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The Wireless Wire Do M-Payments and UNCITRAL Model Law on International Credit Transfers Match, Raw?

Benjamin Geva
Osgoode Hall Law School of York University, bgeva@osgoode.yorku.ca

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Geva, B. (2013). The Wireless Wire Do M-Payments and UNCITRAL Model Law on International Credit Transfers Match, Raw? *Banking & Finance Law Review*, 27(2), 249-264.

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This paper examines the suitability of the UNCITRAL Model Law on International Credit Transfers 1992 ("MLICT") to cover IRTs initiated and/or completed by mobile devices. The MLICT is a comprehensive statute covering rights and obligations incurred in the course of an international credit transfer.

The paper concludes with the observation that low-value credit transfers were envisaged as covered by the MLICT and yet were not central in the work leading to the model law. Overall, the ML/CT is appropriate to cover IRTs. Only a few adjustments to the model law should be considered. Consumer-protection aspects, primarily regarding disclosures, should be added; consumers' liability for unauthorized transfers should be rethought and redrafted.

Keywords:
Law, Money, Banking, International Remittance Transfers, IRT

Author(s):
Benjamin Geva
Professor
Osgoode Hall Law School
York University, Toronto
E: bgeva@osgoode.yorku.ca

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CARSWELL®

The Wireless Wire: Do M-Payments and UNCITRAL Model Law on International Credit Transfers Match?

Benjamin Geva[*]

In recent years mobile devices have been increasingly used for the transmission of data, including the initiation and receipt of payments. Payments executed include "international remittance transfers" ("IRTs"), which are cross-border, person-to-person payments of a relatively low value. An IRT is likely to involve a "settlement chain" consisting of a series of separate payments.

This paper examines the suitability of the UNCITRAL Model Law on International Credit Transfers 1992 ("MLICT") to cover IRTs initiated and/or completed by mobile devices. The MLICT is a comprehensive statute covering rights and obligations incurred in the course of an international credit transfer.

The paper concludes with the observation that low-value credit transfers were envisaged as covered by the MLICT and yet were not central in the work leading to the model law. Overall, the MLICT is appropriate to cover IRTs. Only a few adjustments to the model law should be considered. Consumer-protection aspects, primarily regarding disclosures, should be added; consumers' liability for unauthorized transfers should be rethought and redrafted.

L'utilisation des appareils mobiles pour la transmission de données, y compris l'envoi et la réception de paiements, n'a cessé d'augmenter au cours des dernières années. Les paiements ainsi réalisés comprennent ceux effectués par transferts de fonds internationaux, qui sont des paiements transfrontaliers de sommes relativement peu importantes effectués de personne à personne. Or, un transfert de fonds international entraîne habituellement une « chaine de règlement » comportant une série de paiements distincts.

L'auteur examine la pertinence de la Loi type de la CNUDCI sur les virements internationaux de 1992 — laquelle traite d'une façon exhaustive des droits et des obligations créés à l'occasion d'un virement international — au cas des transferts de fonds internationaux réalisés à l'aide d'appareils mobiles.

Selon l'auteur, même si les rédacteurs de la Loi type ont pris en compte les virements de faible valeur, ils n'y ont pas accordé un rôle central lors des travaux de rédaction. Dans l'ensemble, la Loi type peut s'appliquer aux paiements effectués

* Professor of Law, Osgoode Hall Law School of York University, Toronto. For research assistance, I am grateful to Christian Chamorro-Courtland and Sarah Templeton.

par transferts de fonds internationaux mais des ajustements devraient y être apportés. Il y aurait lieu d'y ajouter un volet sur la protection du consommateur, principalement en ce qui à trait à la communication de renseignements, de modifier et de réécrire les dispositions concernant la responsabilité imputable au consommateur en cas de virements non autorisés.

1. INTRODUCTION

The use of mobile phones has recently expanded beyond voice calls. Together with other mobile communication devices, such as personal digital assistants (PDAs), wireless tablets, and mobile computers, these devices facilitate payment for goods or services by means of data transfer.[1] Any payment method which is wireless at least in part, namely in which a mobile device is used for the purpose of initiation, activation, confirmation, and/or giving or receiving advice concerning the transaction, is an m-payment.

Domestic and international innovations have proved significant in developing nations lacking extensive banking and land-line communication infrastructure. Consumers, including migrant workers remitting payments to their families, make substantial use of m-payments.[2]

M-payments give rise to regulatory and legal issues. This paper focuses on one aspect, examining whether the UNCITRAL Model Law on International Credit Transfers (MLICT)[3] is appropriate to govern the rights and duties of participants in m-payments. It concedes that the predominantly commercial wire transfer precipitated the MLICT but argues that there is nothing to preclude applying the MLICT to the predominantly consumer wireless m-payment. Part 2 sets out the elements of the international m-payment. Part 3 provides an analysis of the MLICT. Concluding Part 4 assesses what changes are needed to make the MLICT better govern m-payments.

2. THE INTERNATIONAL M-REMITTANCE

Payment instructions are processed either individually, in wholesale systems, or in bulk, in retail systems. Where they "push" funds from the payer's account to that of the payee, causing the banking operation to start with a debit to the payer's account, payment instructions initiate credit transfers.[4]

Retail payment devices are either access devices or stored-value products (SVPs). The former allow consumers to access value kept in their accounts, a record of which is retained by a depositary. Conversely, in the latter, a record of the value available to the consumer is stored in an electronic device kept in the con-

---

1 See *e.g.*, "Not just talk", *The Economist* 398: 8718 (29 January 2011) 68.

2 See *e.g.*, Michaël Van Bossuyt & Leo Van Hove, "Mobile payment models and their implications for NextGen MSPs" (2007) 9:5 Info 31–43; Rhys Bollen, "Recent Developments in Mobile Banking and Payments" (2009) JIBL 454.

3 See *infra*, n. 14, and full discussion in Part 3, below.

4 For the distinction between debit and credit transfers, see *e.g.*, Benjamin Geva, "International Funds Transfers: Mechanisms and Laws" in Chris Reed, Ian Walden & Laura Edgar, eds., *Cross-Border Electronic Banking: Challenge and Opportunities* (London; Hong Kong: Lloyd's of London Press, 2000) 1 at 1-2.

sumer's possession.[5] In the former, value is referred to as "funds." In the latter, it is referred to as "electronic money." Both funds and electronic money constitute value credited to an account, operated either by the depositary (for an access device), or on the device (for an SVP). These concepts being thus indistinguishable, funds will be used below in a broad sense, so as to include electronic money.[6]

Depending on each individual plan, a mobile device can be used either for access to a bank account or as an SVP. Mobile devices are mostly used for low-value (retail) payments. Both asset accounts and credit lines can be accessed. Furthermore, access may be provided to a bank account of a system operator who maintains sub-accounts for each subscriber. In the latter case, the mobile facility is "prepaid".[7] Other than for "proximity payments",[8] communication from the mobile device can be facilitated by either Short Message Service (SMS), commonly known as text messaging, or by Wireless Application Protocol (WAP), a Web-based process.

Instructions communicated over a mobile device may initiate and/or complete an international remittance transfer (IRT). IRTs are cross-border, person-to-person payments of low value. They mostly are recurrent payments by migrant workers; however, they are indistinguishable from other low-value cross-borders transfers. They may thus discharge low-value debts. The institutions that provide the service to the payer and the payee, and with which these parties are in direct contact, are Remittance Service Providers (RSPs).[9] They may not necessarily be deposit-taking institutions, but rather may be "money transmitters"[10] or "payment institutions".[11]

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5 An SVP may be in the form of either "electronic purse", in which the value is "loaded" on a card, or "digital cash", in which value is "loaded" into computer-software.

6 See *e.g.*, Benjamin Geva & Muharem Kianieff "Reimagining E-Money: Its Conceptual Unity with Other Retail Payment Systems" (2005) 3 Current Developments in Monetary and Financial Law 669.

7 For pre-paid card facilities, see *e.g.*, Benjamin Geva, "Recent International Developments in the Law of Negotiable Instruments and Payment and Settlement Systems" (2007) 42 Tex Int'l LJ 685 at 699–705.

8 Near-field communication (NFC), using a radio-frequency identification (RFID) technology, is available for these payments. NFC is premised on communication made in close proximity between silicon chips and an active RFID-enabled reader. See *e.g.*, Julia S. Cheney, "An Examination of mobile banking and Mobile Payments: Building adoption as Experience Goods?" (June 2008), online: Federal Reserve Bank of Philadelphia <http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2008/D2008MobileBanking.pdf>.

9 See generally Bank for International Settlements & The World Bank, "General Principles for International Remittance Services" (January 2007), online: <http://siteresources.worldbank.org/INTPAYMENTREMMITTANCE/Resources/New_Remittance_Report.pdf> [IRS].

10 Governed in the United States by Article 2 of the *Uniform Money Services Act* (2000), developed by the National Conference of Commissioners on Uniform State Laws.

11 Governed by Chapter 1 of Title II of the European Commission's Payment Services Directive. See EC, *Commission Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market*, [2007] OJ L 319/1 [PSD].

A remittance typically commences with the payer/originator's instruction to the capturing RSP and is completed by the payment to the payee/beneficiary by the disbursing RSP. As such it is a credit transfer. The link between the capturing and disbursing RSP is provided by "banks", in the sense of deposit-taking institutions.

In the process of transmission, payments are handled in bulk so as to be consolidated, netted, and redistributed in various stages. Indeed, a remittance transfer likely "involve[s] a 'settlement chain' — a series of separate payments — each of which may be made differently." For each payment, "from capturing agent through to disbursing agent," settlement typically occurs "by means of a credit transfer from the payer to the payee's bank, with one of the payments being cross-border (typically by correspondent banking)." End-payments — from the originator to the capturing RSP's agent, as well as between the disbursing RSP's agent to the beneficiary — are typically single (separate for each transaction). Such payments are not necessarily from and into a bank account. However, "the payment between agents and the RSP may be batched and possibly netted . . . [although] the scope for netting may be limited given the largely one way nature of the remittance flow."[12]

Similarly, payments between RSPs and banks, and between banks, are to be batched and netted. An RSP is likely to settle with a bank in accounts the RSPs maintain with that bank. Banks are likely to settle with each other either on correspondent accounts they maintain with each other or on the books of a central counter-party such as the central bank. Communication among the non-end participants occurs over a regular communication network. The network may be proprietary (for an entity), inter-bank, or that available between an RSP-customer and its bank. Taking into account the complex settlement procedures and the easy flow of communication, it is not unusual for payment orders to move faster than funds.

Remittance services may be provided in unilateral, franchised, negotiated, or open networks. A unilateral service is proprietary to a single RSP global bank. A franchised service is characterized by a proprietary service provided by a central provider. In a negotiated service, an RSP negotiates with other institutions in order to create an adequate network of access points. Open services are provided on the international banking system that can be broadly accessed.[13] The present discussion focuses on the last three types of services, particularly where the RSPs are not "banks" in the traditional sense of the word.

3. UNCITRAL MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

(a) Introduction

The UNCITRAL adopted the MLICT on June 21, 1985.[14] Subsequently, the United Nations General Assembly encouraged UN member states to consider its

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12 *Supra*, n. 9 at 41-42. For elements of a remittance service, see generally *ibid.*, at 40–42.

13 *Supra*, n. 12 at 9-10.

14 *UNCITRAL Model Law on International Commercial Arbitration*, UNCITRALOR, Annex I, UN Doc A/40/17 (1985). Hereafter, references to "art." and "arts." refer to articles of the MLICT, unless otherwise specified.

enactment as national legislation.[15] Basic concepts and definitions in the MLICT can be traced to UCC Article 4A. There are, however, some differences in terminology, scope, and rules.

The payment transaction under MLICT is called a "credit transfer". Art. 2(a) defines it as "the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary." It includes "any payment order issued by the originator's bank or any intermediary bank ("IB") intended to carry out the originator's payment order."

Under art. 2(h) "funds" or "money" include "credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States." Art. 2(b) defines a "payment order" as "an unconditional instruction, in any form, by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money if (i) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and (ii) the instruction does not provide that payment is to be made at the request of the beneficiary."

The "payment order" (often referred to below as "order") underlies a bilateral relationship between a sender and receiving bank ("RB"). The former is the issuer "including the originator and any sending bank."[16] "RB" is defined in art. 2(f) as "a bank that receives a payment order." Any RB other than the originator's and the beneficiary's is an "IB".

The two end participants in a credit transfer are the originator, acting as the payer, and the beneficiary, acting as the payee. "Originator" is defined in art. 2(c) as "the issuer of the first payment order in a credit transfer." "Beneficiary" is defined by art. 2(d) as "the person designated in the originator's payment order to receive funds as a result of the credit transfer."

A credit transfer falls under the MLICT whenever "any sending bank and its receiving bank are in different States."[17] Stated otherwise, whenever one order of which the credit transfer consists is between banks in different countries, the entire credit transfer is international and governed by the MLICT.[18] While not excluding credit transfers from or to consumers, the MLICT "does not deal with issues related to the protection of consumers."[19]

"Bank" is not specifically defined. It may be taken to mean a deposit-taking institution. However, under art. 1(2), "[t]his law applies to other entities that as an ordinary part of their business engage in executing payment orders in the same manner as it applies to banks." This is broad enough to cover "money transmitters", including RSPs. Furthermore, under arts. 8, 11, 12, and Y — dealing with the obli-

15 *Report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session*, GA Res 47/34, UNGAOR, 47th Sess, Supp No 49, UN Doc A/RES/47/49 (1992), 288.

16 Art. 2(e).

17 Art. 1(1). "States" must be such in the international sphere, as opposed to states in a federal country.

18 However, this will include its conflict of law rule, where adopted. See Part 2(c), below.

19 Note to art. 1.

gations of an RB other than the beneficiary's bank ("BB"), time for an RB to execute an order and give notices, revocation, and conflict of laws, respectively — "branches and separate offices of a bank" are to be treated as separate banks.

The sender's order to the RB must be "unconditional."[20] Departing from UCC Article 4A, art. 3 states that the MLICT applies whenever an RB executes a sender's conditional instruction "by issuing an unconditional payment order".

"Except as otherwise provided in this law", art. 4 permits variation by agreement. However, the MLICT has no equivalent to UCC §4A-501(b), dealing with the effect on third parties of variation by funds-transfer system rule.

(b) Sender's Obligations

Under art. 5(1), a "sender is bound by a payment order or an amendment or revocation of a payment order if it was issued by the sender or by another person who had the authority to bind the sender." Furthermore, under art. 5(2), for a payment order that "is subject to authentication other than by means of a mere comparison of signature," a purported sender not bound under art. 5(1) is nonetheless bound if "(a) the authentication is in the circumstances a commercially reasonable method of security against unauthorized payment orders, and (b) the receiving bank complied with the authentication." Nevertheless, under art. 5(4), a purported sender is not bound by art. 5(2) if:

> it proves that the payment order as received by the receiving bank resulted from the actions of a person other than
>
> > (a) a present or former employee of the purported sender, or
> >
> > (b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.

But even then, liability may be fastened on the purported sender "if the receiving bank proves that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender."

"Authentication" is defined by art. 2(i) as "a procedure established by agreement to determine whether a payment order or an amendment or revocation of a payment order was issued by the person indicated as the sender."

Under art. 5(5), "A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank." However, the sender is not bound by an erroneous duplicate of, or an error or discrepancy in, a payment order if:

> (a) the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates, errors or discrepancies in a payment order, and
> (b) use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate, error or discrepancy.

Finally, under art. 5(6), a "sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the beginning of the execution period."

Revocation of an order is available to the sender as long as "the revocation

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20 Art. 2(b).

order is received" by the receiving bank "at a time and in a manner sufficient to afford [it] a reasonable opportunity to act."[21]

(c) Conflict of Laws

Art. Y is a mere suggestion by UNCITRAL. Thereunder, except for questions relating to the sender's authority and in the absence of an agreement by the parties, "the law of the State of the receiving bank shall apply" to the rights and obligations arising out of an order. "State" is broadly defined to include a territorial unit having different rules of law that is one of several such units making up the State.

The MLICT does not provide for the law applicable to the rights and obligations between the BB and the beneficiary. Nor does it deal with the issue of when payment is made by the originator to the beneficiary. Departing from UCC Article 4A, the MLICT does not provide for the selection of the law of a particular jurisdiction by a funds-transfer system rule to bind remote parties on notice.

(d) Execution

Other than for the BB, "execution" is defined in art. 2(1) as the issue of an order intended to carry out the order received by the RB. Unlike under UCC Article 4A, however, "execution" is also used in MLICT arts. 9(1)(a), 10(2), and (5) in relation to the BB, where it means carrying out or completing the funds transfer.

Under art. 11(1), incorporated by reference into the definition of "execution period" in art. 2(k), in the absence of another determination, an RB is required to execute an order on the banking day it is received.[22] However, if the RB does not execute an order on the banking day it is received, the RB is mandated to execute "on the banking day after the order is received." This means that, while not the norm, next-day execution is permissible.[23] Unlike Article 4A, the MLICT provides that, so far as an RB other than the BB is concerned, the expiration of the "execution period" may mark acceptance.[24]

(e) Acceptance Other Than by BB

Under art. 2(l), "in so far as it applies to a receiving bank other than the beneficiary's bank, [execution] means the issue of a payment order intended to carry out the payment order received by the receiving bank."

Under art. 7(2)(b), (c), and (d), other than by execution, acceptance by an RB other than a BB takes place either by giving notice of acceptance to the sender or by debiting the sender's account as payment for the order. In two situations, acceptance may also occur by the inaction of such an RB. First, under art. 7(2)(a), acceptance may occur by merely receiving the sender's order, "provided that the sender

21 Art. 12(1), (2).

22 As under UCC §4A-106, art. 11(5) provides that receipt by the receiving bank after "the receiving bank's cut-off time" may be treated as next-day receipt.

23 In principle, however, unless the payment order specifies a later date, under Art. 11(2), "[i]f the receiving bank executes the payment order on the banking day after it is received . . . the receiving bank must execute for value as of the day of receipt."

24 Art. 7(2)(e), (3).

and the [receiving] bank have agreed that the [receiving] bank will execute . . . orders from the sender upon receipt." Second, under art. 7(2)(e), in conjunction with art. 7(3), acceptance occurs automatically at the end of "the banking day following the end of the execution period,"[25] unless notice of rejection is given by the RB to the sender within that period. Notice is excused and no acceptance by inaction under art. 7(2)(e) takes place where neither funds nor payment is made available by the sender, or where there is insufficient information to identify the sender.[26]

(f) Acceptance by BB

Under art. 19(1), acceptance by the BB marks the completion of the funds transfer. Under a text suggested by UNCITRAL, acceptance by the BB may mark the discharge of the originator's obligation to the beneficiary. Art. 19(1) states that acceptance by the BB further generates a debt owed by the BB to the beneficiary "to the extent of the payment order accepted by it."[27] Under art. 10(1), this debt is discharged by the BB by either placing the funds at the beneficiary's disposal or otherwise applying the credit "in accordance with the payment order and the law governing the relationship between the bank and the beneficiary."

Under art. 9(1), the BB accepts an order at the earliest of the following eight events:

> (a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt;
>
> (b) when the bank gives notice to the sender of acceptance;
>
> (c) when the bank debits an account of the sender with the bank as payment for the . . . order;
>
> (d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary;
>
> (e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit;
>
> (f) when the bank otherwise applies the credit as instructed in the payment order;
>
> (g) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court or other competent authority; or
>
> (h) when the time for giving notice of rejection under paragraph (2) has elapsed without notice having been given.

Art. 9(2), requires a BB that does not accept an order to give notice of rejection no later than on the banking day following the end of the execution period. Notice is excused where the sender is unidentifiable or has not paid (and has no

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25 Art. 2(k).

26 Time for the execution for an order accepted under art. 7(2)(e) is governed by art. 11(3).

27 Completion and discharge also occur where charges were deducted by receiving bank(s) from the amount of the originator's order, in which case the originator is still liable to the beneficiary for the amount of the charges. See art. 19(2).

funds with) the BB. Acceptance by passage of time under art. 9(1)(h) is thus effective only for a BB that has been paid other than by debiting the sender's account under art. 9(1)(c).

(g) RB's Obligations

The MLICT fastens on an RB obligations relating to assistance, response to a payment order addressed to it, and inquiry and notice.

(i) Assistance

Until a credit transfer is completed, "each receiving bank is requested to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the banking procedure of the credit transfer."[28] No parallel obligation is fastened on an RB under UCC Article 4A.

(ii) Acceptance and Rejection

An RB is free to either accept or reject an order addressed to it. An order expires if it is neither accepted nor rejected before the close of business on the fifth banking day following the end of the execution period.[29]

Having accepted an order, an RB other than the BB becomes obligated to issue a timely conforming order "that is consistent with the contents of the payment order received by the RB and that contains the instructions necessary to implement the credit transfer."[30]

A BB that has accepted an order becomes obligated "to place the funds at the disposal of the beneficiary, or otherwise to apply the credit, in accordance with the payment order and the law governing the relationship between the bank and the beneficiary."[31] Liability to the beneficiary by the BB is "to the extent provided by the law governing the relationship between the beneficiary and the bank."[32]

Contrary to the position of UCC Article 4A, an RB that has not rejected an order may be required under the MLICT to make inquiries or to give notices, regardless of whether acceptance occurred. The requirements for an RB other than a BB are set out in art. 8; the requirements for a BB are outlined in art. 10. As a rule, notice to the sender must be given "on or before the banking day following the end of the execution period,"[33] while notice to the beneficiary must be given within the execution period.[34] In addition, an inquiry directed to the sender must be made "before the end of the execution period."[35]

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28 Art. 13.

29 Arts. 8(3) and 9(3).

30 Art. 8(2).

31 Art. 10(1).

32 Art. 17(6).

33 Art. 11(4), referring to arts. 8(4), (5), 10(2), (3), (4).

34 Art. 10(5).

35 Art. 8(3).

(iii) Notice

Each RB involved in a transaction has five inquiry and notice obligations. First, under art. 8(3), where it is unfeasible or uneconomical for an RB other than the BB to follow the sender's instructions specifying an IB or a funds-transfer system, the RB shall be taken to have complied with art. 8(2) if, prior to the end of the execution period, "it inquires of the sender what further actions it should take." This contrasts with UCC §4A-208(b), under which an RB, acting without knowledge of an order's inconsistency between the name and number identifying an IB, may act either on the number or on the name. If it is aware of the inconsistency, an RB may not execute the order and need not make any inquiry.

Second, in the case of insufficient information about an order,[36] where the sender can be identified, the RB is mandated to give notice to the sender of the insufficiency on or before the banking day following the end of the execution period.[37]

Third, in the case of detection by the RB of an inconsistency in the information relating to the amount of money to be transferred, where the sender can be identified, the RB is required to advise the sender of the inconsistency on or before the banking day following the end of the execution period.[38]

Fourth, where the sender can be identified, a BB detecting inconsistency in the information that is intended to identify the beneficiary is required under art. 10(4) to give notice of the inconsistency to the sender "on or before the banking day following the end of the execution period."[39] There is no parallel in the MLICT to UCC §4A-207(b)(1), under which a bona fide BB, unaware of the inconsistency between a number and name identifying the beneficiary, may rely on the number (but not the name) as the proper identification of the beneficiary.[40]

Finally, in the case of an order instructing payment to a beneficiary who does not maintain an account at the BB, the bank is required under art. 10(5) to give notice to the beneficiary that it is holding funds for the beneficiary's benefit. Such notice must be given to the beneficiary within the execution period.[41] Notice by the BB is required only where the bank has sufficient information to give the notice, and where the order does not release the bank from the duty. In contrast, under UCC §4A-404(b) notice must be given to the beneficiary solely by a BB that has accepted the order and only when the order requires the BB to give the notice.

Under art. 17(4), the failure by an RB other than the BB to give any notice required to be given to the sender under art. 8(4) or (5) triggers liability to pay interest to the sender for "any payment that [the RB] has received from the sender

36 Both arts. 8(4) and 10(2) apply to "an instruction . . . that appears to be intended to be a payment order but does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data."

37 Arts. 8(4), 10(2).

38 Arts. 8(5), 10(3).

39 Art. 10(4), by reference to art. 11(4).

40 This result can be achieved under the MLICT by contract, permitted under art. 4.

41 For this time frame, see arts. 2(k), 11(1).

[for an accepted order] for the period during which it retains the payment."[42] Similarly, under art. 17(5), the failure by a BB to give any notice it is required to give to the sender under art. 10(2) or (3) triggers liability to pay interest to the sender "on any payment that [the BB] has received from the sender [for the accepted order], from the day of payment until the day that it provides the required notice." Under art. 17(6), liability of the BB for its failure to give notice to the beneficiary under art. 10(5) is determined by general law. "Interest" is defined in art. 2(m) as "the time value of the funds or money involved, which, unless otherwise agreed, is calculated at the rate and on the basis customarily accepted by the banking community."

(h) Correction and Restitution

Having executed an order in a smaller amount than in the order it accepted, other than as a result of the deduction of its charges, the RB is obligated to issue an order for the difference to its own RB.[43] Conversely, having executed an order in a greater amount than that of the order it accepted, so that the beneficiary has been overpaid, the RB may "recover the difference from the beneficiary as may otherwise be provided by law." The overpaid beneficiary may raise defences available under the law of restitution.[44]

(i) Sender's Payment and Remedies

(i) Sender's Payment

Art. 6 provides that a sender's payment to an RB is made by means of: (i) a debit posted to the sender's account with the RB; (ii) a credit posted to the RB's account at the sending bank or another bank; (iii) final settlement either at a central bank, or at a receiving bank (in which case it must be made according to the rules of a funds-transfer system, or pursuant to a bilateral netting agreement); or (iv) under general principles of law.

Payment by means of credit posted to the RB's account at the sending bank or another bank coincides with the use of the credit. However, if credit is not used, payment is delayed until "the banking day following the day on which the credit is available for use and the RB learns of that fact."[45]

(ii) Refund

Under art. 14(1), if a credit transfer is not completed, the originator's bank becomes obligated to refund to the originator "any payment received from it, with interest from the day of payment to the day of refund." This is a "money-back guarantee" that under art. 14(2) may be varied by agreement only "when a prudent

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42 Art. 8(5), which concludes by stating that "[a]ny interest payable under article 17(4) for failing to give the notice required by [art. 8(5)] shall be deducted from any interest payable under article 17(1) for failing to comply with [art. 8(2)]."

43 Art. 15.

44 Art. 16.

45 Art. 6(b)(i) and (ii).

originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfers."

Contrary to under Article 4A, "leapfrogging" is specifically permitted. Thus, under art. 14:

> (4) A bank that is obligated to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender. Any bank subsequent to that prior sender is discharged to the same extent.
>
> (5) An originator entitled to a refund under this article may recover from any bank obligated to make a refund hereunder to the extent that the bank has not previously refunded. A bank that is obligated to make a refund is discharged from that obligation to the extent that it makes the refund directly to the originator. Any other bank that is obligated is discharged to the same extent.[46]

The last obligated bank in the chain remains liable.

(iii) Interest and Damages

Late completion of a credit transfer due to the noncompliance by an originator's bank or an IB with the obligation to timely execute a sender's order is governed by art. 17(1). Such an RB becomes liable to the beneficiary for "interest on the amount of the payment order for the period of delay caused by the RB's noncompliance." This liability "may be discharged by payment [of the defaulting bank] to its RB or by direct payment to the beneficiary." Under the first alternative, the second RB (receiving payment) is required to "pass on the benefit of the interest," all the way to the beneficiary.[47] Under art. 17(3) the originator may recover interest payable under art. 17(1) only "to the extent the originator has paid interest to the beneficiary on account of a delay in the completion of the credit transfer." Unlike under UCC §4A-305, expenses arising out of the funds transfer, incidental expenses, and reasonable attorneys' fees are not stated to be recoverable and no liability runs in the originator's favour.

Art. 17(7) permits some variation by agreement of rules governing liability provisions. Variation is permitted under an interbank agreement. Towards a nonbank customer a bank "may agree to increase its liability" but not to reduce it. In contrast to UCC Article 4A, an effective increase of liability need not necessarily be provided "in an express written agreement of the receiving bank."[48]

The most fundamental departure from the Article 4A scheme appears in art. 18. Having established the exclusivity of the remedies under art.17, art.18 states that an exception to this rule is that "any remedy that may exist when a bank has improperly executed, or failed to execute, a payment order (a) with the specific intent to cause loss, or (b) recklessly and with actual knowledge that loss would be likely to result."[49] Under such circumstances, even the recovery of consequential

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46 See also art. 12(7) and (8) (upon revocation).

47 See art. 17(2).

48 UCC §4A-305(c).

49 Art. 18.

damages is not ruled out.

4. CONCLUSION — IS THERE A MATCH?

One of the five *IRS* general principles aimed at achieving safety and efficiency is that remittance services should be supported by a sound, predictable, non-discriminatory, and proportionate legal and regulatory framework.[50] This is in line with the 2006 endorsement by the Bank for International Settlements (BIS) of the promotion of legal certainty through the development of a transparent, comprehensive, and sound legal framework for the payment system, as a guideline for national payment system development.[51]

In the U.S., an m-payment out of or into a consumer asset account with a deposit-taking institution is governed by Regulation E.[52] In Europe m-payments are governed by the European Union's PSD.[53] The latter does not cover payment for goods or services purchased directly from the telecommunication, digital, or IT operator which are delivered to and used through the device.[54] Regardless, neither Regulation E nor the EU PSD is a comprehensive payment transactions code.

The international m-remittance is a multi-participant credit transfer processed in bulk. This means there is a multiplicity of participants, links, and settlement methods. For example, one scenario, envisaged by the BIS, involves an originator paying the capturing RSP's agent through an interbank transfer.[55] The agent then pays the RSP by means of another interbank transfer. The RSP's bank then makes another interbank transfer to a bank with a correspondent in the destination country. In the destination country, the first bank transfers to the bank of the disbursing RSP's bank, which then transfers onwards to the bank of the disbursing RSPs' agent. The latter may pay the beneficiary in cash or through another interbank transfer. In this setting, the capturing and disbursing RSPs are part of a negotiated network[56] in which the remittance information is sent separately from the funds. In the process, each interbank transfer, whether in the country of origin, from country to country, or in the destination country, settles separately. Settlement is likely to be in bulk. The process may be further complicated by the use of an amalgamator who will consolidate and distribute various payment streams as they move forward.

Communication in an IRT can even be cut short by the transmission of messages directly to the BB from a sender earlier in the chain to the one from which the BB is to be compensated. However, it may be up to the BB to decide whether to act on such a message or to wait until it has received a message from its own immediate sender. When it acts on such a message, whether by choice or bind-

50 *Supra*, n. 9 at 23.

51 IRS, *supra*, n. 9 at 5, 38–42 (Guideline 10) and 63–67 (Annex 4).

52 12 CFR §205.3. For elaboration, see in this issue, Mark Budnitz, "Mobile Financial Services: The Need for a Comprehensive Consumer Protection Law", (2012) 27:2 B.F.L.R. 213, 225-228.

53 *Supra*, n. 11.

54 Art. 3(l).

55 *Supra*, n. 9 at 43.

56 See above text around note 13.

ing agreement with the remote sender, it becomes an RB to the remote sender's "order" and is entitled to reimbursement directly from that remote sender — albeit through the intervening sender(s) as instructed by that remote sender.

Regardless, compared to available means of speedy communication, the complex settlement process could be slow. Thus, in the IRT, messages move faster than funds. Indeed, "next-day execution" required by the MLICT[57] does not appear to pose any difficulty in its application to the IRT. Taking into account the low amount involved for each payment, it is not uncommon for the disbursing RSP to disburse the funds to the beneficiary prior to being reimbursed by its sender. This differs from the usual practice in large-value credit transfers in which funds typically move from one entity to another with each message. However, the MLICT is versatile and is quite suitable for handling either process. Particularly in connection with m-payments, as noted, the MLICT treats a money transmitter,[58] such as a non-bank RSP (and for specific purposes, every office of such an RSP),[59] as a "bank". With one exception to be pointed out below, this scheme does not adversely affect consumers.

As acknowledged by the drafters, the MLICT is not consumer-protection legislation. Nor does it cover the regulation of RSPs. Its provisions are thus to be supplemented by laws to such ends.

The solution offered by the MLICT may not fit consumers in connection with unauthorized transfers. As indicated,[60] under art. 5(4), a purported sender attempting to avoid liability for an unauthorized, albeit properly authenticated, order must prove causation by a person other than either (i) a present or former employee or (ii) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure. This is a heavy burden; moreover, liability may still be fastened on the purported sender "if the receiving bank proves that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender."

There is no ceiling on the purported sender's liability. Nor is liability directly dependent on the purported sender's negligence;[61] rather, the purported sender's fault is introduced only to meet the purported sender's successful assertion of the interloper defence. In most cases, the RB will not be required to prove more than compliance with an "authentication [which] is in the circumstances a commercially reasonable method of security against unauthorized payment orders."[62]

There are three other points with regard to which the MLICT scheme as applied to the IRT merits at least reconsideration. First, the communication flow is

57 See Part 3(d), above.

58 See Part 3(a), above.

59 See Part 3(a), above.

60 See Part 3(b), above.

61 A classic example for the former is the U.S. Regulation E, *supra*, n. 51. A classic example to the latter is the EU PSD, *supra*, n. 11. See *e.g.*, Benjamin Geva, "Payment Transactions under the EU Payment Services Directive: A US Comparative Perspective" (2009) 27 Penn State Int'l L Rev 713, 724–37.

62 Art. 5(2)(a).

usually faster than the settlement flow,[63] so that it is typical for the beneficiary to be paid before the BB or possibly even an earlier sender. There is, however, no provision allowing a "bank" that paid to "leapfrog" its immediate insolvent sender (which defaulted in the obligation under art. 5(6) to pay its RB)[64] and recover from an earlier sender. "Leapfrogging" is only allowed for a sender claiming a refund upon the non-completion of the transfer.[65]

Second, under MLICT art. 5(5), "A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank."This is in line with UCC §4A-206 under which a communication system for the transmittal of an order "is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank." Loss caused by an error in the content of an order is usually allocated to the sender.[66] This is not appropriate where the communication system is one designated by the RB.[67] Furthermore, in an m-payment, the role of the mobile network operator ("MNO") may vary from system to system. It may act as an agent of either party or even as an intermediary or 'bank' on its own. The scheme allocating losses between the sender and the RB for the errors of the mobile network is thus to be specifically addressed.

Third, the rationale for limiting an RB's liability for consequential loss for mishandling a credit transfer, as reflected in MLICT art. 18,[68] is protecting banks from excessive exposure that may affect the profitability of the wire transfer service and even their stability. It is said that this is particularly so in the context of "the high-speed, low-price, mechanical nature of the processing system that characterizes wire transfers."[69] The classic example of this point is a case involving a payment of $20,000, a relatively low amount, which might have exposed a bank to US$2.1 million liability.[70] However, the typical, even smaller amount of the IRT and its primary use for non-business purpose may open the discussion regarding whether RBs are liable for consequential losses.[71]

The framers of the MLICT must have had in mind primarily funds transfers carried over large-value transfer systems. While low-value credit transfers were envisaged as covered by the MLICT, they were not central in the work leading to it. From this perspective, it is encouraging to find that overall, the MLICT is appropri-

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63 See Part 2, above.

64 See Part 3(b), above.

65 See Part 3(i)(ii), above.

66 See Part 3(b), above.

67 For the treatment of a third-party processor designated by a bank to deal directly with the customer in a payment transaction, see *e.g.*, Benjamin Geva, "Payment System Modernization and Law Reform in Developing Nations: Lessons from Cambodia and Sri Lanka" (2009) 126 Banking LJ 402 at 414 (discussing legislation in Cambodia).

68 See Part 3 (i)(iii), above.

69 See *e.g.*, Official Comment 2 to UCC §4A-305.

70 *Evra Corp. v. Swiss Bank Corp.*, 673 F (2d) 951 (7th Cir. 1982).

71 By way of example, in the U.S., the *Electronic Fund Transfer Act*, 15 USC §1693 (1978), provides in Section 910(a)(1) for the financial institution's liability to consumer "for all damages proximately caused" by it and does not limit liability for system failure.

ate to cover them. Focusing on the typically large-value wire transfer, the MLICT needs only a few adjustments in order to satisfactorily cover the low-value wireless consumer payment. Consumer-protection aspects, primarily about disclosures, nevertheless should be added; consumer's liability for unauthorized transfers also should be rethought and redrafted.