit., I.4 h); Padovini, (ob. cit., I.4 h); Schlechtriem, *Einheitliches UN-Kaufrecht* (Tübingen, 1981); (Convention reprinted in English and French on pp. 120-167). Witz, "L'adhésion de la RFA à la Convention des Nations Unies sur les contrats de vente internationale de marchandises", *RDAI* (1990) n. 1, pp. 57-63. The text of the Convention in English and German is also to be found in: *RabelsZ* 51 (1987) 135-195.

II — Foreign money liabilities

1. Council of Europe:

a) European Convention on Foreign Money Liabilities/Convention Européenne relative aux obligations en monnaie étrangère.

b) Paris, 11.12.67.

c) Not in force; requirement: 3 ratifications.

d) LUX, 9.2.1981.

e) A. F. D.

f) The rules, laid down in nine articles, confer upon the debtor the right to pay in local money a sum due in a currency other than that of the place of payment, unless a different intention of the parties appears, or a different usage is applicable (art. 1). They allow the creditor to recover damages in case of delay in payment if, during the period of such delay,

the currency to which the creditor is entitled depreciates in relation to the currency of the place of payment. They enable the creditor to claim in proceedings the money to which he is entitled so as to avoid the risk of a loss which may result from conversion into the currency of the country of the forum.

g) *Council of Europe*, Explanatory Report on the European Convention on Foreign Money Liabilities (Strasbourg, 1968; ISBN 92-871-0444-1).

III — Funds Transfer / Payment / Payment Systems¹¹

1. Council on International Banking (CIB):

a) Interbank Compensation Rules.

b) New York, first effective 1.11.77; latest version, incorporating all amendments and effective interpretations, apparently effective 1.1.83.

c) (To be incorporated by contract, e.g. reference in CHIPS rules).

f) The purpose is to establish rules for settling claims for compensation between CIB member banks when such claims are the result of interbank payment errors. The rules govern compensation for lost availability of funds and do not apply to recovery of lost principal. The rules apply to all payments, to and from; foreign customers in U.S. dollars, whether made by check, CHIPS, book transfer of Federal Funds Transfer.

g) Council on International Banking, Approved Rules, (09A-069G), 23.9.82.

h) Garrison, "Interbank Standards Set for Misdirected Wire Transfers: American Banker", 23.3.83; Lingl, "Risk Allocation in International Interbank Electronic Funds Transfers: CHIPS & SWIFT", *Harvard Int'l L.J.* 22 (1981) 621-660 (639-640 at notes 103-110).

2. *European Community:*

a) Commission Recommendation on a European Code of Conduct relating to electronic payment/Recommandation de la Commission portant sur un code européen de bonne conduite en matière de paiement électronique.

b) Brussels, 8.12.87.

f) The Recommendation (4 sections) addresses "all economic partners concerned" in the relations between financial institutions, traders and service establishments, and consumers. They are limited, however, to card payment systems or POS terminals and cover: contracts, interoperability, equipment, data protection and security, fair access, relations between issuers/traders/consumers.

g) *Official Journal of the EC* (1987), n. L.365/72 (Recommendation 87/598).

h) *Commission EC*, (ob. cit., note 10); Schauss/Thunis, "Quelques réflexions à propos du Code européen de bonne conduite en matière de paiement électronique", *Droit de l'Informatique et de Télécoms*, (1988) 54-56. Thouvenel, *Les Aspects Juridiques des Moyens de Paiement Français et le Contexte Européen*, Paris. 1990.

3. *European Community:*

a) Commission Recommendation concerning payment systems, and in particular the relationship between card holder and card issuer. / Recommendation de la Commission concernant les systèmes de paiement et en particulier les relations entre titulaires et émetteurs de cartes.

b) Bruxelles, 17.11.88.

f) The Recommendation contains an Annex (8 paragraphs) that regards financial consumer protection and is, *inter alia* aimed at harmonising terms of contract and achieving the irrevocability of payment instructions communicated electronically. Issuers of payment cards and similar devices as well as system providers should conduct their activities in accordance with the provisions of the Recommendation.

g) *Official Journal of the EC*, n. L.317/55 (24.11.88) (Recommendation 88/590).

h) *Commission EC*, (ob. cit., note 11); Thouvenel (ob. cit., III.2 h).

4. *European Community:*

a) Commission Recommendation on the transparency of banking conditions applicable to cross-border financial transactions / Recommendation de la Commission concernant la transparence des conditions de banque applicables aux transactions financières transfrontalières.

b) Brussels, 14.2.90.

f) The objective of the recommendations (laid down in 6 "principles") is to increase the transparency of the information and invoicing regulations which the institutions (credit institutions and postal services) shall observe.

g) *Official Journal of the EC*, n. L.67/1 (15.3.90), (Recommendation 90/109).

h) *Commission EC*, (ob. cit., note 11).

5. "Group of Ten" Central Banks:

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

b) Basle, nov./1990.

f) The report describes the policy objectives that central banks have in common with respect to the analysed

netting systems, presents the Committee's analysis of the impact of netting on credit and liquidity risks and on the level of systemic risk and describes the broader implications of netting arrangements for central banks and supervisory authorities. It sets forth the Committee's recommended minimum standards for the design and operation of cross-border and multi-currency netting and settlement schemes, and presents principles for co-operative central bank oversight of these schemes.

The *minimum* standards mentioned above are, *inter alia*: (i) Netting schemes should have a well-founded legal basis under all relevant jurisdictions; (ii) Netting scheme participants should have a clear understanding of the impact of the particular scheme on each of the financial risks affected by the netting process; (iii) multilateral netting systems should, at a minimum, be capable of ensuring the timely completion of daily settlements in the event of an inability to settle by the participant with the largest net-debit position; (iv) all netting systems should ensure the operational reliability of technical systems and the availability of back-up facilities capable of completing daily processing requirements. The report also suggests the harmonisation of national laws in order to prevent conflict-of-law problems related to achieving binding net exposures (p. 17).

g) *Bank for International Settlements*, Report of the Committee on Interbank Netting Schemes (56 pp.; Basle, nov./1990; available in English, French, Italian, and German).

h)¹² "A summary of the report is published" in *World of Banking* (nov. dec./1990) 25-27, and 30. See also the preparatory report *Bank for Inter-*

national Settlements (BIS), "Report on Netting Schemes (prepared by the Group of Experts on Payment Systems of the central banks of the Group of Ten countries)", Basle, february, 1989; reviewed in: *World of Banking* (1989) 4-8. Further co-operative efforts with regard to payments/electronic funds transfers published at the BIS include: *Bank for International Settlements*, "Large-value Funds Transfer Systems in the Group of Ten Countries", Basle, may/1990; *idem*, *Payment Systems in Eleven Developed Countries*, Basle, april/1989 — (all prepared by the Group of Experts on Payment Systems); *idem*, *Security and Reliability in Electronic Systems for Payments* (prepared by the Group of Computer Experts of the Central Banks of the Group of Ten countries), Basle, revised edition, may/1978.

6. *International Chamber of Commerce:*

a) Guidelines on International Interbank Funds Transfer and Compensation/Principes directeurs pour le transfert international interbancaire de fonds et pour l'indemnisation.

b) Paris, febr./1990.

f) The aim of the Guidelines (18 articles) is not to provide a sophisticated set of rules, but rather a framework in which the largest number of banks can operate, particularly if they have no existing system. The Guidelines apply only to funds transfer messages between banks (in different countries), they do not contain rules on discharge of underlying obligation or time of payment. Subdivisions of the Guidelines: definitions, applicability, process, liabilities and responsibilities, compensation procedures for incorrect execution of funds transfer messages.

g) ICC Publication n. 457 (febr./1990); identical draft of 8.7.88. ICC — Policy and Programme Department, Document n. 470-30/5.

h) ICC, *Commission on Banking Technique and Practice*, Working Party Report "Inter-bank Funds Transfer and Compensation Rules", Document n. 470/Int. 232, 21.9.87.

7. *International Organization for Standardization:*

a) Bank telecommunication — Funds transfer messages/Télécommunication bancaire — Messages de transfert de fonds.

b) Geneva, 15.9.87.

c) Part 1: International standard; Part 2: Draft (see below, f).

f) *Part 1* (ISO 7.982-1): Vocabulary and data elements; Annex A: Parties to a transfer; Annex B: Telex funds transfer message field descriptors [The annexes do not form part of the Standard].

[*Part 2* (ISO 7.982-2): Universal set of data segments and elements for electronic funds transfer messages. This is still a *draft* and has not yet been published.]

Part 1 identifies and defines terms and data elements used in describing, processing, and formatting funds transfer payment orders. The terms are, generally, defined from the perspective of the receiver of a funds transfer message since it would be incumbent on him to interpret and understand the full intent and meaning of such messages.

g) *International Organisation for Standardization*, ISO 7.982-1:1987.

8. *United Nations — UNCITRAL*

a) Model Law on International Credit Transfers. (A/CN.9/WG IV).

c) Draft.

f) The Model Law is intended for use by national legislators; its 18 are in a fairly advanced stage of drafting and were discussed, but not yet adopted, by the Commission in June/1991. It constitutes the most thorough and advanced project to date for the unification of rules governing international credit transfers (= originator's bank and beneficiary's bank are in different countries). The articles — in the present draft — cover: I — *General provisions*: Sphere of application, Definitions, Variation by agreement; II — *Duties of the parties*: Obligations of sender, Payment to receiving bank, Acceptance or rejection of a payment order by receiving bank that is not the beneficiary's bank, Obligations of receiving bank that is not the beneficiary's bank, Acceptance or rejection by beneficiary's bank, Obligations of beneficiary's bank, Time for receiving bank to execute payment order and give notices, Revocation; III — *Consequences of failed, erroneous or delayed credit transfers*: Duty to assist, Duty to refund, Correction of underpayment, Restitution of overpayment, Liability and damages; IV — *Completion of credit transfer and discharge of obligation*; V — *Conflict of Laws*.

g) United Nations, *UNCITRAL*, Comments on the Draft Model Law on International Credit Transfers, Report of the Secretary General (A/CN.9/346; 15th May/1991). *UNCITRAL*, Report of the Working Group on International Payments on the work of its twenty-second session, Vienna, 26.11.-7.12.90 (A/CN.9/344; 10.1.91).

h) Bergstein, "Legal aspects of international electronic funds transfers", *RDAL* (Paris) (1987) 1-20; Carey, "Electronic funds transfers: model rules", *International Business Lawyer* (London) 16 (1988) 104-105; *Federa-*

ción Latinoamericana de Bancos (Bogotá), "Reunión conjunta de FELABAN y la Secretaría de UNCITRAL sobre letras de cambio y aspectos legales de la transferencia electrónica de fondos", *Rev. FELABAN* (1988) 13-209; Hascher/Le Guen, "Le projet de loi modèle de la CNUDCI sur les virements internationaux", *Droit de l'Informatique* (Bruxelles) n. 4 (1990) 95-106; Radcliffe, "Towards uniformity in the rules governing electronic funds transfers", *Butterworths* (London) (1988) 364-366; Schinnerer, Zum "Leitfaden — Entwurf von UNCITRAL über den internationalen elektronischen Überweisungsverkehr", *ZfRV* (Wien) 26 (1985) 226-240; Schneider, "Das UNCITRAL-Modellgesetz über den internationalen Überweisungsverkehr", *Wertpapiermitteilungen* (Frankfurt a.M.) 43 (1989) 285-293; Thévenoz, "Error and Fraud in Wholesale Funds Transfers", *UCC — Art. 4A and the UNCITRAL Harmonization Process*, Zürich, 1990; Vasseur, "Informations sur les aspects juridiques des transferts internationaux de fonds par d'autres moyens que les cartes", *Banque & Droit* (Paris) (1989) 61-66; Wulff, "Two ways to achieve the same goal: The model law on international credit transfers and the new UCC Art. 4A in the national and international contexts", *Wisconsin Int'l L.J.* 9 (1991) 69-123.

9. *Universal Postal Union/Union Postale Universale*

a) Money Orders Agreement/Arrangement concernant les mandats de poste.

b) Washington, 14.12.89.

c) In force, 1.1.91.

f) The rules (13 articles) govern the exchange of postal money orders ("mandats") which contracting coun-

tries agree to set up in their reciprocal relations; the rules on postal traveller's cheques that were contained in the previous Money Orders Agreement (1984, Hamburg Congress) were abolished at the 1989, Washington Congress. *Inter alia*, there are articles dealing with the currency of payment and conversion (art. 3), and with preparation and settlement of accounts (arts. 12 and 13).

g) *Universal Postal Union, Annotated Acts*, Berne, 1991, pp. 4-78. ["The Arrangement is published as a law in Switzerland" RO (1991) 1.797-1.805.]

10. *Universal Postal Union/Union Postale Universale*

a) Giro Agreement / Arrangement concernant le service des chèques postaux.

b) Washington, 14.12.89.

c) In force, 1.1.91.

f) The rules (17 articles) govern all the services which the giro service is able to provide for users of giro accounts and which contracting countries agree to set up in their reciprocal relations; non-postal organizations may also participate (art. 1). The rules contain provisions on transfer, inpayment into a giro account, payment by money order or by outpayment cheque, and postcheque.

g) *Universal Postal Union, Annotated Acts*, Berne, 1991, pp. 79-140. ["The Arrangement is published as a law in Switzerland" RO (1991) 1.806-1.814.]

IV — Collections

1. *International Chamber of Commerce:*

a) Uniform Rules for Collections.

b) Paris, 1978.

f) Parties to a contract have to agree to the rules (23 articles); under a certain legal opinion, however, the rules define current trade practice. The rules are binding, unless contrary to a national/state/local law. "Collection" means the handling of documents by banks in instructions received. The Rules cover, *inter alia*, liabilities and responsibilities, payment (documents payable in local currency — art. 11 — or in currency other than that of country of payment — art. 12), interest, charges and expenses.

g) ICC publication n. 322.

h) Nielsen, *Das Inkassogeschäft* (Köln, 1987).

2. Universal Postal Union/Union Postale Universelle

a) Collection of Bills Agreement / Arrangement concernant les recouvrements.

b) Hamburg, 27.7.84.

c) In force, 1.1.86, but abolished at the 1989, Washington Congress in light of an EC study pursuant to a resolution at the 1984, Hamburg Congress.

f) The "arrangement" (23 articles) regulated the collection of a wide range of commercial paper. The rules covered, *inter alia*, deposit of collectibles, the collection and forwarding of funds, liabilities.

g) *Acts of the Universal Postal Union*, v. IV (Berne) (also available in French, Spanish, etc.). ["The Agreement was published as a law in Switzerland", *Recueil Officiel des Lois Fédérales* (1985) 2.213-2.218.]

V — Bankruptcy¹³

1. Council of Europe:

a) Draft European Convention on Bankruptcy.

b) 1984.

c) Draft (of Committee of Experts on Bankruptcy Law).

f) The convention (12 articles) — in contrast to the EEC draft (above, VI.1) — only deals with two problems regarding cross-border bankruptcy procedures: the possibility of allowing a bankruptcy administrator appointed abroad to take measures to protect property and institute legal proceedings; and safeguards for foreign creditors to enable them to prove their claims in national bankruptcy proceedings.

h) Arnold, "Entwurf eines Europäischen Übereinkommens über den Konkurs", *ZIP/Zeitschrift für Wirtschaftsrecht* 5 (1984) 1.114-1.152 (German translation of draft convention on pp. 1.152-1.155); Guillenschmidt, "Projet de convention du Conseil de l'Europe sur certains aspects internationaux de la faillite", *Banque & Droit*, n. 7 (1989) 191-194; Lowry, "The harmonisation of bankruptcy law in Europe — The role of the Council of Europe", *J.Bus.L* (1985) 73-76.

2. Council of Europe:

a) European Convention on Certain International Aspects of Bankruptcy.

b) Istanbul, 5.6.90.

c) Not yet in force; requires three ratifications.

e) As of nov./1990: B, D, F, GR, LUX, TR.

f) The Convention (44 articles) covers similar topics as the draft convention of 1984 (above, V.1.f). In particular, it allows the opening of secondary bankruptcies in any other signatory country in which the bankrupt party possesses assets, without the need for his insolvency to be esta-

blished at local level; the secondary bankruptcy is governed by the national law of the state in which it is opened.

g) *I.L.M.* 30 (1991) 167-180 (English text).

3. *European Community:*

a) Commission, Draft of a Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings / *Projet de Convention relative à la faillite, aux concordats et aux procédures analogues.*

b) Bruxelles, 26.6.80.

c) Draft.

f) The Convention contains 87 articles in 9 Titles: I — Scope; II — Jurisdiction; III — Applicable law; IV — General effects of bankruptcy; V — Recognition and enforcement; VI — Interpretation by the Courts of Justice; VII — Transitional provisions; VIII — Relationship to other conventions; IX — Final provisions. Title IV, Sec. V (effects of the bankruptcy on past acts and on current contracts), art. 36 [*set-off*]: "The laws of the Contracting States must allow set-off in the event of bankruptcy, ...". The harmonised rules will eventually be a "lex specialis" in bankruptcy matters with regard to the "Brussels Convention" (see VII.3).

g) *EC Bulletin*, 1982, Supplement n. 2. (A report/commentary is published on pp. 45-116 of the Supplement.); Lemontey, "Rapport sur la Convention... III", D/222/80-FR (Commission, Direction III);

h) Aminoff, "The EEC Draft Bankruptcy Convention — An exercise in harmonizing private international law", *Legal Issues in European Integration* (1990) 121-137; Celle, "Sulla legge regolatrice degli effetti del falli-

mento sui rapporti giuridici preesistenti", *Riv. Dir. Int. Priv. Proc.* 25 (1989) 837-862; Farrar, "The EEC Draft Convention on Bankruptcy and Winding Up, a progress report and evaluation", *J.Bus.L.* (1977) 320-337; Hunter, "EEC Bankruptcy Convention and the development of insolvency law in the UK", *Bus.L.Rev.* (1980) 250-252; Thieme, "Der Entwurf eines Konkursübereinkommens der EG-Staaten von 1980", *RebelsZ* 45 (1981) 459-499; (Thieme, ed.), "Materialien zum ausländischen und Internationalen Privatrecht" (Tübingen: Mohr, 1988), Bd. 32: "Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens" [Bearb. von J. Thieme]. On the preliminary draft: Fletcher, "The proposed Community Convention on bankruptcy and related matters", in: (Lipstein, ed.), *Harmonisation of Private International Law by the EEC*, London, 1978, pp. 119-137.

4. *International bar Association:*

a) Model International Insolvency Cooperation Act (MIICA).

b) Helsinki, June/1989.

f) MIICA is a model statute proposed, not as a treaty, but in a format for enactment as domestic legislation. The model act provides mechanisms by which courts may assist and act in aid of insolvency proceedings in other countries; the basic purpose is to obtain a universal right for a representative of a foreign insolvency proceeding to appear and request ancillary relief with respect to assets located in another jurisdiction.

h) Glosband/Katucki, "Current Developments in International Insolvency law and Practice", *Business Lawyer* 45 (1990) 2.273-2.280 (2.279-2.280).

VI — Private International Law

1. European Community:

a) Convention on the Law Applicable to Contractual Obligations ("Rome Convention").

b) Rome, 16.6.80.

c) In force, 1.4.91.

d) B-14.7.87, D-25.7.86, DK-7.1.86, F-10.11.83 (J.O.-3.3.91), GB-1.91, I-25.6.85, LUX-1.10.86.

e) GR, Ireland, NL.

f) Its rules (33 articles) apply even as regards contracts with a link to a non-EC country. Some main provisions: an express choice of law will be given effect (art. 3), otherwise, a contract will be governed by the law of the country with which it is most closely connected, i.e. country where party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence/central administration/principal place of business (art. 4), under certain circumstances, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection (art. 7.1).

g) *Official Journal of the EC*, 1980, n. L.266 (9.10.80); Report by Profs. Giuliano and Lagarde, *O.J.* 1980, C 282 (31.10.80).

h) Jaffey, "The English proper law doctrine and the EEC Convention", *I.C.L.Q.* 33 (1984) 531-557; Lesguillons, "Loi applicable aux obligations contractuelles: entrée en vigueur de la Convention de Rome du 19.6.80", *RDAl* (1991) 267-283; Reithmann-Martiny, *Internationales Vertragsrecht* (4. Auflage, Köln, 1988) 1-33. Text and report also reprinted in North (ed.), *Contract Conflicts* (1982).

2. European Community:

a) Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters ("Brussels Convention").

b) Brussels, 27.9.68.

c) In force; (for respective dates, see below, d).

d) B, D, F, I, LUX, NL = 1.2.73; GB = 1.1.87; IRE = 1.6.88 (see "Conventions d'adhésion", below, g).

f) 41 articles (partially altered by the "Conventions d'adhésion").

g) *Official Journal of the EC*, n. L.299/32 (1972). "Conventions d'adhésion": *OJEC*, n. L.304/1 (1978), L.388/1 (1982), C.97/1 (1983).

h) Basedow, "Allgemeine Fragen des Europäischen Gerichtsstands- und Vollstreckungsübereinkommens (GVÜ)", in: *Handbuch des internationalen Zivilverfahrensrechts*, Bd.I (Tübingen, 1982) 99-179; Focsaneanu, "Compétence judiciaire, reconnaissance et exécution des décisions civiles et commerciales dans la CEE" (Paris, 1982); Hartley, "Civil Jurisdiction and Judgements — The application in England of the Convention on Jurisdiction ... under the Civil Jurisdiction and Judgements Act 1982" (London, 1984); *Juris-Classeur de Droit International*, t. 9, fasc. 630 (Convention), 631 (commentary on "Généralités" by P. Je-nard/J. Lemontey), and 632-633 (commentary on specific matters by J.-P. Beraudo); Moloney/Robinson (eds.), "The Brussels Convention..." (Dublin: *I.C.E.L.*, 1989); Vander Elst/M. Weser, *Droit international privé belge et Droit conventionnel international*, t. II (Bruxelles, 1985).

3. European Community / EFTA:

a) EC/EFTA Parallel Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial

Matters / Convention concernant la compétence judiciaire et l'exécution en matières civile et commerciale. ("Lugano Convention").

b) Lugano, 16.9.88.

c) Not yet in force.

f) (68 articles).

g) *Official Journal of the EC*, n. L.319 (25.11.88) (Convention and Protocols). Text also reprinted in: *I.L.M.* 28 (1989) 620-643; Italian text in: *Riv. Dir. Int. Priv. Proc.* 25 (1989) 735 pp.

h) Bernet/Heim, "The EC/EFTA Parallel Convention ..." *Butterworths J.* (London) (1989) 80-82; Brogginl, "La Convention parallèle de Lugano, vue par un juriste suisse", *Sem. Judiciaire* (Genève) 112 (1990) 481-512; Droz, "La Convention de Lugano parallèle...", *Rev. Crit. Dir. Int. Proc.* 78 (1989) 1-51; Dutzak (ed.), "The Lugano and San Sebastian Conventions, London", *Butterworths* 1990; *Conseil Fédéral Suisse*, "Message du 21.2.90 au Parlement suisse et texte de la Convention", *Feuille Fédérale/Bundesblatt*, n. 16, vol. II, 24.4.90, p. 269 ss.

4. Hague Conference on Private International Law:

a) Convention on the law applicable to contracts for the international sale of goods / Convention sur la loi applicable aux contrats de vente internationale de marchandises.

b) 22.12.86.

c) Not yet in force (requires ratification, acceptance, approval, or accession by at least five States).

e) (as of oct./1990) NL, CSFR.

f) The Convention (31 articles), bearing in mind the UN Convention on contracts for the international sale of goods (see above 1.5), determines the law applicable to such contracts

between parties: (i) having their places of business in different States; (ii) in all other cases involving a choice between the laws of different States, unless such choice arises solely from a stipulation by the parties as to the applicable law, even if accompanied by a choice of court or arbitration (art. 1). The law applicable to a contract governs, *inter alia*, also the various ways of extinguishing obligations, as well as prescription and limitation of actions (art. 12 g).

The Convention is intended to replace the Convention of 1955 on the same subject (in force for B, CH, DK, F, I, N, S, SF, Niger).

g) Act. Doc. *La Haye* (1987) 690-708 (official text in English/French) an annex contains inofficial UN-translations in Arabic, Chinese, Spanish and Russian; *Hague Conference, Collection of Conventions (1951-1988)*, pp. 326-339; the official text ("édition définitive" of the Extraordinary Sessions, 30.10.85) is also reprinted in: *RabelsZ* 51 (1987) 197-213; *Hague Conference, Convention ...*, and Explanatory Report/Rapport explicatif (by/de von Mehren), Den Haag, may/1987.

h) Boschiero, "La nuova convenzione dell'Aja sulla legge applicabile alla vendita internazionale", *Riv. Dir. Int. Priv. Proc.* 22 (1986) 507-540; Cohen/Ughetto, "La nouvelle Convention de La Haye relative à la loi applicable aux ventes internationales de marchandises", *Rec. Dalloz* (1986) n. 20, p. 20 ff., n. 21, p. 157 ff.; Lando, "The 1985 Hague Convention on the Law Applicable to Sales", *RabelsZ* 51 (1987) 60-85; Loussouarn, "La Convention de La Haye d'octobre 1985 sur la loi applicable aux contrats de vente internationale de marchandises", *Rev. Crit. Dir. Int. Proc.* 75 (1986) 271-296; Napolitano, "Il progetto di

una nuova convenzione sulla legge applicabile alla compravendita internazionale di merci", *Dir. Communit. Scambi Int.* 24 (1985) 19-54; Pelichet, "La vente internationale de marchandises et le conflit de lois", *Rec. des Cours*, t. 201, 1987, I, pp. 9-193 (text of Convention in E/F, pp. 195-209).

On the Convention of 1955: Zweigert/Drobnig, "Einheitliches Kaufrecht und IPR", *RebelsZ* 29 (1965) 146-165.

5. *Hague Conference on Private International Law:*

a) Note on conflicts of laws occasioned by transfrontier data flows / Note sur les conflits de lois provoqués par le flux transfrontière de données. (prepared by Michel Pelichet).

b) The Hague, nov./1988.

f) The document points out some problems of conflicts of laws in connection with some of UNCITRAL's projects, amongst others "Electronic funds transfers" (now "International Credit Transfers"). It comes to the conclusion that as long as there exist no substantive national rules there is no need to draft a convention on the applicable law. However, "the work undertaken by UNCITRAL should be closely followed, so as not to lose contact with an activity which is developing rapidly."

g) *Hague Conference*, Preliminary Document n. 5 of nov./1987 for the attention of the Special Commission of jan./1988 on general affairs and policy of the Conference.

NOTAS

1. See below at III.8.

2. UNCITRAL, Report of the Working Group on International Payments, 18th Session (ACN.9/318; 27.1.89), p. 3.

3. UNCITRAL, Report of the Working Group on International Payments, 17th Session (A/CN.9/317; 25.8.88).

4. UNCITRAL, Report of the Working Group on International Payments, 21st Session (A/CN.9/341; 13.8.90), p. 25.

5. On 1.1.91, art. 4A had been put into effect in: California, Colorado, Connecticut, Illinois, Kansas, Louisiana, Minnesota, New York, Oklahoma, Utah, Virginia, West Virginia. The text also constitutes an Appendix to the Federal Reserve System's "Regulation J" applicable to funds transfers through "Fedwire" of 28.9.90; 12 CFR Part 210 = *Federal Register*, v. 55, n. 194, 5.10.90, pp. 40.791-40.814.

6. For instance, the rules of art. 4A may also have an impact on international payments involving the United States, since under art. 4A-507 (Choice of law) parties are allowed to make a choice-of-law agreement, funds transfer systems are allowed to select the law of a particular jurisdiction to govern funds transfers carried out by means of the system, and, if no choice of law has occurred, 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. See also Ballen/Diana, *Walking a high wire: Banking Technology* (july-aug./91) 38-40.

7. On international initiatives in general, see *Unidroit*, Digest of Legal Activities of International Organizations and other Institutions, 9.^a ed., nov./1990.

8. See for instance: *Bank for International Settlements: Large Value Funds Transfer Systems* in the Group of Ten Countries, Basle, may/1990; *Organization for Economic Co-operation and Development* (OECD), Banking and Electronic Funds Transfers, by J.R.S. Revell, Paris, 1983; UNCITRAL, Report on the Legal Value of Computer Records, A/CN.9/265, 21.2.85. See also UNCITRAL, Legal guide on electronic funds transfers, (Vienna, 1987) (published in all the official UN languages); *Gutwirth/Joris*, Electronic Funds Transfers and the Consumer: The "Soft Law" Approach in the European Community and Australia: I.C.L.Q. 40 (1991) 265-301.

9. See Schönle, "Ort und Zeit bargeldloser Zahlung", in: *Festschrift für Winfried Werner zum 65. Geburtstag*, Berlin — New York, 1984, S. 817-839.

10. For Italy, see *Asam/Kindler*, Ersatz des Zins- und Geldentwertungsschadens nach dem Wiener Kaufrechtsübereinkommen vom 11.4.80 bei deutsch-italienischen Kaufverträgen: *RIW* 35 (1989) 841-849. Conetti,

"Problemi di Diritto Internazionale Privato derivanti dalla partecipazione dell'Italia alla Convenzione di Vienna del 1980", *Riv. Dir. Int. Priv. Proc.* 23 (1987) 41-46.

11. Effros, "A Banker's Primer on the law of Electronic Funds Transfers", *Banking L.J.* (1988) 510-543; Ellinger, "The GIRO System and Electronic Transfers of Funds", *L.M.C.L.Q.* (1986) 178; Hellner, "Rechtsfragen des Zahlungsverkehrs unter besonderer Berücksichtigung des Bildschirmtextverfahrens", in *Festschrift für Winfried Werner zum 65. Geburtstag*, Berlin/New York 1984, S. 252-280; Schönle, ob. cit., at note 9. European Community: *Commission of the EC*, Discussion Paper — Making Payments in the Internal Market, COM (90) 447, 26.9.90; Gutwirth/Joris, ob. cit., above, footnote 5. France: Gallouédec-Genuys, *Nouvelles Technologies de l'Information et Droit de la Preuve*, Paris 1990, (extensive bibliography on pp. 117-133); Martin, "Aspects juridiques du virement", *Rev. Droit Bancaire et de la Bourse* (1989) 149-152. Germany: *Bankrecht und Bankpraxis*, Köln (Loseblatt), Bd. III Nr.6: Zahlungsverkehr; Canaris in Staub, *Grosskommentar HGB*, 4.Aufl. 1988, 10. Lfrg.: Bankvertragsrecht, 1. Teil; Hadding/Häuser, *Rechtsfragen des bargeldlosen Zahlungsverkehrs*, RWS-Skript 127, Köln, 1984. Italy: *Banca d'Italia*, "White Paper on the Payment System in Italy" (Roma, 1986); *id.*,

"Analyzing the Italian Payment System: The Current Status and the Future", *World of Banking* (1987) 6-12; Maccarone, "I trasferimenti elettronici di fondi nel Diritto Italiano", *Bancario* (1984) 1.090-1.101. Switzerland: Hess, "Rechtliche Aspekte der Bankübersweisung, unter besonderer Berücksichtigung des Interbankzahlungsverkehrsystems Swiss Interbank Clearing (SIC)", *SZW/RSDA* (1990) 101-116; USA: Patrikis, "Developments in the Law of Large Dollar Electronic Payment in the United States", *RDAI* (1987) 639-648; (various authors), "Special issue on the UCC (in particular Art. 4A, EDI, financial services)", *Business Lawyer* 45 (1990) 1.389-2.052; Ballen/Diana, "Walking a high wire", *Banking Technology* (jul.aug./1991) 38-40 (on a recent case involving Security Pacific and UCC art. 4A).

12. See also Cunningham/Rogers, "Netting in the Law", *Butterworths J.* 5 (1990) 354-362; Group of Thirty, "Clearance and settlement systems in the world's securities markets", New York/London, march/1989; *idem*, "Clearance and Settlement Systems", *Status Reports: Year-End 1990*, New York/London, may/1991; Wood/Terray, "Foreign exchange netting in France and England", *IFL/Rev.* (oct./1989) 18-20.

13. Cf., Didier, "La problematique du Droit de la Faillite Internationale", *RDAI* (1989) 201-206.