

PAYMENT FINALITY AND DISCHARGE IN FUNDS TRANSFERS

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INTRODUCTION.....	633
I. NON-CASH PAYMENT MECHANISMS: DEBIT AND CREDIT TRANSFERS	635
II. FINALITY OF PAYMENT FOR CHECKS	639
III. FINALITY OF PAYMENT FOR CREDIT TRANSFERS.....	643
IV. FINALITY OF PAYMENT FOR CREDIT TRANSFERS BY RECEIVING FUNDS.....	648
A. <i>Interbank Payment</i>	648
B. <i>Acceptance by Beneficiary's Bank by Receiving Payment</i>	651
C. <i>Final Settlement Through a Federal Reserve Bank or a Funds-Transfer System</i>	652
D. <i>Interbank Payment by Set Off</i>	657
V. DISCHARGE.....	659
CONCLUSION	668
ADDENDUM	670

INTRODUCTION

In connection with a non-cash payment through the banking system, “finality of payment” has acquired diverse meanings. In one sense, it has come to denote the irreversibility of the payment process, par-

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ticularly in connection with insolvency.¹ Otherwise, it has also been taken to signify the loss of the right to recover a mistaken payment.² Finally, it has been used to mark the accountability to the payee/beneficiary by a bank instructed to pay to that payee/beneficiary. This article deals with the latter, third-listed, meaning. The article explores the occurrence of “final payment” resulting in or constituting “accountability”³ across the two categories of funds-transfer systems, and further examines the relationship between “final payment” in this third sense and the discharge of an obligation paid by means of the “funds transfer.”

In this article, unless indicated otherwise, the term “funds transfers” is to be used in a broader sense than in Article 4A of the Uniform Commercial Code (U.C.C.), so in fact to cover all non-cash payment systems operated by banks. Stated otherwise, “funds transfers” are to be broadly described as any mechanism or process for the transmission of funds or the making of a non-cash payment through the banking system, whether it is a debit or credit transfer. “Discharge” is the satisfaction of the liability or debt in payment of which the funds transfer is made. “Payment finality” is taken to refer to the point of accountability, or the irrevocability of liability, of the bank in which the payment process is completed. In a debit transfer it is the payor bank. In a credit transfer it is the beneficiary’s bank. Either way, however, it is the destination bank—the last bank in the communication chain.

For checks and other paper collection items covered by U.C.C. Article 4, “accountability” by the payor bank is provided for in section 4-302; it occurs upon “final payment” governed by sections 4-215(a) and 4-301(a). On its part, Article 4A of the U.C.C. does not use these terms. However, sections 4A-209, -403, -404, -405 and -406 of Article 4A deal with the receipt by the beneficiary’s bank of funds to be paid to the beneficiary, as well as with payment by the beneficiary’s bank to the

1. See in this symposium, James Stevens Rogers, *Unification of Payments Law and the Problem of Insolvency Risk in Payment Systems*, 83 CHL-KENT L. REV. 689 (2008). For a related use, see, for example, Council Directive 98/26, 1998 O.J. (L 166) 45 (EC).

2. Known also as the rule of *Price v. Neal*, under which the drawee takes the risk that the drawer’s signature is unauthorized. (1762) 3 Burr. 1354, 97 Eng. Rep. 871 (K.B.). The rule is presently codified in U.C.C. section 3-417(a)(3). See U.C.C. § 3-417 cmt. 3 (2005). Under that rule, payment by the drawee over a forged drawer’s signature may not be recovered; hence, it is “final,” as was acknowledged, for example, in the 1962 Official Text of the U.C.C., in which the rule was codified in section 3-418 with the heading “Finality of Payment or Acceptance.”

3. That is, “accountability” is either the legal result or synonym of “final payment” and not an ensuing stage.

beneficiary—matters which fall under “payment finality” in the sense used in this article.

“Final payment,” denoting the accountability of a bank to the payee, typically marks the (absolute) discharge of the debt paid by the funds transfer. In both credit and debit transfers, “payment finality” is achieved by the end of a banking process, which may consist of a series of banking operations in which the end-parties, payor/drawer and payee/beneficiary (that is, debtor and creditor) have no control. This constitutes a drawback in the case of a time-sensitive payment. For a debit transfer, the solution is the “conditional payment,” as under U.C.C. section 3-310. This option is not available in a credit transfer. Building on the separation between absolute discharge and “finality of payment” in a bank check, this article proposes the consideration of a procedure under which a bank check is to be paid over a wire-system, thus providing a precise point of time for the actual discharge, while expediting payment and meeting regulatory concerns.

The article discusses relevant provisions of the Uniform Commercial Code in a broader comparative setting, which includes general principles of English common law. It further discusses the principal issues in both debit and credit transfers, and highlights the role of contract and other private arrangements in varying laws. Ultimately, the article advocates the consideration of “final payment” and discharge in a comprehensive legislative scheme covering all payment systems, as well as the adoption of a mechanism that will best serve private parties’ needs while meeting regulatory concerns.

I. NON-CASH PAYMENT MECHANISMS: DEBIT AND CREDIT TRANSFERS

A payment mechanism can broadly be described as any machinery facilitating a non-cash payment in monetary value; while authorizing or conferring on the payee the right to claim the sum of payment from a third party, it enables the payor (i) to avoid the transportation of money and its physical delivery to the payee, and (ii) where applicable, to obtain in the process a discharge of a debt owed by the payor to the payee.⁴ A payment mechanism carried out through the banking system may be described as a “funds transfer”;⁵ thereunder, funds “move”

4. This is designed to improve on, for example, Benjamin Geva, *International Funds Transfers: Mechanisms and Laws*, in *CROSS-BORDER ELECTRONIC BANKING: CHALLENGES AND OPPORTUNITIES* 1, 1–2 (Chris Reed, Ian Walden & Laura Edgar eds., 2d ed. 2000).

5. Unfortunately, however, in U.C.C. Article 4A the drafters of the Uniform Commercial Code reserved the term to denote exclusively a credit transfer. U.C.C. art. 4A prefatory note.

from one bank account to another, whether at the same or two different banks. It involves a process under which the debt owed to the payor by the payor's bank is ultimately replaced by a new debt owed to the payee by the payee's bank. To that end, the characterization of the process as a "transfer" is certainly a misnomer,⁶ as in fact nothing tangible or intangible is transferred. Rather, one debt, owed by a bank to the payor, extinguishes (or decreases), and allows for another debt, that of a bank to the payee, to arise (or increase) and substitute it substantially⁷ for the same amount.⁸

A funds transfer is initiated by payment instructions given by the payor or under the payor's authority and issued directly or indirectly to the payor's bank. It is the manner of communicating these instructions to the payor's bank and the resulting sequence of the ensuing banking operations that determine the classification of each mechanism. Thus, depending on how these instructions are communicated to the payor's bank, funds transfers are either debit or credit transfers. As a rule, the communication flow and the movement of funds are in opposite directions in a debit transfer but in the same direction in a credit transfer.

In a debit transfer, the payor's instructions are communicated to the payor's bank by the payee through the payee's bank. Such instructions are issued by the payee under the payor's authority, given in the form of either a specific check or general authority to initiate pre-authorized debits to the payor's account (as, for example, in connection with recurring mortgage or insurance premium payments). When the instructions are communicated by the payee to the payee's bank, the payee's account is credited. The payee's bank passes these instructions onto the payor's bank, either directly or through intermediary bank(s). When the instructions ultimately reach the payor's bank, the payor's account is debited. Funds credited to the payee's account are thus collected or "pulled" from the payor's account. By definition, in a debit transfer the credit to the payee's account precedes the debit to the payor's account; credit to the payee's account is thus provisional, may not necessarily be available for immediate use, and is subject to rever-

6. Notwithstanding *dicta* in *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, under which a "funds transfer" was treated as the assignment of a debt. 609 F.2d 1047, 1051 (2d Cir. 1979).

7. Possibly subject to charges levied by banks.

8. *Libyan Arab Foreign Bank v. Bankers Trust Co.*, (1989) 3 All E.R. 252, 269 (Q.B.) (specifically disapproving the *dicta* in *Delbreuck*, 609 F.2d at 1047, though without specifically identifying the case).

sal if the payor's bank dishonors the payor's instructions (e.g., for lack of funds) and communicates its rejection to the payee's bank. Such communication may be direct or through the same banking channels by which the instructions were communicated to the payor in the first place. Credit to the payor's account becomes final only as of the time the payor's bank becomes accountable, or makes a "final payment," for the amount, irreversibly debited or to be debited to the payor's account.

In contrast, in a credit transfer (such as a direct deposit of payroll, benefit, interest, pension, or dividend, as well as a wire payment) the payor's instructions are communicated to the payor's bank directly by the payor or the payor's agent without the mediation of a credit to the payee's account at the payee's bank. In terms of the banking operation, when the instructions are communicated to the payor's bank, the payor's account is debited. Thus, in a credit transfer, unlike in a debit transfer, the first impact of the payor's instructions on the banking system is a debit to the payor's account with the payor's bank. Having received the payor's instructions and debited the payor's account, the payor's bank forwards the instructions, directly or through intermediary bank(s), to the payee's bank, which ultimately proceeds to credit the payee's account. Hence, in a credit transfer, the debit to the payor's bank precedes the credit to the payee's account and is not subject to reversal for lack of funds. Stated otherwise, in a credit transfer, funds debited to the payor's account are "pushed" and paid into that of the payee.

A funds transfer is completed at the last bank in the communication chain, which by reference to the payment instructions may be referred to as the destination bank. In a debit transfer, the payment process is thus completed at the payor's bank. Conversely, in a credit transfer, the payment process is completed at the payee's bank. Hence, "finality of payment" is to occur at the destination bank; in a debit transfer it is the payor's bank, and in a credit transfer it is the payee's bank.

In the U.S., the paper-based check⁹ collection system, governed by U.C.C. Article 4, is a debit transfer mechanism. At the same time, non-consumer¹⁰ credit transfers, such as wire payments¹¹ (whether electronic or not) and credit transfers processed over the ACH electronic bulk system,¹² are governed by U.C.C. Article 4A, which calls the credit transfer a “funds transfer.” There is no statutory law to govern electronic non-consumer debit transfers, as well as the finality of payment and discharge of consumer payments, whether debit or credit transfers, other than (paper-based) debit transfers falling within the ambit of Article 4.

Both debit and credit transfers may be either in-house or interbank. An interbank transfer may involve banks interacting bilaterally or multilaterally through a clearing-house or a funds-transfer system. An interbank transfer may involve a series of interbank operations.

Banks¹³ participating in an interbank collection of checks fall into several categories. Thus, under U.C.C. section 4-105, a *depository bank* is the first bank to take the check; it is the bank in which the payee/holder keeps a bank account and to whom the payee/holder delivers the check for deposit and collection. A *payor bank* is the

9. A check can be described as a written order addressed to a bank instructing it to make payment at the demand of the payee, someone deriving title from the payee, or the bearer. For the statutory definition, see *infra* note 18. The instrument is “negotiable” and governed by Article 3 of the U.C.C. The interbank paper-based collection system has become more automated, yet the check collection machinery is fundamentally a paper-based system, characterized by low-speed, batch processing, and multilateral deferred net settlement (DNS). In the U.S., checks are processed in regional clearing houses and Federal Reserve Banks.

10. More specifically, as stated in section 4A-108, “a funds transfer any part of which is governed by the [Federal] Electronic Fund Transfer Act” is excluded from the coverage of Article 4A.

11. Wire-transfer systems target the high value/low volume commercial and financial “wholesale” payments. They are automated systems in which processing characterized by high-speed, individual-payment focus and high security is exclusively for credit transfers. In the U.S., wire transfers are processed either over Fedwire (the wire-transfer system operated by the Federal Reserve Banks) or CHIPS (the wire-transfer system operated by the New York Clearing House). A wire transfer may, however, include a link in which communication is by paper, cable, or wire, or even in which communication is oral. Settlement in a wire-transfer system may be (but is not necessarily) on a real-time gross basis (as in Fedwire), in which case the system is a real-time gross settlement (RTGS) system. This article sets out CHIPS settlement in Part IV(C), *infra*.

12. The Automated Clearing House (ACH) system in the U.S. targets the low value/high volume “retail” (consumer and business) payments. This is a nationwide automated system, in which processing is low-speed and batch-based. It accommodates numerous debit and credit applications and settles multilaterally on a deferred net settlement (DNS) mode.

13. The U.C.C. broadly defines the term as “a person engaged in the business of banking, including a savings bank, saving and loan association, credit union or a trust company.” U.C.C. §§ 4-105(1), 4A-105(a)(2), 1-201(b)(4) (2005). Presumably, “banking” focuses here on deposit taking and providing non-cash payment services.

drawee¹⁴ of the check; it is the bank in which the drawer/payor keeps an account. Any other bank in the chain, situated between the depository and payor bank, is an *intermediary bank*. Each bank participating in the check collection process, other than the payor's bank, is a *collecting bank*. The collecting bank presenting the check for payment to the payor's bank is the *presenting bank*; by definition, it is the last collecting bank in the chain. Parties to a check are the *drawer* and the *payee/holder*.¹⁵

At the same time, under U.C.C. sections 4A-103 and -104, the end participants of a credit transfer are the *originator* and *beneficiary*, respectively maintaining their accounts with the *originator's bank* and *beneficiary's bank*. Any other bank participating in the credit transfer and thus situated between the originator's and beneficiary's banks is an *intermediary bank*. The parties for each payment order issued to a bank in connection with carrying out the credit transfer are the *sender* and *receiving bank*.

Treated generically, the end parties to a funds transfer, whether a debit or credit transfer, could be called originator and receiver. In a credit transfer, they are, respectively, the payor and the payee. Conversely, in a debit transfer the originator and receiver are, respectively, the payee and the payor. In each case, the originator's bank is to be called the originating or originator's bank, and the receiver's bank is to be called the destination bank. Banks situated between these two end-banks are intermediary banks. Parties to a payment order are the sender and receiving banks. In a credit transfer, each payment order "pushes" funds, ultimately, to the payee-receiver. In a debit transfer, such as the collection of a check, each payment order "pulls" funds, ultimately, from the payor-receiver. This uniform terminology is advisable in order to facilitate a cohesive treatment of legal issues arising in conjunction with a funds transfer;¹⁶ yet, with the possible exception of the term "funds transfer," which is mostly used here to denote both debit and credit transfers, the balance of this article will purport to

14. Drawee is the person ordered to make payment. U.C.C. § 3-103(a)(4).

15. Drawer is the person who orders payment. *See id.* § 3-103(a)(5). Payee is the person designated on the check to obtain payment and is its first "holder." *See* U.C.C. § 1-201(b)(21)(A); *see also, e.g.*, U.C.C. §§ 3-105(a), -110(c). Where the instrument is payable to bearer, or where the payee "negotiated" it, the depository bank receives the check from a holder other than the original payee. *See id.* §§ 3-109, 3-201.

16. Such uniform terminology appears in the rules and regulations governing the ACH network (referred to *supra* note 12) in the U.S., published annually by the National Automated Clearing House Association (NACHA). For legislation to that end in Cambodia, see Addendum, *infra* page 670.

adhere to the “bifurcated” statutory terminology as applicable to checks under Article 4 and credit transfers under Article 4A.

II. FINALITY OF PAYMENT FOR CHECKS

Article 4 is quite unique in explicitly providing for “finality of payment” for a debit transfer system.¹⁷ For checks¹⁸ and other debit paper items governed by U.C.C. Article 4,¹⁹ “final payment” happens under section 4-215(a) upon the occurrence of the first among the following three milestones (in the form of actions taken by a payor bank):²⁰ (i) payment in cash, (ii) settlement for the check “without having the right to revoke the settlement,” or (iii) a provisional settlement for the check followed by the failure to revoke it in a timely and proper manner. A fourth milestone, that of the completion of the “process of posting,” formerly having been included, was judged “unsuitable for a system of automated check collection or electronic presentment” and explicitly abandoned.²¹

Practically speaking, among the current three milestones, payment in cash under the first milestone is limited to the case of presentment and payment over the counter, as opposed to payment to a bank account, on which the present discussion focuses, and for which “settlement,” under both the second and third milestones is thus central. Under U.C.C. section 4-104(a)(11), “settle” is defined to mean “to pay in cash, by clearing-house settlement, in a charge or credit or by remittance, or otherwise as agreed.” The provision further states that “[a] settlement may be either provisional or final.”²² The combined

17. Nothing of that sort exists under legislation in England, Canada, or statutes that draw on the Geneva Uniform Laws. For this point under the law of several jurisdictions, see BENJAMIN GEVA, *BANK COLLECTIONS AND PAYMENT TRANSACTIONS: COMPARATIVE STUDY OF LEGAL ASPECTS* 135, 155–56, 167–68, 177–78 (2001) [hereinafter *GEVA, BANK COLLECTIONS*].

18. “Check” is defined to essentially mean a draft (which is an “order” under paragraph (e)), other than a documentary draft, payable on demand and drawn on a bank; it may also be drawn by a bank (whether on itself or on another bank, in which case it is respectively either a cashier’s check or a teller’s check). U.C.C. § 3-104(f).

19. “Item” is defined to mean “an instrument or promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Article 4A or a credit or debit card slip.” U.C.C. § 4-104(a)(9). The definition does not adequately highlight the limitation that it applies only to debit collection paper items.

20. In fact, these are not milestones in a sequential process; nor are they necessarily positive actions, since, as will be set out below, they can arise by inaction.

21. See U.C.C. § 4-215 cmt. 5.

22. The present discussion strictly adheres to the terminology under the scheme of U.C.C. Article 4, which is not taken to be superseded or preempted by that of Federal Reserve Regulation CC, Availability of Funds and Collection of Checks. See 12 C.F.R. § 229 (2007). Indeed, the latter provides in § 229.36(d) that “[s]ettlements between banks for the forward collection of a check

effect of this statement with section 4-215(a) is that for a settlement, revocability and finality are irreconcilable or mutually exclusive. Thus, it is only with respect to a provisional settlement that the right to revoke is contemplated to exist by the second milestone. Similarly, and in fact the other side of the same coin, a provisional settlement is by definition revocable, as envisioned by the third milestone.

In practice, a payor bank will endeavor to revoke the settlement of a check and avoid accountability for it where vis-à-vis the customer, the bank (i) is either not entitled to be reimbursed, as for example where the check is not “properly payable,”²³ or (ii) is not bound to honor the check, as in, for example, lack of adequate cover in the account.²⁴ Both the right to revoke the settlement (per the second milestone) and the time and manner to exercise that right (per the third milestone) are stated in section 4-215(a) to be available only by reference to “statute, clearing-house rule, or agreement.” Per section 4-103(a) and (b), both “agreement” and “clearing-house rules” may be used even to vary the provisions of Article 4. Presumably, in this context, “agreement” is to be read interchangeably with “contract,” the latter being defined in section 1-201(b)(12)²⁵ as “the total legal obligation that results from the parties’ agreement”²⁶ “Clearing-house rules” are to be issued by a “clearing house,” the latter being defined under section 4-104(a)(4) as “an association of banks or other payors regularly clearing items.” Under section 4-103(b), “Federal Reserve

are final when made.” However, the commentary to Regulation CC § 229.36(d) explains that settlement by a paying bank, in the meaning of that provision, “is not considered to be final payment for the purposes of U.C.C. 4-215(a)(2) or (3), because a paying bank has the right to recover settlement from a returning or depository bank to which it returns a check under this subpart.” 12 C.F.R. pt. 229 app. E. In general, non-compliance with Regulation CC may give rise to a claim for damages but not to “acceleration” of the time of payment. *See* GEVA, BANK COLLECTIONS, *supra* note 17, at 168.

23. According to the U.C.C., “[a] bank may charge against the account of a customer an item that is properly payable from the account.” U.C.C. § 4-401. In turn, “[a]n item is properly payable from a customer’s account if the customer has authorized the payment and the payment does not violate any agreement that may exist between the bank and its customer.” *Id.* at cmt. 1.

24. In which case the check could nevertheless be “properly payable” and hence chargeable to the customer’s account, as specifically acknowledged in section 4-401. And yet, other than by agreement, in the absence of adequate cover a bank is not bound to honor a check.

25. Definitions and principles of construction appearing in Article 1 are stated by U.C.C. section 4-104(d) to be applicable throughout Article 4.

26. However, as a matter of strict interpretation, both “agreement” and “contract” are stated in sections 1-201(b)(3) and (12) to be distinguished from each other. According to the U.C.C. official comments, “[a]greement” is broadly defined in section 1-201(a)(3) “to include full recognition of usage of trade, course of dealing, course of performance and surrounding circumstances as effective parts thereof.” U.C.C. § 1-201 cmt. 3.

Regulations and operating circulars, clearing-house rules, and the like have the effects of agreements”

As indicated, besides “clearing-house rule, or agreement,” section 4-215(a) enumerates “statute” as a source for both the right to revoke settlement and the time and manner to exercise that right. A statutory provision governing both points is section 4-301(a), which, in effect (per section 4-103), will govern them unless superseded by agreement or clearing-house rule. Section 4-301 deals with the case of a payor bank to which “a demand item other than a documentary draft presented otherwise than for immediate payment over the counter.” In such a case, where the payor bank settles for the demand item “before the midnight of the banking day of receipt,” it may revoke the settlement by acting before it has made final payment and before its midnight deadline. Required action for revocation is stated to be the (timely) return of the item, return of its image if so agreed,²⁷ or the transmission of a notice of dishonor “if the item is unavailable for return.”

Section 4-301 is complemented by section 4-302, under which a payor bank that missed the midnight deadline specified under section 4-301 for an item becomes accountable for the amount of that item. It is this “accountability”—which denotes “final payment” in the sense used in both sections 4-215(a) and 4-301(a)—that is explored in this article. Such “accountability” or “final payment” is to take place by default, or by the mere failure to take specified action within prescribed limits. Indeed, section 4-301 states that “the payor bank may revoke settlement and recover the settlement, if [it acted] before *it has made final payment* and before its midnight deadline” (emphasis added). This may be read to require a positive action timely taken for “final payment” to occur. At the same time, section 4-302 clearly establishes that “accountability” is the automatic result of inaction within the time limit set out in section 4-301. Thus, under paragraph (a)(1) of section 4-302, a payor bank is accountable for the amount of any demand item, other than a documentary draft presented to and received by it, where it “does not pay or return the item or send a notice of dishonor²⁸ until after midnight deadline.” As well, under section 4-302(a)(1) a payor bank that is not the depositary bank is accountable for the amount of such a demand item presented to and received by it where it “retains

27. Authorizing the return of an image under the term of an agreement is designed to facilitate electronic check processing. See U.C.C. § 4-301 cmt. 8.

28. Curiously, the option of returning an image, as under section 4-301, is not mentioned.

[it] beyond the midnight of the banking day of receipt without settling for it.”

“Midnight deadline” is defined in section 4-104(a)(10) as the “midnight of [the bank’s] next banking day on which it receives the relevant item.” “Banking day” is defined in section 4-104(a)(3) to mean “the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions.” Note, however, that per section 4-108, a bank may fix an afternoon hour of 2:00 p.m. or thereafter “as a cutoff hour,” beyond which the receipt of any item will be deemed to occur at the opening of the next banking day. Per § 229.30(c) of Regulation CC,²⁹ in two cases the “midnight deadline” may be deferred, particularly when the method of dispatch is likely to result in an expedited return.³⁰ Regardless, per section 4-107, “receipt” is by reference to the branch or separate office of the payor bank that maintains the account on which the item was drawn.

Stated otherwise, under section 4-302(a), to avoid accountability, a payor bank which is not the depository bank must respond to the receipt of a demand item, even by settling for it provisionally, by the midnight of the banking day it received the demand item. Furthermore, to avoid accountability, any payor bank, whether or not it is also the depository bank, must return the item or send a notice of dishonor by the midnight of the next banking day after the receipt of the demand item. “Final payment” under both sections 4-215(a) and 4-301(a), which is interchangeable with accountability under section 4-302(a), is thus closely linked to the loss of the power to revoke a provisional settlement, thereby making it final.

It is upon, or at least with the view of making, a “final payment,” that a payor bank becomes entitled to charge the drawer-customer’s account for a “properly payable” check under section 4-401.³¹ “Final payment” further leads to a “chain reaction” in the collection system. First, under section 4-215(c), “final payment” automatically “firms up” the provisional settlement made between the payor and presenting banks “through a clearing house or by debits or credits in an account”

29. 12 C.F.R. § 229 (2007).

30. According to the commentary, such could be the case, for example, when services of a swift courier are available only as of the morning following the midnight deadline. 12 C.F.R. pt. 229, app. E. The other case enumerated in § 229.30(c) is an extension of a deadline falling on a Saturday, if that is a banking day for the paying bank.

31. The point, however, is not explicitly stated in the section, under which “[a]n item is properly payable from a customer’s account if the customer has authorized the payment and the payment does not violate any agreement that may exist between the bank and its customer.” U.C.C. § 4-401 cmt. 1.

and “transforms” it to a final settlement. Second, the same “transformation” occurs for the settlements “between the presenting and successive prior collecting banks seriatim.”³² Finally, upon receiving a final settlement, a depository bank becomes accountable to the depositor “and any provisional credit given for the item in an account with its customer [i.e., the depositor] becomes final.”³³

III. FINALITY OF PAYMENT FOR CREDIT TRANSFERS

On the level of principle, and without the benefit of statutory guidance, English common law examined “payment finality” and on occasion appeared to endorse two extreme, and ostensibly incompatible, positions.³⁴ At one extreme,³⁵ English law endorsed the point at which a message or instruction from a sending bank, embodying its obligation, is received by the beneficiary’s bank.³⁶ The other extreme endorsed by English law was the point of time of notice given by the beneficiary’s bank advising the beneficiary of the credit posted to the beneficiary’s account.³⁷ The latter was ultimately unequivocally disapproved;³⁸ the former was effectively abandoned. Rather, English law “settled” on the occurrence of the first of two events that are to happen between these two extremes. One such event is payment by the beneficiary’s bank to the beneficiary, normally by crediting the beneficiary’s

32. *Id.* § 4-215(c); see also *id.* § 4-215 cmt. 9.

33. *Id.* § 4-215(d); see also *id.* § 4-215(e) (regarding availability for withdrawal of the amount of the item).

34. For a fuller discussion, see GEVA, BANK COLLECTIONS, *supra* note 17, at 270–89.

35. Logically, however, what ensues in the text is not the first plausible point. See, e.g., Arthur Oulai, *La détermination du moment de l’achèvement du virement: l’apport de l’article 4A du Uniform Commercial Code*, 21 BANKING FIN. L. REV. 215, 230–36 (2006) (where, in a comprehensive learned comparative discussion on the completion of the credit transfer, the author identifies the points of transmittal of the originator’s payment order or debit to the originator’s account as potential candidates; nonetheless, he concludes the article by supporting the solution of Article 4A.).

36. *Empresa Cubana de Fletes v. Lagonisi Shipping Co. Ltd. (Georgios C)*, (1971) 1 All E.R. 193, 196–99 (A.C.). This view was further developed by Lord Denning in *Mardorf Peach & Co. v. Attica Sea Carriers Corp. of Liberia (The Laconia)*, (1976) 2 All E.R. 249, 255 (appeal taken from Q.B.D.), *rev’d*, (1977) 1 All E.R. 545 (H.L.). In the House of Lords, Lord Russell, and possibly Lord Salmon, appear to agree with Lord Denning on this point. *Mardorf Peach*, (1977) 1 All E.R. at 559, 566–67.

37. See *Rekstin v. Severo Sibirsko*, (1933) 1 K.B. 47, 57 (holding that payment from one account to another “cannot be done by mere entries in the bank’s books without communication with the transferee”).

38. See, e.g., *Momm v. Barclays Bank Int’l, Ltd.*, (1976) 3 All E.R. 588, 597 (Q.B.D.) (rejecting counsel’s submission that “*Rekstin* . . . decides that there could not have been any completed payment unless and until an advice note recording the credit to the[] account had been dispatched . . . or had been received”); see also *Royal Prods. v. Midland Bank*, (1981) 2 Lloyd’s Rep. 194, 199 (Q.B.D.).

account with the amount of the payment order, irrespective of any notice to be given to the beneficiary.³⁹ The other point is payment by the sending bank to the beneficiary's bank, and not merely the incurring of liability by the former to the latter.

Time for the occurrence of the second point, that of payment by the sending bank to the beneficiary's bank, depends on the method of payment. Thus, an interbank payment to the beneficiary's bank occurring over a funds-transfer system or a clearing house takes place by reference to the rules that govern the system.⁴⁰ An interbank payment by means of credit to the sending bank's account maintained with the beneficiary's bank occurs as soon as the beneficiary's bank receives the payment order advising it of the payment so made.⁴¹ An interbank payment by means of a debit posted to the sending bank's account held at the beneficiary's bank could take place as early as the decision to post such a debit was made by the beneficiary's bank.⁴²

However, in the final analysis, so far as the implementation of principle is concerned, English law failed to provide for a fully consistent scheme determining the "finality of payment." Thus, it is the delay to the point in which credit is posted to the beneficiary's account which led courts to search for an earlier milestone, such as the subsequently disfavored receipt of a payment order by the beneficiary's bank,⁴³ or the decision of the beneficiary's bank to credit the beneficiary's account.⁴⁴ At the same time, alleged ambiguities in the latter milestone, that of the decision to debit the sender's account, were pointed out.⁴⁵

39. *Eyles v. Ellis*, (1827) 130 Eng. Rep. 710, 711 (holding that payment was made when the "[transferred] sum was actually placed in the [beneficiary's] account"). A similar view was expressed in *The Laconia* by Justice Donaldson at trial, (1975) 1 Lloyd's Rep. 634, 640 (Q.B.D.), and more strongly by Lord Fraser in the House of Lords, (1977) 1 All E.R. at 563.

40. *Cf. Tayeb v. HSBC Bank*, (2004) 4 All E.R. 1024 (Q.B.D.) (discussing payment under CHAPS Rules). CHAPS is the UK national RTGS wire-transfer system.

41. *See, e.g., Afovos Shipping Co. SA v. Pagnan (The Afovos)*, (1980) 2 Lloyd's Rep. 469, 473 (Q.B.), *rev'd on other grounds*, (1982) 3 All E.R. 18 (A.C.), *aff'd* (1983) 1 All E.R. 449 (H.L.); *Astro Amo Compania Naviera S.A. v. Elf Union S.A. (The Zographia M)*, (1976) 2 Lloyd's Rep. 382, 390 (Q.B.); *Royal Prods.*, (1981) 2 Lloyd's Rep. at 198-99.

42. *The Brimnes, Tenax Steamship Co., Ltd. v. The Brimnes (Owners)*, (1973) 1 All E.R. 769, 784 (Q.B.D.) *aff'd*, (1974) 3 All E.R. 88 (A.C.); *Momm*, (1976) 3 All E.R. at 598.

43. In the words of Lord Denning in *The Laconia*, "'processing' was a piece of mechanism inside the [beneficiary's bank] itself, which worked fast or slow according to the power put behind it. Its speed should not affect the legal position of the parties making or receiving payment . . . parties in business must know where they stand." (1976) 2 All E.R. at 255.

44. Particularly *Momm*, (1976) 3 All E.R. at 598.

45. *See, e.g., Bradley Crawford, Credit Transfers of Funds in Canada: The Current Law*, 3 CAN. BUS. L.J. 119, 142 (1979); Alan L. Tyree, *Electronic Funds Transfer in New Zealand*, 8 N.Z.U. L. REV. 139, 149-50 (1978-79).

Fortunately, in providing a legislative framework exclusively covering credit transfers,⁴⁶ U.C.C. Article 4A had the advantage of being proactive, rather than following individual cases, and responding to them. As will be seen below, while adopting the two milestones of receiving and giving payment by the beneficiary's bank, Article 4A significantly refined the circumstances in which either of which occurs.

Under Article 4A, "acceptance" by the beneficiary's bank is a central concept leading to the determination of "finality of payment." Subject to specified narrow exceptions, acceptance by the beneficiary's bank is either by (i) payment or advice to the beneficiary,⁴⁷ or (ii) by receipt of payment from its sender.⁴⁸ Payment to the beneficiary is typically to the beneficiary's account; both enumerated occurrences (namely, payment or advice to the beneficiary, and receipt of payment from sender) thus create a debt owed by the beneficiary's bank to the beneficiary.⁴⁹ In turn, besides denoting the completion of the funds transfer,⁵⁰ and subject to specified narrow exceptions, acceptance by the beneficiary's bank further marks the discharge of the originator's debt to the beneficiary⁵¹ and the point in time in which a beneficiary's bank (that accepted other than by undertaking to pay the beneficiary) becomes indebted to the beneficiary.⁵² Indebtedness to the beneficiary by the beneficiary's bank is tantamount to "finality of payment"; it constitutes both a mode and result of "acceptance."

46. Exclusive application to "credit transfer" is the combined effect of sections 4A-104(a) and 4A-103(a)(1). See the discussion in BENJAMIN GEVA, *THE LAW OF ELECTRONIC FUNDS TRANSFERS* § 2.02[3][c] (2007) [hereinafter GEVA, *LAW OF EFT*].

47. U.C.C. § 4A-209(b)(1) (2005). The advice is "of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order." In exceptional circumstances enumerated in sections 4A-405(d) and (e), and involving the settlement failure by a funds-transfer system, acceptance by making payment can be nullified.

48. *Id.* § 4A-209(b)(2)-(3). Under subsections (c) and (d) of section 4A-209, acceptance does not occur where the beneficiary does not have an account with the receiving bank or where the beneficiary's bank accepts before "payment date," defined in section 4A-401 as "the day on which the amount . . . is payable to the beneficiary by the beneficiary's bank."

49. The *locus classicus* for the proposition that "the relation between banker and customer, as far as the pecuniary dealings are concerned, [is] that of debtor and creditor" so that "the money placed in the custody of a banker is . . . the money of the banker" who is obligated "to repay to the [customer] when demanded, a sum equivalent to that paid into his hands" is *Foley v. Hill*. (1848) 2 H.L.C. 28, 45, 36-37; 9 Eng. Rep. 1002, 1005-06, 1009.

50. See U.C.C. § 4A-104(a).

51. *Id.* § 4A-406. The exception pertains to a funds transfer carried out in breach of contract that caused a loss.

52. *Id.* § 4A-404. Exceptions pertain to a cancelled payment order as well as to exceptional cases in which payment to beneficiary may be reversed.

Under section 4A-405(a), credit posted by the beneficiary's bank to the beneficiary's account constitutes payment by the beneficiary's bank to the beneficiary⁵³ "when and to the extent (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank." Arguably, crediting the amount to a "final funds" balance will satisfy the third alternative.

Under section 4A-405(c), a beneficiary's bank that paid the beneficiary by crediting the beneficiary's account may not recover the payment from the beneficiary, even where the beneficiary's bank ends up not receiving payment from its sender. In fact, this is an application of a broader rule, provided by section 4A-404(a), under which acceptance by the beneficiary's bank binds the latter to the beneficiary. Stated otherwise, payment or unqualified notice to the beneficiary by the beneficiary's bank prior to receipt of payment from its own sender is at the risk of the beneficiary's bank. Notwithstanding settlement failure by the sender to the beneficiary's bank, payment (or even payment obligation) by the beneficiary's bank is thus final and irrevocable.

The rule under U.C.C. section 4A-405(c) is often referred to as "receiver finality." Its effect is to allocate the risk of a settlement failure in a funds transfer to the beneficiary's bank that completed it by paying the beneficiary without waiting for payment to arrive.⁵⁴ Official comment 2 to U.C.C. section 4A-405 cites comment 5 to section 4A-209 for the proposition that "the beneficiary's bank can protect itself against this risk by delaying acceptance."⁵⁵ Obviously, this is a risk that does not exist in RTGS systems, in which the beneficiary's bank is to receive a payment order for which settlement has already been given.⁵⁶

Specifically, section 4A-405(c) invalidates "a condition to payment or agreement of the beneficiary giving the [beneficiary's] bank the

53. While section 4A-405 (a) states this is "payment of the bank's obligation under section 4A-404(a)" dealing with the obligation to pay *following* acceptance, per section 4A-209(b)(1), payment under section 4A-405(a) and (b) is also a *mode* of acceptance. Under section 4A-405(b), the occurrence of payment made by the beneficiary's bank other than by crediting the beneficiary's account "is governed by principles of law that determine when an obligation is satisfied."

54. See GEVA, LAW OF EFT, *supra* note 46, § 2.12[4]. That is, under section 4A-104(a), acceptance by the beneficiary's bank marks the completion of the funds transfer. Thus, where acceptance by the beneficiary's bank is by means of making payment to the beneficiary, rather than by obtaining payment or funds from its sender, completion of the funds transfer by the acceptance of the beneficiary's bank occurs notwithstanding the lack of completion of settlement in favor of the beneficiary's bank.

55. U.C.C. § 4A-405 cmt. 2.

56. RTGS, standing for "real-time gross settlement," is briefly explained in note 11, *supra*.

right to recover payment from the beneficiary if the bank does not receive payment” This rule is subject to exceptions, some of which are specifically stated, while others are a matter of interpreting the statutory language just quoted. Thus, “receiver finality” does not apply where:

1. The beneficiary’s bank lends money to the beneficiary, under a specific loan agreement, against the security of an incoming payment order;
2. The beneficiary’s bank releases funds to the beneficiary under an overdraft facility, in anticipation of funds to be received from a sender, without crediting the account or advising the beneficiary of the receipt of the payment order (though it may advise the beneficiary of the funds availability under the overdraft facility);

The key for allowing these first two exceptions is that section 4A-402(c) precludes a conditional payment of the payment order, rather than the disbursement of funds against the security of the payment order.⁵⁷

3. In notifying the beneficiary of the receipt of the payment order or of crediting the beneficiary’s account with respect to the order, the beneficiary’s bank “indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order”;⁵⁸

This third exception is premised on the fact that it is not the mere posting of a provisional or conditional credit to the beneficiary’s account which is precluded; rather, what is actually precluded is the permission given by the beneficiary’s bank to the beneficiary to use the funds so credited, subject to a recourse if payment to the beneficiary’s bank by its sender has not been made.

4. The sending and beneficiary’s banks participate in a funds-transfer system whose rules contract out receiver finality. This

57. See GEVA, LAW OF EFT, *supra* note 46, § 2.12[4].

58. U.C.C. § 4A-209(b)(1)(ii).

exception is designed to cover the ACH (namely, the electronic bulk)⁵⁹ system, where payments are received by the beneficiary's bank in batches. It is meant not to apply to a wire-transfer system;⁶⁰ and

5. A funds-transfer system that nets obligations multilaterally among participants failed to complete settlement pursuant to its rules notwithstanding the operation of its loss-sharing agreement. This exception is directed to a wire-transfer system that, despite the existence of a loss-sharing formula, fails to complete the daily settlement due to a chain of bank settlement failures.⁶¹

Other than when any of these exceptions apply, the payment to the beneficiary by the beneficiary's bank is final. "Finality of payment" by the receipt of funds is discussed in the ensuing Part of this article.

IV. FINALITY OF PAYMENT FOR CREDIT TRANSFERS BY RECEIVING FUNDS

A. Interbank Payment

Section 4A-403 governs time of payment of any "sender's obligation under [s]ection 4A-402 to pay the receiving bank" in connection with the execution of a payment order for a funds transfer that has been properly completed.⁶² Effectively, three methods of payments are specified in subsection (a), to which a residual fourth is added in subsection (d). The first two methods set out in subsection (a) apply only to the case where the sender is a bank, namely, for an interbank payment. Two subsections, (b) and (c), deal with payment by setoff. The four methods are as follows:

1. Paragraph (a)(1) provides for the occurrence of interbank payment upon the receipt by the receiving bank of "final settle-

59. For a brief review, see *supra* note 12.

60. For this exception and the requirements for its application, see U.C.C. section 4A-405(d), official comment 3 to section 4A-405, and GEVA, LAW OF EFT, *supra* note 46, section 2.12[5][a].

61. For this exception and the requirements for its application, see U.C.C. section 4A-405(e), official comment 4 to section 4A-405, and GEVA, LAW OF EFT, *supra* note 46, section 2.12[5][b]. The exception was tailored to CHIPS in its previous DNS design.

62. In the absence of a proper completion, no payment occurs. In such a case a sender is either excused to pay its payment order or entitled to a refund on the "money-back guarantee" under section 4A-402(c) and (d). See U.C.C. § 4A-402 cmt. 2.

ment . . . through a Federal Reserve Bank or through a funds-transfer system." A "funds-transfer system" is defined in 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."

2. Paragraph (a)(2) provides for payment by means of credit posted to the receiving bank's account either with the sending or any other bank. Such payment is deemed to have occurred "when the credit is withdrawn or, if not withdrawn, at midnight of the day on which credit is withdrawable and the receiving bank learns of that fact." Official comment 2 explains that the delay stated in paragraph (a)(2) is designed to allow the receiving bank whose account was credited "an opportunity to reject the order if it does not have time to withdraw the credit to its account and it is not willing to incur the liability to Beneficiary before it has use of the funds represented by the credit." This rationale is stated to apply only to a receiving bank that is the beneficiary's bank, which incurs liability to the beneficiary upon receiving payment.⁶³ Yet, the language of paragraph (a)(2) is also broad enough to cover payment to a receiving bank acting in the funds transfer as an intermediary bank.⁶⁴
3. Paragraph (a)(3) governs payment by means of a debit to an account of the sender maintained at the receiving bank. The occurrence of such payment is timed to coincide with the posting of the debit, that is, with the time "the debit is made," but only "to the extent the debit is covered by a withdrawable credit in the account." In effect, this allows a receiving bank to post a temporary or provisional debit, thereby either creating or increasing an

63. For the liability of the beneficiary's bank to the beneficiary upon receiving payment, see U.C.C. sections 4A-209(b)(2) and (3).

64. Nevertheless, the rationale stated in official comment 1 to section 4A-209 appears to have persuaded the drafters of the UNCITRAL Model Law on International Credit Transfers not only to adopt in Article 6(b)(i) and (ii) a similar rule for payment by means of a credit posted to the receiving bank's account held at the sending or another bank, but also to slightly postpone the time unused credit constitutes payment beyond the midnight of the day credit is withdrawable to the knowledge of the receiving bank to "the banking day following the day on which the credit is available for use and the receiving bank learns of that fact." G.A. Res. 47/34, art. 6(b), U.N. Doc. A/RES/47/34 (Feb. 9, 1993).

overdraft in the sender's account. This temporary debit is pending, and conditional on, the arrival of cover, though it is not of indefinite duration. It will become final, so as to be "payment" under paragraph (a)(3), where the receiving bank accepts the payment order by acting on it.⁶⁵ Alternatively, this temporary debit will extinguish upon the automatic cancellation of the payment order by the operation of law, if no such action has been taken.⁶⁶ Logically, however, such a "temporary debit" ought not to be permitted. In the absence of cover, a receiving bank need not be under any obligation to debit the sender's account for an incoming payment order, and if it nevertheless elects to post the debit, it effectively extends thereby credit to the sender for the payment that was made by means of the debit.⁶⁷ A debit made by the receiving bank to the sender's account ought to have been treated as payment,⁶⁸ regardless of the availability of cover, except that sender ought to have been under an obligation to cover the debit, as repayment of an overdraft or credit extension, rather than in discharge of the payment obligation under section 4A-402.

4. Subsection (d) deals with "a case not covered by subsection (a)." This is a residual provision, covering the less common payments carried out other than by means of posting a debit or credit into a bank account, such as by means of issuing a bank draft, paying cash or, in theory, any other method of discharging debts under general law.⁶⁹ The time of such payment "is governed by appli-

65. Acceptance by a receiving bank other than that of the beneficiary is by means of "execution," that is, under section 4A-301(a), the issue of a payment order intended to carry out the payment order received by it. Other than by the receiving of payment for the received payment order, acceptance by a beneficiary's bank is by means of payment or notice to the beneficiary. See generally U.C.C. § 4A-209.

66. Under U.C.C. section 4A-211(d), "[a]n unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank . . ."

67. Particularly, this would have meant that by choosing to debit the sender's account, and subject to section 4A-209(b)(3), a beneficiary's bank would have to be taken as accepting the payment order so as to be bound to the beneficiary under section 4A-404(a).

68. Which, indeed, is the position under Article 6(a) of the UNCITRAL Model Law on International Credit Transfers, *supra* note 64.

69. In this context, it ought to be particularly recalled that section 4A-403 is not limited to payment by a sending bank, but also applies to payment by a non-bank customer acting as the originator of the funds transfer that could be made by means of payment in cash over the counter. As well, U.C.C. Article 4A is drafted so as not to be limited to existing and known banking practices, and thus uses in section 4A-403(d) very broad language that will cover also unrealistic scenarios in the interbank payment context of payment by renunciation or even in specie or kind.

cable principles of law that determine when an obligation is satisfied.”

Section 4A-403(a)(1) envisages Federal Reserve regulations and operating circulars as well as system rules to fill in blanks. Furthermore, the benchmarks noted in paragraphs (a)(1) and (2) of section 4A-403 are not engraved in stone; per section 4A-501, side by side with some⁷⁰ “applicable principles of law” contemplated by subsection (d), they may be contracted out and modified by means of bilateral interbank agreements. Certainly, there is nothing to preclude banks from waiving the delays provided for in paragraphs (a)(1) and (a)(2) and agreeing on the interbank payment to coincide with the respective credit or debit posted to the account. Similarly, per section 4A-107, Federal Reserve regulations and operating circulars “supersede any inconsistent provisions of . . . Article [4A] to the extent of the inconsistency.” And yet, the ensuing discussion assumes that benchmarks noted in section 4A-403 apply; they are default provisions to apply in the absence of agreements, system rules, and Federal Reserve regulations and operating circulars to the contrary.

B. Acceptance by Beneficiary’s Bank by Receiving Payment

Section 4A-209(b)(2) provides for the acceptance by the beneficiary’s bank by means of receiving payment “pursuant to [s]ection 4A-403(a)(1) or 4A-403(a)(2),” that is, by means of either “final settlement . . . through a Federal Reserve Bank or through a funds-transfer system” or credit to the account of the beneficiary’s bank. In both cases, acceptance is stated by section 4A-209(b)(2) to take place when the beneficiary’s bank receives such payment.

Conversely, under section 4A-209(b)(3), the time of acceptance by a beneficiary’s bank by means of receiving payment, effectively pursuant to section 4A-403(a)(3) or 4A-403(d),⁷¹ is delayed beyond the point of time of receiving payment. In such cases, acceptance is by the combined effect of holding funds for the sender and failing to timely reject the payment order. Section 4A-209(b)(3) thus primarily applies to the acceptance of the beneficiary’s bank by debiting the sender’s account, but also by having cover for a payment order it received; in

70. Of course, there may be relevant “principles of law” that may not be contracted out.

71. Section 4A-403 is not specifically mentioned in section 4A-209(a)(3), and yet, reference to its paragraph (a)(3) and subsection (d) is a matter of interpreting section 4A-209(b) by reference to section 4A-403.

the latter case, the statutory language thus provides for the acceptance by the beneficiary's bank by inaction. As long as the beneficiary's bank has not timely rejected the payment order, acceptance under section 4A-209(b)(3) is at "the opening of the next funds-transfer business day . . . if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender." That is, cover at the time debit is posted is irrelevant; what counts is the state of the account at the opening of the next funds-transfer business day. According to official comment 7 to section 4A-209, the provision is designed to accommodate a bank that "may not be willing to give credit to the sender" and for whom "it may not be possible . . . to determine until the end of the day on the payment date whether there are sufficient good funds in the sender's account."

Section 4A-209(b)(3) is consistent with both the cover condition and delay in the completion of payment by debiting the sender's account under section 4A-403(a)(3); both the delay and the cover condition are premised on the possibility of posting a provisional or temporary debit to the account and thus are subject to the same criticism as section 4A-403(a)(3). Sound policy would therefore support a rule under which acceptance is to coincide with, rather than be delayed beyond, either the posting of a debit regardless of availability of cover, or the availability of cover regardless of the posting of a debit.⁷²

C. Final Settlement Through a Federal Reserve Bank or a Funds-Transfer System

As discussed, receipt of "final settlement . . . through a Federal Reserve Bank or through a funds-transfer system" is a method of inter-bank payment under section 4A-403(a)(1). Article 4A does not define "settlement." Conversely, for checks and other debit paper items not governed by Article 4A, U.C.C. Article 4 broadly defines "settle" in section 4-104(a)(11) to refer to payment "in cash, by clearing-house settlement, in a charge or credit or by remittance, or otherwise as agreed." Such settlement under that provision "may be either provisional or

72. See *supra* text accompanying notes 65–68. Under Article 9(1)(c) of the UNCITRAL Model Law, *supra* note 64 (which is the parallel provision to U.C.C. section 4A-209(b)(3)), a contrary position is adopted, consistent with that of Article 6(a) of the Model Law, *supra* note 64, which corresponds to U.C.C. section 4A-403(a)(3). Under Model Law Article 9(1)(c), the time of acceptance by the beneficiary's bank by debiting the sender's account coincides with the time debit is made.

final.” However, this provision does not apply to credit transfers governed by Article 4A. Moreover, section 4A-403(a)(1) covers only “final settlement . . . through a Federal Reserve Bank or a funds-transfer system” and section 4A-403(b) covers only “final settlement” completed according to the rules of “a funds transfer system that nets obligations multilaterally among participants”; there is no other explicit reference to “settlement” in the language of section 4A-403. Hence, compared to Article 4, Article 4A appears to envisage a narrower set of circumstances in which “settlement” may occur.

Indeed, under Article 4, “settlement” can be taken to cover all methods of payment in discharge of an interbank obligation. Certainly not all such methods are explicitly stated in Article 4A, and yet, this general meaning for “settlement” extracted from Article 4 ought arguably to be read into Article 4A as well. In fact, “final settlement” is used in Article 4A by reference to rules applicable to the operation of Federal Reserve Banks and funds-transfer systems, and there is nothing to preclude such rules from applying to any desired method of payment. At the same time, two limitations are to be noted. First, unlike Article 4, Article 4A uses the term “settlement” only in the context of an interbank payment made in connection with a funds transfer carried out either through a Federal Reserve Bank or a funds-transfer system. An interbank payment made otherwise in discharge of liability for a payment order is not treated as “settlement.” Second, Article 4A appears only to envisage the existence of “final” settlement, namely, a permanent one, rather than one of a tentative nature; that is, the “settlement” envisaged in Article 4A must be unconditional and irrevocable.⁷³ But even so, there is nothing in the language of section 4A to preclude an interbank provisional settlement that may become “final” upon the occurrence of stated circumstances, at which point it will fall under section 4A-403.

Receipt of “final settlement . . . through a Federal Reserve Bank,” as required by the first option of U.C.C. section 4A-403(a)(1), is effectively provided for by Subpart B of Regulation J,⁷⁴ which governs funds transfers under Fedwire (the RTGS operated by the Federal Reserve

73. For the distinction between provisional and final settlement (though in the context of checks and other debit paper items), see comment 10 to U.C.C. section 4-104. *See also* U.C.C. §§ 4-213, -214, -215, -301 (2005).

74. 12 C.F.R. pt. 210 (2007). The current text of Subpart B was approved on October 5, 1990, and became effective on January 1, 1991. It was last amended on October 14, 1992, and those amendments went into effect on October 14, 1993. *See* Funds Transfers Through Fedwire, 55 Fed. Reg. 40,791 (Oct. 5, 1990); Collection of Checks and Other Items, 57 Fed. Reg. 46,950 (Oct. 14, 1992).

System in the U.S.).⁷⁵ This is so notwithstanding the fact that the Regulation bypasses altogether the term “final settlement” or any similar terminology.⁷⁶ Under its § 210.30, “[p]ayment of a Federal Reserve Bank’s obligation to pay a receiving bank (other than a Federal Reserve Bank) occurs at the earlier of the time when the amount is credited to the receiving bank’s account or when the payment order is sent to the receiving bank.” In the language of section 4A-403(a)(1), “final settlement . . . through a Federal Reserve Bank” thus occurs by means of advice or credit to a Reserve account of the receiving bank. Involving an obligation of a Federal Reserve Bank, this mode of settlement takes effect immediately, and is not delayed as contemplated by U.C.C. section 4A-403(a)(2) for an obligation of a bank, other than that of a Federal Reserve Bank, in the form of a credit to the account of a receiving bank.

Indeed, in the Federal Reserve System, the sending and receiving banks⁷⁷ may maintain their accounts with different Federal Reserve Banks. In theory, the receiving bank may not rely on actions taken in a Federal Reserve Bank other than its own. This may explain the reliance in Subpart B of Regulation J on the advice or credit given to the receiving bank. However, in a more typical design for a gross settlement system, sending and receiving banks are to hold their accounts with the same central counterparty, usually a central bank, in which “settlement finality” is thus likely to coincide with the debit to the sending bank’s account.⁷⁸ Furthermore, in a gross settlement system with liquidity saving features, finality may also be achieved by offsetting an outgoing payment against an incoming one of the same counterparty that is outstanding in its queue.⁷⁹

75. For RTGS and Fedwire as an RTGS, see generally *supra* note 11.

76. For funds transfers over the Fedwire system, see GEVA, LAW OF EFT, *supra* note 46, § 3.04 (current text by Stephanie Heller). For payment by Federal Reserve Bank, see *id.*, § 3.04[4][g].

77. The terms loosely refer here to the end participating banks, namely the bank sending a payment order to a Federal Reserve Bank, and a bank receiving a payment order from a Federal Reserve Bank. Strictly speaking, however, in the terminology of Article 4A, a Federal Reserve Bank acts in Fedwire as an intermediary bank; thus, it is the Federal Reserve Bank receiving a payment order from a sending bank which serves as that sending bank’s “receiving bank.” See U.C.C. § 4A-206(a) & cmt. 2. In general, for the “receiving bank” as the bank to which the sender’s instruction is addressed, see *id.* § 4A-103(a)(4).

78. Typically, the debit will be for a single transaction. However, this is not universally the case. For example, in the UK, CHAPS has a gridlock-resolving mechanism called “circles,” which operates very much like a multilateral offset algorithm. This optimization facility allows the simultaneous settlement of payments queued on behalf of different banks, that if they are all made, they will largely set off each other. This facility has been used only rarely, in exceptional circumstances. See GEVA, LAW OF EFT, *supra* note 46, § 4.04[3].

79. As in Germany, originally in RTGSplus, see *id.* § 4.04[6], and since November 2008 in TARGET2. See TARGET2—The New Payment System for Europe, DEUTSCHE BUNDESBANK MONTHLY

The second option set out in U.C.C. section 4A-403(a)(1) is that of a “final settlement” made “through a funds-transfer system” rather than “through a Federal Reserve Bank.” A “funds-transfer system” is defined in 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.” It is not entirely clear whether this definition is broad enough to cover Fedwire, which is the wire-transfer network of the Federal Reserve Banks and not an “association of banks” as required in the quoted language of the definition.⁸⁰ However, in any event, insofar as “final settlement” carried out “through a Federal Reserve Bank” is treated as a separate option in section 4A-403(a)(1), Fedwire settlement is to be taken as covered by that option rather than treated as taking place in the context of a “funds-transfer system.”

Official comment 1 to section 4A-403 reinforces this interpretation. Dealing with the second option, that of a “final settlement” made “through a funds-transfer system,” the official comment states that “[w]ith respect to payment orders other than Fedwires, the amounts of the various payment orders may be credited and debited to accounts of one bank with another or to a clearing house account of each bank and amounts owed and due are netted.” Regrettably, however, as the official comment continues, it categorically states that “[s]ettlement [for such payment orders] is made through a Federal Reserve Bank by charges to the Federal Reserve accounts of the net debtor banks and credits to the Federal Reserve accounts of the net creditor banks.”

Indeed, a “final settlement” received “through a funds-transfer system” may be made on the books of a Federal Reserve Bank. For a wire-transfer system, this may be desired from a regulatory perspective, and even required. And yet, notwithstanding a possible implication from the language just quoted from official comment 1 to section 4A-403, in principle, this is not an exclusive mode for having a “final settlement” received “through a funds-transfer system.”⁸¹ Rather, as a matter of the interpretation of Article 4A, banks are not precluded

REP., Oct. 2007, at 69, 73, available at http://www.bundesbank.de/download/volkswirtschaft/mba/2007/200710mba_en_target.pdf.

80. But see, for example, U.C.C. section 4A-206, which specifically speaks of the “funds-transfer system of the Federal Reserve Banks.” In general, however, the issue of whether Fedwire is a “funds-transfer system” under Article 4A may be academic, due to the precedence of federal law as acknowledged in section 4A-107. See GEVA, LAW OF EFT, *supra* note 46, § 3.02[3][a].

81. See GEVA, LAW OF EFT, *supra* note 46, § 2.02[4].

from agreeing on a settlement through a funds-transfer system other than on the books of a Federal Reserve Bank. More generally, the occurrence of a “final settlement” in a “funds-transfer system” is to be determined under its own “funds-transfer system rule”; the latter is defined in section 4A-501(b)(i) as a rule of an association of banks “governing the transmission of payment orders by means of a funds-transfer system of the association, or rights and obligations with respect to those orders.”

In fact, the broad range of options for a “final settlement” received “through a funds-transfer system” is recognized in subsection (b) of section 4A-403. Thus, for sending and receiving banks that are “members of a funds-transfer system that nets obligations multilaterally among participants,” “final settlement” is stated in the first sentence of subsection (b) to be received by the receiving bank “when settlement is complete in accordance with the rules of the system.”⁸² With respect to settlement, however, “completion” is not defined. Elsewhere, I endeavored to identify it with the completion of the banking process carrying out the settlement; yet, in as much as this point of time is mandated by section 4A-403(b) to denote “settlement finality,” this “natural meaning” proved to be not fully inclusive and hard to reconcile with circumstances in which “settlement finality” is stated or perceived to exist prior to the completion of the settlement process.⁸³ Upon reflection, it may then be more helpful to refer to “completion” as the point of time in the course of the banking operation in which the sending bank’s obligation is to be treated as discharged.⁸⁴

Indeed, it is quite common for the settlement of payment orders exchanged over “a funds-transfer system that nets obligations multilaterally among participants,” as dealt with in paragraph (b) of section 4A-403, to take place on the books of the central bank as envisaged in the excerpts from comment 1 to section 4A-403. However, rules governing such a system may provide for “settlement finality,” in the sense of the discharge of the sending bank’s obligation, by means of a central bank guarantee prior to the actual completion of the settlement proce-

82. Arguably, “rules of the system” are same as “funds-transfer system rules.” Certainly, it is hard to think of a reason for choosing a different language in section 4A-403(b).

83. Benjamin Geva, *Interbank Settlement in Wire Transfers—Legal Aspects*, UCC L.J., Spring 2003, at 47, 63–74, 84–94.

84. Indeed, if so, wouldn’t it be simpler, in the statutory language of paragraph (b), to eliminate “completion” in favor of “discharge” (which would then of course require a few additional conforming changes in the language)? Certainly, from a purely linguistic point of view, interpreting “completion” to refer to discharge is strained and less natural than reading it by reference to the completion of the banking process. And yet, “discharge” would better fit the statutory scheme.

dures (namely, prior to the posting of settlement results in settlement accounts of participating banks).⁸⁵ As well, intra-cycle finality may be introduced by means of bilateral and multilateral nettings that occur continuously throughout the day, by means of continuous novation and substitution.⁸⁶

Thus, according to CHIPS Rules,⁸⁷ “[c]ompletion of settlement constitutes final settlement of that payment message and final discharge and payment of the Sending Participant’s obligation to pay the amount of the payment message to the Receiving Participant.”⁸⁸ For each payment message, “completion” typically occurs by reference to the respective adjustment in participants’ balances or positions in the CHIPS pre-funded balance account run by the Clearing House System. Thus, bilateral and multilateral netting continuously occur in CHIPS, throughout the day, against participants’ balances—in effect, sub-accounts—kept in a CHIPS pre-funded balance account held at the Federal Reserve Bank of New York (FRBNY). In fact, this is a joint account of all CHIPS participants, controlled and operated by the New York Clearing House, consisting of “central bank money” in the form of funds transferred from participants’ respective accounts with FRBNY. Payments are recorded throughout the day in the Clearing House System as adjustments to participants’ balances or positions in the CHIPS pre-funded balance account—“FRBNY will not take any action during the day to adjust its records in connection with payment messages released by CHIPS.”⁸⁹ Only outstanding unsettled payments are processed and settled during end-of-day procedures, in connection with which a single entry, either debit or credit, reflecting the outcome of the entire daily activity, is posted to each participant’s account with FRBNY. Other than for outstanding orders processed during end-of-day procedures, “settlement finality” for each payment order is thus

85. Compare this to the large-value transfer system (LVTS) in Canada. See GEVA, LAW OF EFT, *supra* note 46, § 4.04[2].

86. This can be provided explicitly in the clearing rules, or it may be inherent, that is, implicit, in the clearing house arrangement. For the latter view, see the dissenting judgment of Lord Morris in *British Eagle International Airlines Ltd. v. Compagnie Nationale Air France*, (1975) 2 All E.R. 390, 391 (H.L.), as explained by Benjamin Geva, *The Clearing House Arrangement*, 19 CAN. BUS. L.J. 138, 161–64 (1991) [hereinafter Geva, *Clearing House*]. For a netting process by means of a continuous novation and substitution for the LVTS in Canada, see the Canadian Payments Act, By-law No. 7 Respecting Large Value Transfer System, section 52, SOR/2001-281, available at <http://canadagazette.gc.ca/partII/2001/20010815/html/sor281-e.html>.

87. THE CLEARING HOUSE PAYMENTS CO., CHIPS RULES AND ADMINISTRATIVE PROCEDURES 12–16 (2006) [hereinafter CHIPS RULES], http://www.chips.org/reference/docs_rules/000720.pdf. For a discussion by Stephanie Heller, see GEVA, LAW OF EFT, *supra* note 46, § 3.03.

88. CHIPS RULES, *supra* note 87, at rule 13(b)(1); see *id.* at rule 13(b)(2)–(3).

89. *Id.* at rule 12(a)(3).

achieved upon “completion” of its intra-cycle processing in the CHIPS system, notwithstanding the subsequent delayed end-of-day “completion” of the banking process at FRBNY.

D. Interbank Payment by Set Off

Subsections (b) and (c) of section 4A-403 govern interbank payment by setoff. Subsection (c) deals with bilateral netting. It covers the case of two banks exchanging payment orders “under an agreement that settlement of the obligations of each bank to the other . . . will be made at the end of a [cycle],” usually daily. In such a case, “the total amount owed with respect to all orders transmitted by one bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank,” so that “[t]o the extent of the setoff, each bank has made payment to the other.” The final balance is to be settled between the banks under one of the methods specified in paragraph (a), or, at least in theory, under subsection (d).

Subsection (b) deals with “final settlement” for payment orders exchanged among “members of a funds-transfer system that nets obligations multilaterally among participants.” As already indicated, in such a case, “final settlement” is stated, in the first sentence of subsection (b), to be received by the receiving bank “when settlement is complete in accordance with the rules of the system.” At the same time, “to the extent permitted by the rules of the system,” such “final settlement” may apply only to balances owed by a sender after obligations for payment orders it transmitted through the funds-transfer system have been satisfied by setting them off against the amounts of payment orders received by it.

Thus, first, under subsection (b), “to the extent permitted by the rules of the system,” a sender may have its obligation to pay the amount of a payment order transmitted through a funds-transfer system satisfied by bilaterally “setting off and applying against the sender’s obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system.” Second, having exercised this bilateral right of set off, and “to the extent permitted by the rules of the system,” a sender may have the aggregate balance of obligations it owes to each receiving bank in the funds-transfer system satisfied “by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system.” Stated otherwise, the sum of bilateral

debit balances owed by a participant to some participants are satisfied by setting that sum off against the sum of bilateral credit balances owed to that participant by other participants. "Final settlement" received under subsection (a)(1) upon the completion of the settlement per the first sentence of paragraph (b) occurs either when offsets are not permitted by the funds-transfer system or as a final stage for balances owed after the exercise of the right of set off as permitted by the funds-transfer system.

However, certainly paragraph (c) for bilateral netting, and arguably also paragraph (b) for multilateral netting, provide only for intra-cycle position netting; under this interpretation, the discharge of all netted obligations, and hence their settlement, is marked by the exercise of the right of set off at the end of the cycle followed by actual payment or the completion of settlement.⁹⁰ The treatment by section 4A-403 of the right of set off is thus premised on an outdated perspective. Nevertheless, both paragraph (a)(1), speaking of finality by reference to funds-transfer system rules, and paragraph (d), speaking of any case not provided for by paragraph (a), are broad enough to cover netting by novation, whether multilateral or bilateral, except that they are to be provided by bilateral agreements as well as multilateral system rules.⁹¹

V. DISCHARGE

English common law views the credit transfer as designed "to transfer an amount standing to the credit of [the originator] . . . to the credit of [the beneficiary's] account."⁹² Such a transfer is carried out with the view of conferring on the beneficiary "the unconditional right to the immediate use of the funds transferred."⁹³ The transfer constitutes payment made to the beneficiary at the beneficiary's bank in the same way as "handing coins or banknotes" to the beneficiary's bank for the beneficiary would constitute payment to the beneficiary.⁹⁴ It is

90. For the fundamental distinction between "position netting" and "netting by novation" (which includes "netting by novation and substitution") see, for example, Geva, *Clearing House*, *supra* note 86, at 140-48.

91. It should be added that, as a matter of statutory interpretation, no good policy is served by treating paragraphs (b) and (c) as "special laws" exhausting all cases of netting arrangements and thus precluding netting by novation from being covered by either paragraph (a)(1) or (d).

92. *Royal Prods. v. Midland Bank*, (1981) 2 Lloyd's Rep. 194, 198 (Q.B.D.).

93. *The Brimnes, Tenax Steamship Co. Ltd. v. The Brimnes (Owners)*, (1973) 1 All E.R. 769, 782 (Q.B.D.).

94. *Mardorf Peach & Co. v. Attica Sea Carriers Corp. of Liberia (The Laconia)*, (1976) 2 All E.R. 249, 257 (appeal taken from Q.B.D.), *rev'd*, (1977) 1 All E.R. 545 (H.L.) (explaining that

thus the “unfettered and unrestricted”⁹⁵ right to the use of the funds, effectively arising upon what is referred to in this article as payment finality, that discharge the debt paid by credit transfer as the equivalent of the deposit of cash to the account.

This position is effectively codified by U.C.C. Article 4A.⁹⁶ Thus, under section 4A-406(a), payment by the originator to “the beneficiary of the originator’s payment order” takes place “at the time a payment order for the benefit of the beneficiary is *accepted* by the beneficiary’s bank.”⁹⁷ Section 4A-406(b) provides for the discharging effect of such payment on an obligation owed by the originator to the beneficiary. Thus, as long it is not made in breach of contract and does not cause loss to the beneficiary,⁹⁸ upon payment constituted by the acceptance of the beneficiary’s bank, the originator’s obligation to the beneficiary “is discharged”; discharge is “to the same extent discharge would result from payment to the beneficiary of the same amount in money,” namely, in coins and banknotes.⁹⁹

Official comment 2 to section 4A-406 explains the occurrence of a discharge under subsection (b) to be effected by the substitution to the beneficiary of “the obligation of the beneficiary’s bank for the obligation of the originator.” In other words, it is “payment finality” constituted by the acceptance of the beneficiary’s bank, as explained above in Part III of this article, which signifies payment to the beneficiary and discharge of the originator’s debt to the beneficiary.

“[n]owadays financial obligations . . . are not normally discharged by handing over coins or bank notes.”).

95. The expression is taken from *A/S Awilco v. Fulvia S.P.A. di Navigazione (The Chikuma)* (1981) 1 Lloyd’s Rep. 371, 375 (H.L.).

96. Though subject to preemption by federal law that delays “funds availability” of “electronic payments” to one day after the receipt of funds by the beneficiary’s bank. 12 C.F.R. § 229.10(b); see GEVA, LAW OF EFT, *supra* note 46, § 2.11[3].

97. U.C.C. § 4A-406(a) (2005) (emphasis added). Payment is “in an amount equal to the amount of the order accepted by the beneficiary’s bank, but not more than the amount of the originator’s order.” *Id.* For the identification of the beneficiary of the originator’s payment order, see U.C.C. section 4A-207.

98. Stated otherwise, discharge is precluded where *all* the following four (cumulative) conditions are satisfied: (i) payment was made by a means prohibited by the contract, (ii) the beneficiary promptly notified the originator of its refusal to accept the payment, (iii) “funds with respect to the order were not withdrawn” or applied to a debt owed by the beneficiary, *and* (iv) “the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract.” *Id.* § 4A-406(b). Typically, the loss envisaged under the fourth condition is that suspension of payment by the beneficiary’s bank. See *id.* § 4A-406 cmt. 3. Note that per the third condition, loss caused by the seizure of funds to satisfy a debt owed by the beneficiary that could have been avoided had payment complied with the contract would not qualify to trigger the exception.

99. *Id.* § 4A-406(b). Under section 1-201(b)(24), “money” means “a medium of exchange currently authorized or adopted by a domestic or foreign government.”

In a case of a customer's check¹⁰⁰ as a collection debit item, discharge is presumed to be a two-stage operation. The first stage is that of the issue of the check; the second is its actual payment. Thus, under U.C.C. section 3-310(b), and in line with the common law,¹⁰¹ unless otherwise agreed, when a customer's check is taken for an obligation, "the obligation is suspended" until dishonor or payment. In turn, the payment of the check "results in discharge of the obligation to the extent of the amount of the check."¹⁰² Stated otherwise, it is "final payment" of the check, as discussed above in Part II of this article, which marks the absolute satisfaction or discharge of the obligation paid by means of the check.

Indeed, unless otherwise agreed, a debt is to be discharged by the payment in banknotes and coins that constitute "legal tender" at the place of payment.¹⁰³ The purpose of a funds transfer, whether it is a credit-push or debit-pull mechanism, is to accord to the beneficiary/payee the benefit of payment in cash deposited to the payee/beneficiary's bank account while avoiding the need to handle cash. It is the "payment finality" point in which the payee-beneficiary reaps this benefit of cash-payment equivalent. And yet, legal ramifications and risk are involved in connection with the execution of a funds transfer, and hence, where it is made to satisfy an obligation, its use ought to be made by reference to the agreement between the debtor and creditor.

Thus, per discussion in this article in Parts II-IV above, in any given case, whether it is a credit or debit transfer, the occurrence of "payment finality" may easily be determined *ipso facto* but, particularly in a multi-bank chain, is not easily capable of being timed in advance by the parties. Furthermore, in both credit and debit transfers, "payment finality" is achieved by the end of a banking process, which may consist of a series of banking operations, on which the end-parties, payor/drawer and payee/beneficiary (that is, debtor and creditor),

100. "Customer's check" is used here to denote any check other than one issued or certified by a bank, discussed below. It could be either a personal or corporate check.

101. See, e.g., *Re Charge Card Services Ltd.*, (1988) 3 All E.R. 702, 707 (A.C.). For effectively applying the "conditional payment" doctrine to direct debits, see *Provost-Cooper v. La Compagnie d'Assurance-Vie Crown*, [1988] R.J.Q. 1359 (Can.).

102. U.C.C. § 3-310(b)(1). Conversely, under paragraph (b)(3), in principle, where the check is dishonored, "the obligee may enforce either the instrument or the obligation." Obviously, payment of a check results in a discharge of the obligation, provided it is made to "a person entitled to enforce the instrument" as required under U.C.C. section 3-602(a).

103. According to BLACK'S LAW DICTIONARY 915 (8th ed. 2004), "legal tender" consists of "[t]he money (bills and coins) approved in a country for payment of debts, the purchase of goods, and other exchanges for value."

have no control whatsoever. This constitutes a drawback in the case of a time-sensitive payment.

For a debit transfer, the solution is the “conditional payment”¹⁰⁴ occurring upon the suspension of the underlying obligation when the check is issued. Thus, the tender of a check on payment due date by a debtor to a creditor who agrees to be so paid satisfies the debtor’s obligation to pay on that date, though of course subject to a condition subsequent—that of the payment of the check. In fact, the payment by check facilitates the separation between the *act* of payment and the *time* that payment is executed; a distinction between payment *by* check and payment *of* the check allows the debtor to pay on time while not being concerned with the time of payment.

No similar separation or distinction, and hence no similar level of comfort, is available to a debtor who is required to pay by means of a credit transfer; no discharge, conditional or otherwise, is to be accorded to the debtor in the course of carrying out the funds transfer until “finality of payment” takes place.¹⁰⁵ The process does not involve an “act of payment” similar to that involved with a check; in paying by credit transfer, a debtor complies with a payment obligation only when payment becomes “final.”

At the same time, payment by check, and in fact by any debit transfer, gives rise to unique risks. Particularly, it presents both to the payee and the depositary banks risks associated with the dishonor of the check. Thus, dishonor presents the payee with two risks. The first is the obvious risk of non-payment by the payor-drawer, which may entail financial loss or enforcement costs. Second, upon the dishonor, the payee may also incur an immediate liquidity risk whose management may entail additional costs. As well, in making funds available to the payee prior to “final payment,” upon the dishonor of the check (and hence the failure to obtain “final payment”), a depositary bank may risk loss to be caused by a depositor’s default in the obligation to return such funds. Finally, the process of check collection may not necessarily be fast and efficient.¹⁰⁶ Indeed, it is specifically to avoid the risk

104. For the use of this term in this context, see, for example, *Re Charge Card*, (1988) 3 All E.R. at 707.

105. For dire consequences of this rule, see, for example, *Evra Corp. v. Swiss Bank Corp.*, a pre-Article 4A case in which the failure to complete a \$27,000 transfer due to the default by an intermediary bank cost the originator a \$2.1 million loss of a profitable contract. 673 F.2d 951, 953–54 (7th Cir. 1982).

106. Risks are outlined in COMM. ON PAYMENT AND SETTLEMENT SYS., BANK FOR INT’L SETTLEMENTS (BIS), CORE PRINCIPLES FOR SYSTEMATICALLY IMPORTANT PAYMENT SYSTEMS 68–74 (2001) [hereinafter BIS], available at <http://www.bis.org/publ/cpss43.pdf>. Dishonor may be for various reasons,

of dishonor inherent in the debit transfer, and to benefit from a faster payment process, that a creditor may insist on receiving payment by means of a credit transfer.

A check drawn or certified by a bank ("bank check")¹⁰⁷ alleviates dishonor risks to the payee. In a case in which payment by a bank is permitted by contract, the bank check further allows the payor to make a time-sensitive payment by delivering the instrument to the payee on the due date. Article 3 does not use the term "bank check" and yet a few types of instruments fall into this category as here proposed. First, under section 3-104(g), a cashier's check is a "draft¹⁰⁸ with respect to which the drawer and the drawee¹⁰⁹ are the same bank or branches of the same bank." Under section 3-104(h), a teller's check is a draft drawn by a bank on another bank. In each case, if the draft is payable on demand,¹¹⁰ it is a check drawn by a bank; while the cashier's check is drawn on the drawing bank itself, the teller's check is drawn on another bank. Third, under section 3-409(d), a check drawn by a bank customer and accepted by the drawee bank¹¹¹ is a certified check.

Under section 3-412, a bank issuer¹¹² of a cashier's check incurs issuer's liability on it; under section 3-414, it is also liable on the instrument as its drawer. Under section 3-413, a certifying bank is liable as its acceptor.¹¹³ Furthermore, an issuer of either cashier's or teller's check and an acceptor of a certified check (namely, a bank liable on a

such as compliance with a stop payment order or lack of cover (namely insufficient funds), and may be even wrongful vis-à-vis the drawer. Inefficiency in the process may result in a delayed return without "final payment," such as when delay occurs other than at the drawee bank. *Cf.* *Midland Doherty Ltd. v. Banque Royale du Canada*, [1984] C.S. 909 (Can.), *rev'd in part*, *Midland Doherty Ltd. v. Banque Royale du Canada*, [1990] CarswellQue 748 (C.A.Q.).

107. Per U.C.C. section 3-104(f), a check is "(i) a draft, other than a documentary draft, payable on demand and drawn on a bank, or (ii) a cashier's check or teller's check." "Bank" is broadly defined in section 1-201(b)(4) as "a person engaged in the business of banking," including a saving bank, saving and loan association, credit union, and a trust company. Relevant terms are defined immediately below.

108. A draft is an order; it is distinguished from a note, which is a promise. *See* U.C.C. § 3-104(e) (2005).

109. Respectively, under U.C.C. section 3-103(a)(5) and (4), the drawer is the "person who signs or is identified in a draft as a person ordering payment," and the drawee is "the person ordered in a draft to make payment."

110. Surprisingly, the "demand" feature is not included in the definitions of cashier's and teller's checks, which are stated in section 3-104(f)(ii) to be checks. This omission must be taken as an oversight.

111. Under section 3-409(a), acceptance is the drawee's signed agreement to pay a draft as presented.

112. Respectively, under section 3-105(a) and (c), "issue" signifies the first delivery of an instrument for the purpose of giving rights, and the "issuer" is the maker or drawer of an instrument.

113. Under section 3-103(a)(1), the acceptor is the drawee who has accepted a draft.

bank check), is an “obligated bank,” liable under section 3-411 also for damages for its wrongful refusal to pay the check. In the final analysis, it is the bank’s obligation attached to a check which makes it a bank check and which, in turn, alleviates dishonor risks.

In practice, upon the issue or certification of a bank check, funds emanating from the payor’s account are set aside to meet it. A claim on a bank check is thus effectively a claim to such funds, deposited with a bank; as a rule, the claim is protected by deposit insurance.¹¹⁴ Furthermore, the bank check may be prepaid by the payor; alternatively, it constitutes proceeds of credit extended to the payor by the obligated bank on terms substantially different from the “on demand” “payability” of the instrument.¹¹⁵ Hence, where the obligated bank suspends payment, it may be unfair to have the payor either effectively pay twice, or vary the payor’s obligation to repay the bank. And yet, having taken the bank check, the payee anticipated payment in full from the bank. All in all, the “conditional payment” feature of a customer’s check does not seem appropriate; a payee who took a bank check in payment may easily be seen as waiving recourse from the payor.

Indeed, in the normal course of events, the delivery of a bank check to a payee serves as more than “conditional payment” for the obligation for which it is given. Thus, under section 3-310(a), and unless otherwise agreed, “if a certified check, cashier’s check, or teller’s check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation.” Stated otherwise, the delivery of a bank check is presumed to bring an absolute discharge and not, as in the case of a customer’s check, a mere suspension, of the obligation paid for by means of the instrument. In other words, “absolute discharge” for a bank check replaces “conditional payment” for a customer’s check.

In effectively substituting the bank’s liability for the debtor’s liability, the effect of a bank check is not dissimilar to that of the completion of a credit transfer by the acceptance of the beneficiary’s bank.¹¹⁶

114. Federal Deposit Insurance Corporation Act, 12 U.S.C. §§ 1813(l)-(m), 1821(a) (2000) (defining “deposit,” “insured deposit,” and “deposit insurance” coverage, respectively, but only with regard to a payee whose name or interest appears on bank records); *see id.* § 1822(c).

115. Arguably, this is a point of distinction between the bank check and the letter of credit, which under U.C.C. section 2-325(a) is presumed to suspend (and not absolutely discharge) the obligation for which it is taken, even though it embodies a bank’s obligation. *See* U.C.C. § 5-102(a)(9)-(10) (2005). Typically, the letter of credit is not prepaid and the applicant’s payment obligation does not vary substantially from that of the bank.

116. This point is expressly noted in official comment 2 to section 4A-405.

Furthermore, payment by bank check may be even more advantageous; a wire transfer cannot be engineered to meet strict timing and conditional requirements. By its nature, it is an unconditional method of payment into a bank account,¹¹⁷ in the course of which the beneficiary does not acquire rights until the occurrence of “final payment” by the beneficiary’s bank—a point on which neither the originator nor the beneficiary has any control. Conversely, delivery of a bank check to the payee may be timed to coincide with the occurrence of external conditions, such as the delivery of goods or documents from the creditor to the debtor, so as to achieve full compliance with “cash-on-delivery” (COD) terms and make it an appropriate payment device for a transaction closing.

Indeed, a bank check taken by a creditor is still to be processed and cleared in the check collection system; the absolute discharge it confers on the debt for which it is taken brings about a separation between “discharge” and “final payment,” with the latter occurring after the former. In fact, this is also the case for card payments at point-of-sale terminals. In the latter case, the payee-beneficiary obtains an instantaneous confirmation of payment, way ahead of the banking process. It is that confirmation (which, depending on the specific system architecture, rules, and underlying contracts, may emanate from the payor’s bank, the payee-beneficiary’s bank, or the system operator) that typically discharges the debt owed by the payor/consumer to the payee-beneficiary/merchant. It is the reliance on this confirmation, rather than on “final payment,” which “demotes” the importance of the determination whether a given retail payment system is a credit- or debit-transfer mechanism.¹¹⁸

Nonetheless, the picture is not one-sided, and compared to the credit transfer, there are some inherent drawbacks to the bank check. To begin with, the analogy with a retail or card system is not perfect. Sums paid by card tend to be low; it may be precisely the opposite for both the bank check and the credit transfer. This difference has two implications. First, for a large sum of money, it may well matter to a payee/creditor which bank is liable; that is, in the normal course of

117. This emerges from section 4A-103(a)(1)(i), under which a payment order should “not state a condition to payment to the beneficiary other than time of payment.”

118. For this point, and a proposal for a legislative framework to govern the “acceptance” of the payor’s request for payment, which envisages liability (i) by the issuer to the payee’s bank and (ii) by the payee’s bank to the payee, see Benjamin Geva & Muharem Kianieff, *Reimagining E-Money: Its Conceptual Unity with Other Retail Payment Systems*, in 3 CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW 669, 687–89 (2005).

events, a payee/creditor is likely to prefer liability of a payee/creditor's bank rather than that of another bank (typically, that of the payor). And yet, the importance of this implication ought not to be overstated; there is nothing to preclude a would-be payee from specifying in the underlying contract with the would-be payor the identity or eligibility of a bank the payee would be prepared to accept as an "obligated bank" on a bank check. A second implication from the relatively large amount, however, is that the fact that a bank check is to be processed and paid may entail a delay in the availability of funds to the payee/creditor. Indeed, in the final analysis, a bank check is not as good as credit available for withdrawal and use in the bank account, colloquially referred to as "money in the bank," which is the point of discharge in a credit transfer.

Three other factors that militate against the use of the bank check and in favor of the use of the credit transfer may also be mentioned. First, the risk of fraud is higher in connection with bank checks than with credit transfers. Thus, particularly certification, but also a cashier's or teller's check, may be forged more easily by an unauthorized instruction purported to be that of a bank over a wire-transfer system.

Second, the liability of a bank obligated on a bank check is well established indeed.¹¹⁹ Equally well established is the absolute nature of that liability, in the sense of not being subject to defenses available to the obligated bank against its own customer, the payor/debtor,¹²⁰ as well as defenses available to the payor/debtor against the payee/creditor. At the same time, a payor/debtor asserting a claim to the bank check on the basis of the rescission of negotiation to the payee may restrain the obligated bank from making payment to the payee by having an injunction properly issued.¹²¹ No comparable restriction to the accountability of the beneficiary's bank in a credit transfer appears to exist.¹²²

119. See *supra* text accompanying notes 112 and 113.

120. Under section 3-305(c), this is so as long as the bank is a holder in due course as defined in section 3-302(a).

121. For both the obligated bank's freedom from defenses and partial subjection to claims, see sections 3-305(c), 3-306, and 3-602(e)(1). See also *id.* § 3-411 cmt. 3; *id.* § 3-602 cmt. 1. A party liable on the instrument other than an "obligated bank" may decline payment on the basis of an adverse claim against indemnity provided by the third-party adverse claimant. See *id.* § 3-602(e)(1)(ii).

122. Though of course, an originator suing the beneficiary may attempt to seize funds available in the beneficiary's account, which may well be the funds paid in connection with the completion of the credit transfer.

Third, use of a bank check in lieu of a credit transfer for large-value payments may give rise to regulatory concerns, particularly so far as compliance with core principles for systematically important systems are concerned. Thus, in a multilateral, predominantly paper-based clearing system, processing is slow, and respective exposures become apparent only upon the completion of clearing. This precludes an ongoing, intra-clearing risk assessment, and hinders effective risk control mechanisms. Particularly, three core principles are said to be compromised:¹²³

1. Core Principle III, requiring that the system should have “clearly defined procedures for the management of credit risks and liquidity risks.”
2. Core Principle IV, requiring the system to provide prompt final settlement in the course of the day of value, “preferably during the day and at a minimum at the end of the day.”
3. Core Principle V, requiring a multilateral netting system “at a minimum” to “be capable of ensuring the timely completion of daily settlement in the event of an inability to settle by the participant with the largest single settlement obligation.”

These concerns led to a recommendation prompting the migration of all large-value checks, including bank ones, to wire systems.¹²⁴

That recommendation specifically took into account Core Principle VIII,¹²⁵ under which a system “should provide a means of making payments which is practical for its users and efficient for the economy.”¹²⁶ In my view, however, even taking into account the unique features of bank check payment with a view toward complying with Core Principle VIII and still meeting regulatory concerns, it may nonetheless be possible to encourage the use of large-value bank checks. What I am proposing for consideration is a mechanism under which a bank check is to be cleared as a credit-push wire payment.

123. BIS, *supra* note 106, at 3, 72 (listing the Core Principles and discussing compliance by check clearing systems, respectively).

124. *See id.* at 73.

125. *Id.* at 72.

126. *Id.* at 3.

Indeed, the check clearing system presently operates on a debit-pull basis; this is not inherent, however, in the check itself and thus not inevitable. True, full conversion of the check collection system to a credit-push mechanism is impractical. At the same time, large-value bank checks may be cleared separately,¹²⁷ and under a different procedure. Under the proposed procedure, the payor will deliver the bank check to the payee, thereby obtaining an absolute discharge. The payee will deliver the instrument to the payee's bank, not for deposit, but rather for immediate presentment to the drawee (namely, the obligated bank on a cashier's or certified check, not teller's check) that will pay over a wire-transfer system such as CHIPS or Fedwire. In the process, no provisional credit is to be given to the payee, though the payee's bank is not to be precluded from lending the payee against the bank check. The operation will bear some similarities to a "drawdown transfer" in which, as instructed by a customer, the beneficiary's bank requests the originator's bank to transfer funds from an account it maintains for that customer to another account of the same customer held at the beneficiary's bank.¹²⁸

Undoubtedly, for the system envisaged in the proposal to work, many details are to be spelled out, such as the matter of bank agreements and funds-system or clearing rules; even a few statutory amendments may be needed. For example, it may be useful to provide for distinguishing features in the form of bank checks to be paid under the proposed system and render them non-transferable.¹²⁹ The elaboration of the details of the scheme is outside the scope of the present article. For our purpose, suffice it to note that the proposed system is available under existing legislation and that it will retain all the benefits of the bank check while resolving or at least mitigating some of its drawbacks compared to wire payment. For example, by clearing over a wire-transfer system, the proposed system is likely to expedite "final payment" and funds availability as well as meet regulatory concerns.

127. *See id.* at 71.

128. *See* official comment 4 to section 4A-104, which nevertheless requires Customer to have an agreement with Originator's Bank, authorizing it to follow instructions of Beneficiary's Bank as an agent for Customer. I submit that the appointment of Beneficiary's Bank as Beneficiary's agent does not necessarily have to be established and communicated to Originator's Bank by means of a direct agreement between the Beneficiary and the Originator's Bank.

129. Under section 3-104(c), in terms of its language, a check need not be stated to be payable to bearer or order. Further, under subsection (d), a statement on a check "to the effect that the . . . order is not negotiable or is not an instrument governed by [Article 3]" is to be disregarded and the instrument is both a check and negotiable instrument. The combined effect may be the invalidation of restrictions as to transferability. *See* GEVA, BANK COLLECTIONS, *supra* note 17, at 159 & nn.146-47.

As well, security features of bank checks processed through the system may be enhanced so as to reduce fraud losses. It seems that without any legislative intervention, it is only the possibility of an adverse claim to a bank check that cannot be avoided by the proposed procedure.

At the same time, while expediting "final payment," the proposed procedure does not affect the earlier discharge by means of the delivery of the bank check subject to the procedure. As in connection with any other bank checks, the separation between "discharge" and "final payment" is thus fully maintained.

CONCLUSION

Throughout the ages, first payment in specie and then payment in banknotes and coins has had an automatic discharging effect. True, precious metal had to be weighed¹³⁰ and banknotes and coins are to be counted;¹³¹ yet the acceptance by the payee of both specie and cash has been part of the discharging "payment" and has not generated a need for a distinct concept of "final payment." This is not, however, the case in connection with payment by means of a funds transfer that purports to give the payee the equivalent of a cash payment through the accountability of a bank.

Thus, while "discharge" is concerned with the payor-payee relationship, "final payment" is a matter between the payee and a bank; the latter concept is required to express cash equivalency, so as to bridge the gap between the result of the banking process and the desired discharge. Indeed, "final payment" is to be made in connection with the conferment of a "discharge," so that both are related topics, the discussion of which are at the heart of any analysis of funds transfers as substitutes for cash payments. It is with this view that they are to be approached in a comprehensive reforming statute covering non-cash payments through the banking system. Compared to legislation elsewhere, the U.C.C. treatment of each of the various aspects of these topics is commendable; what is missing, however, is a general statutory framework that ought to replace piecemeal treatment. It is within such a framework that a solution to specific situations (as, for example, the bank check payable by wire transfer) could be more easily found.

130. The Biblical account in Genesis of Abraham weighing the silver to Ephron in payment for the Machpelah Cave is to the point. *Genesis* 23:16.

131. *Cf. Chambers v. Miller*, (1862) 13 C.B.(N.S.) 125, 143 Eng. Rep. 50 (C.P.).

Indeed, the principal components of the scheme of the U.C.C. governing “finality of payment” and discharge are fundamentally sound. At the same time, not all its specific elements are flawless; per discussion in Part IV above, this is particularly true with regard to milestones set out in Article 4A for credit transfers. Other than such technical points, several more general comments are to be made. First, Article 4A should use the same terminology of Article 4; that is, the accountability of the beneficiary’s bank to the beneficiary ought to be characterized as “final payment” so as to demonstrate that this is the same issue dealt with by Article 4 under the same heading. Second, very likely as part of a broader revision to expand the scope of Article 4, “final payment” ought to cover electronic debit items, such as processed in the ACH system. Third, (and in fact, this supersedes both earlier points) “finality of payment” and discharge ought to be dealt with under a single, cohesive legislative scheme. Certainly, debit transfers are distinct from credit transfers; it is not, however, the uniform solution, but rather the integrated framework, drawing on the commonality of issues, while addressing different solutions reflecting distinct features, that I am advocating. And from such a framework, there is no reason to exclude consumer applications.

“Final payment” denoting the accountability of a bank to the payee typically marks the (absolute) discharge of the debt paid by the funds transfer. While in a debit transfer “final payment” occurs at the payor’s bank, in a credit transfer it takes place at the beneficiary’s bank. Either way, in both credit and debit transfers “payment finality” is achieved by the end of a banking process, which may consist of a series of banking operations, over which the end-parties, payor/drawer and payee/beneficiary (that is, debtor and creditor), have no control. This constitutes a drawback in the case of a time-sensitive payment. For a debit transfer, the solution is the “conditional payment,” which is not available in a credit transfer. Building on the separation between absolute discharge and “finality of payment” in a bank check, this article proposes the consideration of a procedure under which a bank check is to be paid over a wire-transfer system, thus providing a precise point of time for the actual discharge while expediting payment and meeting regulatory concerns. While the mechanism could be constructed under existing law, it might be more beneficial to have it established in the context of a broader legislative framework.

ADDENDUM

In 2005, Cambodia passed a Law on Negotiable Instruments and Payment Transactions.¹³² Chapter V of this Law provides for a comprehensive payment law governing rights and liabilities of participants in a “payment transaction,” whether a credit or debit transfer, retail or wholesale, paper-based or electronic. The two end parties to a payment transaction are the originator and the receiver, who are, respectively, the payor and payee in a credit transfer, and the payee and payor in a debit transfer. Their respective banks are the originating and destination banks. An instruction to a bank to make or collect payment is a “payment order,” whose parties are a sender (which could be a sending bank) and a receiving bank. In each payment transaction, the originator is the first sender, and the destination bank is the last receiving bank.

Chapter V of the Law endeavors to provide for a cohesive single legislative scheme governing “finality of payment” and discharge as recommended by this article. The following provisions in Chapter V address these concepts:

SECTION 4—COMPLETION OF CREDIT TRANSFER AND DISCHARGE

Article 207

1. A credit transfer is completed when the destination bank is paid. In an in-house transfer the bank is paid when it debits the originator’s account with the amount of the payment order. In an interbank credit transfer, the destination bank is paid when the interbank settlement that includes the sending bank’s payment order is completed.
2. A credit transfer is completed at the opening of the next banking day following the banking day the payment order was received by the destination bank, or its value date, whichever is later, if at that time there is adequate cover to the credit of the sender with

132. Law of Negotiable Instrument & Payment Transaction, Law No. NS/RKM/1005/030 of Sept. 19, 2005, available at <http://www.nbc.org.kh/laws.asp?id=8> (unofficial translation of the National Bank of Cambodia). In drafting this piece of legislation, the author advised the authorities in Cambodia as part of the Technical Assistance Program of the International Monetary Fund. Any view expressed below, however, is that of the author and should not be interpreted as that of the International Monetary Fund, its Executive Board, or its management.

2008]

PAYMENT FINALITY AND DISCHARGE IN FUNDS TRANSFERS

673

the destination bank, and unless the destination bank rejected the payment order not later than one hour thereafter.

3. Where the receiver has no pre-existing account with the destination bank, or where such account has been closed or blocked for incoming payments, the credit transfer is completed upon payment of the destination bank to the receiver.

Article 208

1. Upon the completion of a credit transfer, the destination bank becomes indebted to the receiver in the amount of the payment order it received, and subject to reasonable charges it may deduct, shall pay the receiver promptly.
2. Payment to the receiver by the destination bank shall be made by crediting the receiver's account not later than on the banking day following the completion of the credit transfer. Where such account does not exist or cannot be identified with reasonable certainty, or where so instructed, the destination bank is to advise the receiver promptly of the availability of funds in the destination bank's hands and pay the receiver as instructed.
3. Where the receiver or the receiver's account is not identified in the payment order received by the destination bank with adequate certainty so as to raise reasonable doubts as to the receiver's identification, the destination bank shall reject the payment order and advise its sender of its rejection.
4. Where the destination bank paid the receiver or undertook to pay the receiver prior to being paid, such payment or undertaking shall be final and irrevocable and the credit transfer is deemed to have been completed, except that each receiving bank may be owed by its sender. The destination bank's undertaking to pay may be given directly to the receiver or be under an inter-bank agreement.

Article 209

1. Where the credit transfer has been made in payment of a debt owed by the originator to the receiver, unless otherwise agreed

between them, the debt is discharged when the payment transaction is completed. Discharge is to the extent of the payment that completed the payment transaction.

2. Discharge shall take place prior to completion of the payment transaction if and as soon as a guarantee of payment is either accepted by the receiver or, other than in circumstances governed by Article 207(3), confirmed to the receiver by the destination bank.
3. A guarantor or a destination bank guaranteeing or confirming payment under paragraph 2 thereby undertakes to pay and becomes indebted to the receiver in the amount guaranteed or confirmed.

SECTION 5—COMPLETION OF DEBIT TRANSFER AND DISCHARGE

Article 210

1. A debit transfer is completed when the destination bank debits the receiver's account as instructed in the payment order it received and has not reversed the debit and rejected the payment order until the end of the banking day following the receipt. Where a payment order instructs the destination bank to debit an identifiable account maintained with it, the debit transfer is completed on the conclusion of the banking day that follows receipt of the payment order even before a debit is posted to the receiver's account, provided the payment order is not properly rejected until that time.
2. Until the close of the banking day following its receipt, the destination bank may reject the payment order. It shall become entitled from its sender to a settlement for the amount paid to that sender, by advising its sender and the originating bank, if these are two separate banks, of its rejection. Rejection and entitlement from its sender are automatic by operation of law when the receiving bank has been closed by the supervisory authorities before the close of the banking day following receipt of the payment order.

2008]

PAYMENT FINALITY AND DISCHARGE IN FUNDS TRANSFERS

675

3. Upon receiving notice of the rejection, each bank sender, other than the originating bank, shall advise its own sender, and has a corresponding right to obtain settlement from that sender. Each bank sender, other than the originating bank, shall advise its sender of the rejection not later than on the banking day following the day it received notice of the rejection.
4. Upon receiving notice of the rejection, the originating bank shall promptly, and no later than on the following banking day, advise the originator of the rejection, and may reverse any provisional credit previously posted to the originator's account, or otherwise, recover from the originator any payment previously made for the payment order.
5. Notwithstanding paragraph 2 of this Article, the destination bank shall be liable to the receiver for wrongfully dishonoring a payment order where unlawfully or without legal justification it rejects the payment order:
 - (i) With the knowledge of the receiver's authority for the debit transfer;
 - (ii) Notwithstanding the proper identification in the payment order received by the bank of an existing receiver's account held at it; and
 - (iii) There is adequate cover in that account.
6. Time periods under Articles 210 and 211 may be shortened by agreement or regulation.

Article 211

1. Upon the completion of a debit transfer, the destination bank and each receiving bank that obtained payment from its own receiving bank shall be liable to its sender in the amount of the payment it received. Payment by the destination bank to its sender shall be in the amount of the debit to the receiver's account and shall be made not later than on the banking day following the completion of the debit transfer. Payment by any other receiving bank shall be made not later than the banking day following the receipt of its own payment.

2. Upon receiving payment...the originating bank shall be indebted to the originator in the amount it received. To that extent, any provisional credit given to the originator shall be final. Before such credit becomes final, the originating bank shall not be required to release funds to the originator, and unless agreed otherwise, any release of funds prior to the completion of the debit transfer is provisional until the completion.

Article 212

1. Where an authorized debit transfer has been made in payment of a debt owed by the receiver to the originator, unless otherwise agreed between them, the debt is discharged when the payment transaction is completed. Discharge is the amount of its completion.
2. Discharge shall take place prior to completion of the payment transaction if and as soon as a guarantee of payment is either accepted by the originator or confirmed to the originator by the originating bank.
3. A guarantor or an originating bank guaranteeing or confirming payment under paragraph 2 thereby undertakes to pay and becomes indebted to the originator in the amount guaranteed or confirmed.

SECTION 2—PAYMENT ORDERS

Article 202

1. Settlement for interbank payment orders may take place:
 - (i) On banks' settlement accounts with the National Bank of Cambodia, in which case it is governed by Regulation on the Operation of Settlement Accounts;
 - (ii) By posting a debit or credit to an account, other than a settlement account, one bank has with the other or with a third bank. Such debit or credit may be either for each payment order individually or for batches of payment orders in which case it may be at the end of a clearing cycle;
or

2008]

PAYMENT FINALITY AND DISCHARGE IN FUNDS TRANSFERS

677

- (iii) By any other means in which an obligation is satisfied.
- 2. The time for settlement under paragraph 1 of this Article occurs as follows:
 - (i) Under paragraph 1(i), when settlement is completed under Regulation on the Operation of Settlement Accounts issued by the National Bank of Cambodia;
 - (ii) Under paragraph 1(ii), by means of a debit to an account, when the debit is posted to the account.
 - (iii) Under paragraph 1(ii), by means of a credit to an account, when the credit posted to the account is used, or if not used, at the opening of the next banking day following the day on which the credit is available for use and the bank whose account has been credited, learns of that fact.
 - (iv) Under paragraph 1(iii), as determined by the principles of law that determine when the obligation is satisfied.
- 3. This paragraph applies where settlement under paragraph 1(ii) of this Article takes place pursuant to an agreement or rules governing the completion of interbank settlement other than in the National Bank of Cambodia and is for bilaterally or multilaterally netted amounts of payment orders. Notwithstanding paragraph 2(ii) of this Article, such settlement occurs when it is completed according to the agreement or rules.
- 4. Regulations issued by the National Bank of Cambodia may restrict or otherwise govern circumstances under which settlement under paragraph 1(ii) or (iii) of this Article may take place as well as modify the time of its occurrence.