European Commission

THE LAWS ON CREDIT TRANSFERS AND THEIR SETTLEMENT IN MEMBER STATES OF THE EU

Report for the
European Commission (DG XV)

Volume 4: Member State Reports

Italy
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Netherlands
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Wilde Sapte - Brussels
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INTER-PARTY RELATIONS 1: EXECUTION OF CREDIT TRANSFERS

General

Questions relating to Scenario A:

A.1 Taking each stage of the transaction, is there any prescribed form which must be used by any of the parties?

1. There are not, under Italian law, specific rules governing Credit Transfers. It is however, unanimously held that the general rules on mandate (Sections 1703 to 1730 inclusive of the Italian Civil Code) are applicable.[1]

2. Section 1856 of the Italian Civil Code provides that "for the carrying out of instructions received from those having current accounts or from other customers, the bank is liable according to the rules concerning mandate".

3. It has been inferred that if the Credit Transfer has been ordered by someone having a current account, the Credit Transfer does not constitute an autonomous contract of mandate, but falls within the typical services provided by a bank to its customers.[2]

4. The consequence is that whenever the Credit Transfer is ordered by someone having a current account, the bank may not refuse to carry out the instructions even if the Beneficiary's Bank is different from the Originator's Bank,[3] provided however that in the current account of the Originator there are adequate funds, or that the Originator has been granted a line of credit.

5. The general principle set forth in point 4 above seems to be somewhat mitigated by the so called "NBU" ("Uniform Banking Rules"), which provide in general that the bank has the right to choose whether or not to accept the instructions received

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1 **Concetto Costa**, "Bancogiro internazionale e diritto italiano", Banca, Borsa e Titoli di Credito 1992, I, page 353.

2 **Santini**, "Il bancogiro", Upeb, Bologna, 1948, page 134;
Ferri, "Bancogiro", Enciclopedia del Diritto, V, Giuffré, Milano, 1959, page 32;
Molle, "I contratti bancari", Giuffré, Milano, 1981, pages 496 ff, 533.

3 **Santini**, "Il bancogiro", page 22;
Campobasso, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, pages 135 ff.

from Originators having current accounts;[4] NBU are generally referred to in bank contracts as "general terms and conditions"; pursuant to Section 1341, second paragraph, of the Civil Code, however, "conditions which establish in favour of he who has prepared them in advance, limitations on liability, the power of withdrawing from the contract or of suspending the performance (...), are ineffective, unless specifically approved in writing": it is therefore discussed whether the above mentioned NBU are ineffective unless specifically approved in writing by the customer; it does not seem, in practice, that banks invoke such NBU in connection with Credit Transfers.

6. The Originator's Bank is bound to follow the instructions, if any, received from the Originator concerning the method of the payment; in practice, Credit Transfers are ordered by using specific forms to be filled in by the Originator, and in which are listed the various payment methods available for the Credit Transfer. In case such method becomes impracticable after the order, the Originator's Bank has the duty to inform the Originator of such circumstance, pursuant to Section 1710, second paragraph, of the Civil Code, which provides that "the mandatary is bound to inform the principal of any supervening circumstances which might cause the revocation or the modification of the mandate."

7. Until February 1992 Credit Transfer orders could be given in any suitable form, apart from the above-mentioned practice to use printed forms; Section 3 of Law of 17th February 1992, No. 154 now imposes the written form for all contracts concerning bank operations and services: one copy of the contract has to be returned to the customer; the Bank of Italy, jointly with CICR (Italian Inter-ministerial Committee for Credit and Saving), has the authority to impose, in light of grounded technical reasons, particular instructions concerning the form of the contracts for certain bank operations and services.

8. Concerning the form of the communications between the banks involved in a Credit Transfer, the law does not provide for any specific form; the banks may participate with clearing houses (and in such a case the relevant rules will have to be followed), or agreements (either bilateral or multilateral) between the banks may provide for specific mechanisms.

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4 On the contrary, as it will be seen in point 16 above, NBU provide that banks cannot refuse to accept Credit Transfers on behalf of Beneficiaries who have current accounts with them.

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9. The law also omits to specifically regulate the form of the acts between the Beneficiary's Bank and the Beneficiary; in general, the relationship between the Beneficiary and its bank is governed by a specific current account agreement: the bank is therefore liable according to the rules concerning mandate.

A.2 What are the legal provisions (if any) governing the time within which each bank is required to act? Consider in particular:

(i) Is there any definite period prescribed within which the Credit Transfer must be completed if it is not to lapse?

(ii) If there is no definitive period, does custom prescribe the time within which the Credit Transfer must be completed?

(iii) Is there a duty for each bank to act "within a reasonable time"? If so, is there any case-law or principle or anything else giving guidance on what might be considered "reasonable".

10. The duty of the Originator's Bank (towards the Originator) is to perform the mandate with the diligence of a good **pater familias**, following the instructions received from the Originator. Such diligence is deemed to be particularly qualified, also because the Originator is normally charged for any Credit Transfer ordered (the diligence, for gratuitous mandates, is in fact weighted with less strictness: Section 1710, first paragraph, of the Civil Code): the bank must therefore use its best efforts to ensure that the payment is made as soon as reasonably possible. There is however neither legislative nor case-law guidance to assess what might or might be not held "reasonable".

11. As has been stated above, Section 1710, second paragraph, of the Civil Code, provides that "the mandatary is bound to inform the principal of any supervening circumstances which might cause the revocation or the modification of the mandate". The bank can depart from the instructions received whenever circumstances unknown to the Originator, and such as cannot be communicated to him in time, reasonably create the assumption that the Originator would have given his approval (Section 1711, second paragraph, Civil Code).

12. There is not any provision of law which prescribes for a definite period of time within which the Credit Transfer must be completed if it is not to lapse. The only

rule which could be deemed as applicable is Article 1457 of the Civil Code ("Time essential to one party"), which states that "if the time fixed for performance by one of the parties must be considered essential in the interest of the other, the latter, if it intends to demand performance of the obligation notwithstanding the expiration of the time, must so notify the former within three days, unless there is an agreement or usage to the contrary; in the absence of such notice the contract is deemed dissolved by operation of law, even if dissolution was not expressly agreed upon". Therefore, in the absence of an essential term (agreed upon by the parties) for the performance of the Credit Transfer, and unless the Payment Order is validly revoked before the completion of the Credit Transfer, the duty of the Originator's Bank does not lapse until the Credit Transfer is actually made in accordance with the instructions received from the Originator,[5] it has been pointed out that the bank must act as quickly as reasonably possible; there is however a time limit after which the Originator cannot demand any longer that the bank carries out the Payment Order, and such limit is the ordinary 10-year statute of limitations; such situation is clearly only theoretical, since the Originator would be likely to seek remedy against the bank much earlier than after ten years from issuance of the Payment Order. For the avoidance of any doubt, it must be stressed that the above period of limitations refers only to the right of the Originator to demand execution of the Credit Transfer, but it does not imply that the Originator's Bank may freely elect when to carry out the Credit Transfer within such period of time: the duty of the bank is and remains that of performing the instructions received as soon as reasonably possible; the bank is liable for any delay which is imputable to it.

13. Concerning the relationships between the Originator's Bank and the Beneficiary, it is generally held that there are no contractual relationships between them, with the consequence that the Beneficiary has no contractual claim towards the Originator's Bank; there could however be the case that both the Originator and the Beneficiary have current accounts with the same bank, and therefore the Originator's Bank and the Beneficiary's Bank are the same bank; in such a case the bank is bound by two different contractual duties: by a mandate towards the Originator and by the current account contract towards the Beneficiary.

14. The moment in which the Credit Transfer is completed is when the funds are credited to the current account of the Beneficiary; "credited" means the accounting inscription on the current account, irrespective of any communication thereof to

5 This pursuant to the solution to the problem of the nature of Credit Transfers: see point 56 below.

the Beneficiary.[6] It is from such moment that the Beneficiary becomes entitled to dispose of such funds (Section 1852 of the Civil Code: "Disposal of credit by customer. When a deposit, an opening of credit or another banking transaction is made for current account, the customer can dispose at any time of the balance in his favour, subject to the observance of any agreed terms concerning notice.")

15. It is therefore important to ascertain when the Beneficiary's bank has to credit to the Beneficiary's account the sums, and what rights, if any, the Beneficiary has towards the Beneficiary's Bank before the funds are credited to his current account.

16. NUB (which are generally expressly referred to by single banking agreements) expressly state that the banks are obliged to accept Credit Transfers received on behalf of their customers; nothing is however provided concerning the time within which the sums have to be credited. The Italian Supreme Court of Cassation has however recently[7] ruled that the bank is not free to postpone without time limitations the crediting of sums received on behalf of its customers: the bank, on the contrary, must proceed with the maximum rapidity which is available by virtue of technical means at the disposal (of the bank). A recent law, dated 5th July 1991, No. 197 (against so-called "money laundering"), states that a Beneficiary is entitled to obtain payment in the province of its domicile starting from the third banking day after acceptance of the Credit Transfer order (by the Originator's Bank): the real "impact" of this rule has however still to be explored by doctrine and case-law.

A.3 How would your answers to question A.2 differ if the Payment Order was conditional - for example, if the Originator had given his bank express instructions that the Payment Order should only be executed in certain specific circumstances, such as the receipt of sufficient funds to the Originator's account to cover it?

17. Answers to question A.2 would not differ if the Payment Order was conditional: once the condition has been fulfilled, the Originator's Bank has to complete the Credit Transfer as soon as reasonably possible. The Originator's Bank is in fact bound to all instructions received, including those to execute the Payment Order only in certain specific circumstances. If the Originator's Bank has made a

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6 **Molle**, "I contratti bancari", 1981, page 511;
Campobasso, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, page 200 and ff.

7 Cass. 26th July, 1989, No. 3507, **Foro It. 1990**, I, pages 128 ff.

payment prior to the condition being satisfied, the bank is liable towards the Originator, and would not be entitled to debit the Originator's account of the sum paid.

18. After the funds are credited on the Beneficiary's account it is not possible to revoke the Credit Transfer: the bank would thereafter only be entitled to an action based on unjustified enrichment against the Beneficiary. This applies both to the Originator's Bank and the Beneficiary's Bank.

A.4 (a) Are there any rules of value-dating - and how would you define value-dating?

(b) Assuming value-dating, is there any difference in the treatment of credits and the treatment of debits?

19. "Value Date" is not defined by the law, but is commonly recognised as the date from which interest (passive and/or active) runs. The value date is not necessarily the date when the sums are actually credited on the Beneficiary's current account: for example, NUB provide[8] that the value recognised when the cheques or similar instruments are credited determines only the starting date of the interest, but does not grant the right to the customer to dispose of the sums, until the bank has ascertained that such instruments have been duly verified or cashed. It is also admissible that, pursuant to the Originator's instructions, the value date for the Beneficiary is retroactive vis-a-vis the date when the sums are actually credited. Although the matter of the value date is generally left to the contractual negotiations between each bank and its customers, Section 7 ("Lapsing of value dates") of the recent Law 17th February 1992, No. 154,[9] states that interests on sums or on instruments (issued or payable by the bank where the deposit takes place) deposited with a bank are due as of the date of the deposit until the date of withdrawal: such rule does not seem to be directly applicable to Credit Transfers, in connection of which the value date would therefore continue being governed by the rules established by each bank and accepted by its customers.

20. Rule 7, fifth paragraph, of NBU applicable to current accounts, states that the treatment of the credits and of the debits (including the respective value dates) are left to negotiations and arrangements between banks and customers or, in the

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8 Rule 4, third paragraph, of the NUB applicable to current accounts.

9 Such principle has been reaffirmed by Section 120 of the recently enacted new "Banking Law" (Legislative Decree 1st September 1993, No. 385, which will become effective as of 1st January 1994).

absence of arrangements, to the prevailing usages of the place where the bank is located. Generally, the value date of credits is subsequent to the date they take place, or at least the two dates coincide; the opposite takes place with regard to the debits: the value date in this case precedes the date of the operation, or at least the two dates coincide.

A.5 **Are there any rules governing the issue of double charging - for example, where the Originator in giving the instructions to his bank has specified that he should bear all the costs, but the Beneficiary nevertheless has charges deducted for the amount credited to the account at his bank?**

21. There are no specific rules concerning double charging. Double charging must be distinguished from the various taxes and fees which may be payable as a matter of law, for example, on banking operations which exceed certain limits, or which originate from abroad, etc: in these cases it is clear that the Beneficiary would in any event be subject to such charges (since the banks are legally bound to apply them), irrespective of the instructions of the Originator or of the Originator's Bank.

22. The Law of 17th February 1992, No. 154[10] provides that all banks must advertise in each office open to the public, all terms and conditions, including the bank fees and commissions, for all bank operations and services; the same must also be included in each bank contract. (Banks can effect amendments to such terms and conditions, but only by publishing such amendments in the same way.) Any customer (either Originator or Beneficiary) should therefore know in advance the cost of each operation requested to its bank.

23. The "double charging" does not seem however to be a problem, also because most payment means (cheques, bills of exchange, and also money) would imply costs on the Beneficiary when credited to his current account, and such costs generally vary in light of the volume of yearly turnover of the account, or in light of some personal requisites of the Beneficiary, or because of specific agreements negotiated with the bank.

24. Case-law has therefore repeatedly affirmed the full equivalence between payments in cash and payments by virtue of Credit Transfers:[11] such case-law does not seem

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10 Same principles have been incorporated in the new "Banking Law", which will become effective as of 1st January 1994.

11 Recently: Cass. 26th July 1989, No. 3507.

to require that in order to achieve such equivalence the Credit Transfers have to be totally free of costs for the Beneficiary.

A.6 Consider the methods of authentication which would be used and/or which might be considered appropriate. (Ignore comparisons of paper signatures.)

25. For the purposes hereunder, "authentication" will be held and treated as the problem of identifying the person who enters into a contract or from which any other declaration having legal relevance originates, and of establishing a link between such person and the content of said contract or declaration. Authentication must not be confused with the "certified signature" ("sottoscrizione autenticata"), which is the declaration rendered by a duly authorised public official that a certain document has been signed by someone and that person's identity has been previously verified by the said public official (Article 2703 of the Civil Code): certification is only one of the various forms of authentication, but not the only one recognised under Italian law: under Italian law authentication is normally a problem of proof.

26. It appears, from the review of the principles governing form and formation of a contract, that under Italian law a hand-written signature (Article 2702 of the Civil Code) is only required when the contract has to be made or proved in writing; otherwise, a signature represents only one of the various ways to prove the existence of a contract and the identity of the party.

27. Under Italian law the general principle governing the form of contracts is that of freedom of form, unless differently and expressly provided for by specific provisions of law. Article 1325 of the Civil Code, in fact, when listing the requisites of contracts, after mentioning (1) the agreement between the parties, (2) a cause[12] and (3) the object, refers to (4) the form. This may in some circumstances be required by law as a condition of validity.

28. Such a principle seems to be a consequence of the general principle which governs the formation of contracts: Article 1326 of the Civil Code provides that a contract is formed at the time when the person who has made the offer has knowledge of

12 The "cause" of a contract is the economic and legal scope which is immediately accomplished by such contract (e.g., in purchase agreements is the transfer of ownership on certain goods; in lease agreements is the faculty of using something which is owned by someone else; etc.); the "cause" must not be confused with the personal purposes of the parties for entering into a given contract: such purposes are normally irrelevant from a legal point of view.

the acceptance of the other party. It is also specified that, should the offeror require a specific form of acceptance, the acceptance is ineffective if given in a different form.

29. Article 1327 of the Civil Code also states that when at the request of the offeror or by the nature of the transaction or according to usage, the performance should take place without a prior reply, the contract is concluded at the time and place where performance begins. The acceptor must promptly give notice of the beginning of performance to the other party and, if he fails to do so, he is liable for damages.

30. The exceptions to the above principle of freedom of form are the following:

1) contracts that must be made in writing;

2) contracts that must be proved in writing;

3) contracts that must be made in a form previously agreed upon by the parties.

31. Law 17th February 1992, No. 154, imposes the written form for all contracts concerning bank operations and services; it seems, however, that the rule only applies to relationships between the bank and its customers, while inter-bank agreements do not appear to fall either in the first or in the second of the above categories. Banks may however agree, on a bilateral or multilateral basis, on certain forms or procedures to be followed in inter-bank operations (e.g., Italian banks have repeatedly entered into inter-bank agreement pursuant to which, for example, promissory notes were deemed negotiable even if undersigned by way of mechanical means).

32. Once it is has been ascertained that under Italian law only contracts to be made or proved in writing have to bear hand-written signatures (with the few exceptions where mechanical reproductions of signatures are allowed), it can be inferred that for transactions which do not need either to be made or proved in writing any possible form is valid, and therefore any method of signature is allowed: it will be only a problem of proof.

33. Article 1352 of the Civil Code, which states that if the parties have agreed in writing to adopt a specified form for the future contract it is presumed that such form was intended for the validity of the contract.

34. The above rule, in the absence of specific regulations of Credit Transfers, appears to be the sole legal source giving relevance to methods of authentication different from the traditional hand-written signature which, for domestic banking transactions, still keeps a predominant position in light of the preponderance of the traditional paper-based processes employed in Italy to carry out Credit Transfers.

35. However, by virtue of efforts devoted by the Bank of Italy in order to reduce the volume of paper-based media generated by the conventional processing of Credit Transfers, for domestic transactions, the Inter-bank Society for Automation ("SIA") has recently established an interbank data transmission network which operates in a way somewhat similar to the SWIFT network, and which employs encrypted messages; however, in light of the above principles of law, it can be held that any other form of electronic method of authentication could be agreed and/or allowed within such network, provided that the same ensures certainty of identification of the transmitting party.

36. It must be mentioned that some authors[13] assert that Italian law already authorises an interpretation of "signature" which is broad enough to include mechanical or electronic forms of signature and case-law has accorded validity to telex and telefax messages even in cases where "written" form[14] is required. Nevertheless, in order to be certain that an electronic message and signature are admissible in court or before any competent authority (such as Customs, Tax Authorities, etc.), the existing law should be changed either (and preferably) by introducing specific provisions dealing with electronic means, or at least including the same within the definition of "documentary" evidence, with the same evidential effect as writing or mechanical reproduction, if necessary under the condition that specific technical rules be complied with for the purpose of granting: a) perfect receipt of the transmitted message; b) conformity between the received message and the one transmitted, and c) certainty as to the identification of the transmitting party.

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13 Such as Concetto Costa, Banca, borsa e titoli di credito, 1989, Part I, page 626.

14 After having acknowledged the validity of telex, the Supreme Court of Cassation has repeatedly ruled that telefax falls within the definition of "mechanical reproductions", and therefore constitutes full evidence unless it is challenged as to its conformity to the original (Court of Cassation, Civil Division, 13th February, 1989, No. 886). The same Court of Cassation, 2nd Criminal Division, order of 8th January, 1991, has reaffirmed the

Revocation

Questions relating to Scenario A:

A.7 (a) **How would you define revocation and in particular how would you distinguish it from other rights e.g. a receiver's entitlement to disclaim on a winding-up?**

37. "Revocation" is a term which has various specific meanings throughout Italian law. For the purpose of this question, revocation will be deemed as an act initiated by the Originator or by the Originator's Bank whereby the Credit Transfer is prevented from being completed.

38. As will be examined below, the "revocation" hereunder must not be confused with the remedies available to creditors and to receivers to set aside a Credit Transfer which has already been completed.

(b) **In what circumstances might the Originator be entitled to revoke or countermand the Payment Orders?**

(c) **Until what moment can he do so?**

(d) **What steps would he have to take?**

(e) **Can entries be reversed in the case of mistake?**

(f) **Answer questions (b) and (c) above on the assumption that the Originator's Bank on its own initiative wishes to revoke the Payment Order.**

(g) **Can a situation ever arise where the Originator validly revokes, but the Originator's Bank cannot revoke? (Assume that the Originator's Bank has at all times acted correctly.)**

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same principles, and has also declared that telefax equipment does not only assure receipt of the document, but also proves the origin of the transmission, since each equipment has been attributed its own number.

39. Section 1411 of the Civil Code ("Contract in favour of third parties")[15] provides in general that the third party acquires a right against the promisor as a result of the stipulation, unless otherwise agreed. The stipulation, however, can be revoked or modified by the stipulator until the third party declares to the promisor that he intends to avail himself of the stipulation.

40. The above rule does not seem however to be applicable to Credit Transfers, since the doctrine unanimously affirms that the Credit Transfers may be revoked only until they are completed, i.e. until the funds are actually credited to the current account of the Beneficiary, irrespective of any communication thereof to the same Beneficiary: this would mean that most on-line electronic transfers are irrevocable, since the crediting takes place simultaneously with the debiting of the amounts transferred.

41. It must be noted that pursuant to an interpretation of the Court of Cassation,[16] Credit Transfers would be revocable only for just cause: this position has been strongly criticised,[17] because it would obtain the result to deem as always irrevocable almost all the Credit Transfers.

42. The above "traditional" position must however be reconsidered in light of the recent law, dated 5th July 1991, No. 197 (against so-called "money laundering"), which states that a Beneficiary is entitled to obtain payment in the province of its domicile starting from the third banking day after acceptance of the Credit Transfer order (by the Originator's Bank): it could be argued, in fact, that this rule implies that after the third day after acceptance of the order, the Beneficiary has a perfect right to obtain payment, irrespective of the circumstance that he is aware of the order, with the consequence that the order would be irrevocable after such term; as it has been stated above (point 16), the real "impact" of this rule has however still to be explored by doctrine and case law.

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15 Contracts in favour of third parties are one of the existing legal structures to which Credit Transfers are assimilated by the doctrine (**Messineo**, "Punti di vista sulla natura dell'accreditamento bancario", Banca Borsa e Titoli di Credito, 1963, I, pp.309 ff.), the others being the credit assignment (**Mossa**, "Il diritto dello check", I, Sassari, 1919, p.45), the "delegatio promittendi" (**Santini**, "Il bancogiro", Upeb, Bologna, 1948, pp.140 ff.) and the "delegatio solvendi" (**Ferri**, "Bancogiro", Enciclopedia del Diritto, V, Giuffré, Milano, 1959, p.34). The most recent doctrine avoids trying to individuate a specific pre-existing legal structure within which to consider the Credit Transfers, but prefers to focus the attention on the single "fragments" in which such an operation may be divided (**Campobasso**, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, pp.36 ff.). The Supreme Court of Cassation (Cass. 5th May 1980, No. 1483, Banca, Borsa e Titoli di Credito, II, pp.388 ff.) apparently identifies the Credit Transfer with a mandate which is given also in the interest of the mandatory (Section 1723, second paragraph, of the Civil Code).

16 Cass. 5th May 1980, No. 1483, Banca, Borsa e Titoli di Credito, II, pp.388 ff.

17 **Concetto Costa**, "Bancogiro internazionale e diritto italiano", Banca, Borsa e Titoli di Credito 1992, I, p.363.

43. When in a Credit Transfer more than one bank is involved (as is more frequent), there is the additional problem of establishing whether the Originator is entitled to revoke the Credit Transfer order only until the Originator's Bank has transmitted the order to the second bank or until the sums have been credited on the Beneficiary's current account, and possibly not later than the third day after acceptance of the order; and in this latter case, whether the revocation power may be enforced only toward the Originator's Bank or also towards any bank involved in the Credit Transfer.

44. The solution to the above problems is strictly bound to the legal structure within which the Credit Transfer may be construed: those authors[18] who deem that the Credit Transfer is a mandate to the Originator's Bank to simply instruct another bank to make the payment, state that the Originator has no revocation powers towards the other banks involved, and therefore the revocation may be exercised only towards the Originator's Bank and only until the same has instructed the other bank; those other authors who think, on the contrary, that the Credit Transfer order is a mandate to transfer sums of money (and not only instructions), state that the revocation power may be exercised towards any and all banks involved, until the sums are credited (now, possibly, not later than the third day from acceptance by the Originator's Bank).[19]

45. Once the sums are credited on the bank account of the Beneficiary (now, possibly, not later than the third day from acceptance by the Originator's Bank), the revocation may take place only with the approval and consent of the Beneficiary.

46. Revocation could also occur in circumstances whereby the Beneficiary has no legal right to challenge.[20] Italian Doctrine [21] generally deems that revocation for reasons arising out of the relationship between the Originator and the Originator's

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18 **Santini**, "Il bancogiro", Upeb, Bologna, 1948, p.168;
Molle, "I contratti bancari", Giuffré, Milano, 1981, p.534.

19 **Campobasso**, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, pp.163 ff.

20 Section 1271 of the Civil Code, "**Defences available to the delegee**", relating to delegation of payment, provides that "the delegee can interpose against the creditor defences connected with his relationships with him.
Unless the parties have otherwise agreed, the delegee cannot interpose against the creditor those defences which the former might have set up against the delegor even if the creditor had knowledge of them, unless the relationship between the delegor and the delegee is void.
Neither can the delegee set up defences connected with the relationship between the delegor and the creditor, if the parties did not make express reference to such relationship."

21 **Campobasso**, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, pp.212 ff.

Bank can be challenged by the Beneficiary, as can revocation for reasons arising out of the underlying relationship between the Originator and the Beneficiary.

47. It is on the contrary discussed whether the Credit Transfer may be revoked in the presence of the simultaneous nullity or invalidity of both the relationships (Originator/Originator's Bank; Originator/Beneficiary: so called "nullity of the double cause"), or of defects in the Credit Transfer order (so called "iussum"). The prevailing Italian doctrine[22] deems that such defences are valid against any claim by the Beneficiary. Within the "iussum" are generally listed the absence of the order; the defects of the consent (mistake, duress and fraud), the falsity of the order: the answer to question A.7 (e) is therefore affirmative under Italian law.

48. It has however been stressed that in the presence of more than one bank (as it normally happens), the defects of a Credit Transfer order given to a bank other then the Beneficiary's Bank, can be legally challenged by the Beneficiary, since the single relationships among banks constitute autonomous agreements among the banks themselves.[23]

49. The recent Italian doctrine is trying to withdraw from the delegatory structure many banking operations which might abstractly be construed within said structure:[24] pursuant to such doctrine, which could also be extended to international Credit Transfers, no defences whatsoever based on the underlying relationships could be validly used against a claim by the Beneficiary, with the exception of the so called *exceptio doli* based on "liquid" evidence. It is on the contrary unanimously held that the Bank may validly use against the Beneficiary any and all defences arising from the relationships between the Beneficiary's Bank and the Beneficiary.[25]

50. All the above applies equally both to a revocation which originates from the Originator and to that which originates from the Originator's Bank. The latter, in fact, would be entitled to revoke a Payment Order in the same circumstances which would allow a revocation of the Payment Order by the Originator, i.e. in the presence of the simultaneous nullity or invalidity of both the relationships

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22 **Santini**, "Il bancogiro", Upeb, Bologna, 1948, pp.157 ff.;
Campobasso, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, pp.214 and 223 ff.

23 **Santini**, "Il bancogiro", Upeb, Bologna, 1948, p.181;
Campobasso, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, p.226 and note 94.

24 With reference to banking international guarantees, see **Portale**, "Le garanzie bancarie internazionali", Giuffré, Milano, 1989, pp.22 ff., 35 ff., 71 ff.

25 **Campobasso**, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, pp.234 ff.

(Originator/Originator's Bank; Originator/Beneficiary: so called "nullity of the double cause"), or of defects in the Credit Transfer order (so called "iussum": see point 47 above). The deadline for the Originator's Bank to revoke a Payment Order is the same which applies to the Originator (see points 40 and 42 above).

51. Concerning the modalities of a revocation order, same are generally provided for by the agreement between the Originator and its bank; now it can be argued that such an order would in any case fall under the provisions of Law 17th February 1992, No. 154, which imposes the written form for all contracts concerning bank operations and services.

52. It is difficult to imagine a situation where the Originator validly revokes a Credit Transfer order but the bank cannot revoke (assuming the bank has always acted correctly).

Responsibility

Questions relating to Scenario A:

A.8 In respect of each of the following:

(i) the Originator's Bank;

(ii) any Intermediary Bank;

(iii) the Beneficiary's Bank.

(a) At what moment does the bank accept the Payment Order (i.e. assume any legal commitment to the party giving such Order)?

53. In light of Law 17th February 1992, No. 154, which now imposes the written form for all contracts concerning bank operations and services, one copy of the contract has to be returned to the customer: it can be argued that the Originator's Bank accepts the payment order when it returns the copy of the accepted order, but this is a solution still to be evaluated by case-law and doctrine.

54. What is stated above, in any event, seems to be applicable only in the absence of a current account contract; in fact, in the presence of such a contract, a Credit

Transfer order may be considered as one of the bank services available to the customer, and in such a case the Credit Transfer would not constitute an autonomous contract, and would be validly given in the form agreed upon in the contract (the praxis being a written form to be filled and signed by the customer); in such a case, the Credit Transfer would be deemed as "accepted" when duly delivered to the bank, provided there are adequate funds (unless a credit line has previously been granted). In the absence of adequate funds, and in the absence of a credit line, it can be argued that the acceptance of the Payment Order is conditional upon the receipt of sufficient funds to the Originator's account to cover the Payment Order.

55. The same principles would apply between banks: generally a contract between correspondent banks is in operation, and therefore the relevant clauses would apply; in the absence thereof, the general principles on formation of contracts would apply, and the Payment Order would be deemed as accepted when the ordering party has knowledge of acceptance or when the bank which receives the instructions accepts and executes the same. What is stated in this point applies both to the Intermediary Bank and to the Beneficiary's Bank.

(b) At what moment does the bank execute the Payment Order?

56. The answer to this question is strictly bound to the nature which is recognised to the Credit Transfer: if it is a mandate to issue adequate instructions, it may be inferred that the Credit Transfer is executed by each participating bank when each instruction has been duly issued; on the contrary, if the Credit Transfer is a mandate to actually transfer a sum of money, then the Credit Transfer would be executed only upon the actual crediting of the funds to the current account of the Beneficiary.

(c) At what moment is the bank discharged from its obligation - for example, would it be upon delivery of the instructions to effect the payment to the next party in the Credit Transfer chain or would it be upon the Beneficiary receiving value?

57. Also the answer to this question depends on the nature which is attributed to Credit Transfers: if it is a mandate to instruct the Beneficiary's Bank (even an Intermediary Bank), then the mandate would be accomplished when the instructions are properly transmitted; if, on the contrary, the subject matter of the

mandate is a payment, then the mandate would be executed only upon actual crediting of the sums to the Beneficiary's current account. With respect to the Beneficiary's Bank the answer is simpler since it is the last bank of the chain: it is discharged upon crediting the amount on the Beneficiary's account.

(d) In what circumstances, if any, may the bank refuse to accept or execute the Payment Order?

58. The only circumstances may be those based on the relationships between the Originator and the Originator's Bank and/or between the Originator's Bank and the Intermediary Bank and/or between the Intermediary Bank and the Beneficiary's Bank and/or between the Beneficiary's Bank and the Beneficiary: the Originator's Bank may therefore refuse in case of lack of adequate funds on the Originator's current account or in the presence of other circumstances which would legitimate a valid revocation of the Payment Order (see point 47 above); the Intermediary Bank could similarly raise objections based on its own contractual relationships with the Originator's Bank or on the other circumstances which would legitimate a valid revocation of the Payment Order (see point 47 above); the Beneficiary's Bank could raise objections based on its own relationships with the Beneficiary or on any of the other circumstances which would legitimate a valid revocation of the Payment Order (see point 47 above).

A.9 (a) What contractual duties of care express or implied are owed by each party to the transaction to each of the other parties?

59. (a) In general, the duty of any mandatary towards its principal is that of performing the mandate with the diligence of a good *pater familias*, following the instructions received from the principal. Such diligence is deemed to be particularly qualified, also because the principal is normally charged for any Credit Transfer ordered (the diligence, for gratuitous mandates, is in fact weighted with less strictness: Section 1710, first paragraph, of the Civil Code): the bank must therefore use its best efforts to ensure that the Credit Transfer is properly completed as soon as reasonably possible. This rule applies to the Originator's Bank (vis-a-vis the Originator), as well as to the Intermediary Bank engaged by the Originator's Bank (vis-a-vis the latter) and to the Beneficiary's Bank (vis-a-vis both the Intermediary Bank, if any, and the Beneficiary).

(b) Concerning the duties of the Originator towards the Originator's Bank, Article 1719 of the Civil Code states that the principal, except otherwise agreed upon, has to provide the mandatary with the means necessary to accomplish the mandate and to fulfil the obligations that the mandatary has undertaken in its own name for the purpose of carrying out the mandate. The above obligation, with regard to Credit Transfers, includes the obligation of the Originator to provide the Originator's Bank with clear and understandable instructions (e.g. complete name, address, bank's co-ordinates, etc. of the Beneficiary) and with adequate funds, and to pay all costs and commissions due to the bank, pursuant to the current account agreement in force between the parties; another typical duty of any customer of banks is that of reviewing carefully each bank Statement (see points 66 and 67 below) in order to timely challenge possible errors incurred by the bank; certain contractual liabilities may be contractually excluded, except in case of fraud or gross negligence (Article 1229 of the Civil Code): however, since banking contracts are generally set forth on forms previously prepared by the banks, such clauses which exclude liability are generally in favour of the bank and not of the customers.

(c) Concerning the contractual duties of care of the Originator's Bank towards the Originator, they primarily originate from the current account contract in force (if any), and secondarily from the rules of the Civil Code applicable to a mandate (see paragraph 59. (a) above). Section 1856 of the Italian Civil Code provides that "for the carrying out of instructions received from those having current accounts or from other customers, the bank is liable to accord to the rules concerning mandate. Should the instructions be executed in a place where the bank has no branches, the bank may instruct a local bank or a correspondent to execute such instructions"; in such a case Article 1717 ("Substitutes of the mandatary"), second paragraph, states that in such a case the bank is liable for the performance of its substitutes only when it has committed negligence in the choice of the local bank or of the correspondent bank. Pursuant to the third and fourth paragraphs of said Article 1717, the mandatary is liable for the instructions delivered to the substitute; the principal has recourse to direct action against the person appointed by the mandatary as his substitute; Section 1710, second paragraph, of the Civil Code, provides that "the mandatary is bound to

inform the principal of any supervening circumstances which might cause the revocation or the modification of the mandate". The bank can depart from the instructions received whenever circumstances unknown to the Originator, and such as cannot be communicated to him in time, reasonably create the assumption that the Originator would have given his approval (Section 1711, second paragraph, Civil Code). Once the instructions have been carried out the mandatary has the duty of informing the principal thereof without delay (Article 1712 of the Civil Code).

(d) With regard to the duties owed by the Originator's Intermediary Bank to the Originator, it is generally held that no direct contractual duties arise between the Originator and the bank(s) engaged by the Originator's Bank: the prevailing doctrine, in fact, states that Credit Transfers are generally complex operations which can be divided into more "segments", each constituted by a bilateral relationship, but all bound in a broader economic point of view;[26] this does not mean however that the Originator has no action against the bank(s) appointed by the Originator's Bank: those authors who think that the Credit Transfer order is a mandate to transfer sums of money (and not only instructions), state that the Originator has direct action against any and all banks involved, pursuant to Article 1717, last paragraph, of the Civil Code:[27] this would imply that any Intermediary Bank would be liable[28] towards the Originator for improper performance of the mandate.

(e) The relationships between the Originator's Intermediary Bank and the Originator's Bank would be generally governed by an agreement of "correspondence" between the two banks, and in general would be those provided for by the law for the mandatary/principal relationship (see point 59 (c) above).

(f) The duties described in point 59(b) above would apply also to the duties of care owed by the Originator's Bank to the Beneficiary's Bank: the former would in fact act as principal of the latter.

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26 Radicato di Brozolo, **Operazioni bancarie internazionali e conflitti di leggi**, Giuffré, Milano, 1984, pp.178 ff.

27 **Campobasso**, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, pp.163 ff

28 Such liability arises directly from the law, and not from the contract in force between the Originator and the Originator's Bank.

(g) The duties of care owed by the Beneficiary's Bank to the Originator's Bank are those described in point 59(c) above, since the latter would act as a mandatary of the former.

(h) The relationship between a Beneficiary's Intermediary Bank and an Originator's Intermediary Bank would also be those described in point 59(c) above.

(i) Concerning the duties of care of the Beneficiary to the Beneficiary's Bank, it can be stated that generally a current account agreement would be in force, and the Beneficiary would therefore be obliged to abide by the contractual duties (such as to timely inform the Beneficiary's Bank of any mistake found in Bank Statements).

(j) Finally, concerning the duties owed by the Beneficiary's Bank to the Beneficiary, it can be remembered that, in addition to those expressly arising out of the current account agreement, the NUB would also be applicable, as well as the recent law dated 5th July 1991, No. 197 (against so-called "money laundering"): see point 16 above.

(b) Does a contract between the participating banks in itself create a contractual nexus between the parties?

60. A contract between the participating banks does not *per se* novate or otherwise modify the underlying contractual relationships between the parties.

(c) Other than contract, what legal relationships (with attendant duties) can arise between the Originator's Bank and the Beneficiary's Bank?

61. Other than the contractual relationships arising from the mandate (both from the general provisions of law set forth in the Civil Code and from the specific bilateral agreement between the banks, if any), no other legal relationship would arise between the Originator's Bank and the Beneficiary's Bank.

A.10 (a) In what circumstances (if any) might the Originator be bound by a Credit Transfer which he has not authorised? (Consider mistake, forgery and fraud.)

62. Sections 1427 to 1440 inclusive of the Italian Civil Code deal with the so called "defects of the consent": mistake, duress and fraud. They entitle the party, whose consent has been influenced, to ask for the voidance of the contract, if all requisites provided for by the law for such an action are present. Forgery and falsification, on the other hand, may not be defined as defects of the "consent", since they imply the absence of any consent, even if more or less influenced: Italian doctrine, as mentioned above,[29] includes also same, together with mistake, duress and fraud, within the broader concept of "iussum", which describe all defects of the Credit Transfer order, including its non-existence.

63. The hypothesis set forth in the question, in principle, seems to be envisaged only when, for whatever reason, the defects of a Credit Transfer order can be challenged by the Beneficiary.[30]

64. We have already underlined[31] that the Originator's Bank is under a general duty of performing the mandate with the diligence of a good *pater familias*, following the instructions received from the Originator. Such diligence is deemed to be particularly qualified, also because the Originator is normally charged for any Credit Transfer ordered (the diligence, for gratuitous mandates, is in fact weighted with less strictness: Section 1710, first paragraph, of the Civil Code); such duty includes the duty of ascertaining the existence of a proper Credit Transfer order; the Supreme Court of Cassation[32] has ruled that a bank is liable if, in light of the circumstances, it should have suspected the falsity of the Credit Transfer order.

65. In such a case the principle has been reaffirmed that in the presence of a "defective" order the bank could disclaim its liability only if such order has the "appearance" of a regular order, and the mistake of the bank (on the regularity of the order) is excusable; it has also been stated that the mistake of the bank is deemed as "excusable" only if caused by the negligent behaviour of the customer[33] (in our case the "Originator").

66. Under Italian law, however, also the Originator has duties of diligence, one of which is that of carefully reviewing all bank statements ("estratti conto") issued (and to be sent by registered letter) by the bank upon the end of certain agreed periods (customarily at the end of the calendar year): Section 1832 of the Civil

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29 See point 47 above.
30 See above, points 47 to 49 inclusive.
31 See above, point 10.
32 Cass. 20th February, 1988, No. 764, **Banca, Borsa e Titoli di Credito**, 1989, II, p.440.
33 Cass. 19 March 1979, No. 1612.

Code, in fact, states that a bank statement is deemed as approved if not challenged within the agreed term or in that which is customary, or in that which seems to be most appropriate in light of the circumstances; approval of the statement does not preclude the right to challenge the statement for mistakes in writing, omissions or duplicate inscriptions: the action, however, has to be brought within six months from receipt of the bank statement; failure to do so implies acceptance of the bank statement.

67. Case-law and doctrine, however, have repeatedly affirmed that acceptance of the statement only "covers" the existence and the amount of the single banking operations described and set forth in the statement, but not the validity of the title pursuant to which such operations have been listed. It has however been specified that the possibility to challenge the validity of the title of any operation of an approved statement is limited to grounds based on the current account relationships between the customer and the bank, with the exclusion of any ground based on relationships between the customer and third parties or between the customer and the bank, but arising from different contracts.

68. Even if the above principles are almost unanimously accepted, there is however the possibility that the courts reach different applications (of said principles) when actually requested to judge on specific cases.

69. The most common case is that of falsification of cheques: the Supreme Court of Cassation has ruled differently on similar cases: Cass. 9th January 1984, No. 452, has stated that acceptance of the bank statement precludes any possibility to challenge the payment by the bank of falsified cheques or of cheques issued by any person without the relevant authority or power, while Cass. 7th September 1984, No. 4788 has ruled that in such a case the customer is not barred from challenging the statement, even if already approved, and that the bank is liable because it should have used the ordinary diligence in order to detect the falsification (which was detectable).

70. Italian bank customers should therefore examine carefully the yearly bank statements because, even in the presence of defences which cannot be challenged by the bank, they could be prevented by time limitations from recovering from the bank the amounts erroneously paid on their behalf.

In conclusion, it can be affirmed that the Originator would be bound to a Credit Transfer he has not authorised in all circumstances which could fall under a definition of fraudulent or negligent behaviour of the Originator (such as ambiguous or erroneous instructions, delay in challenging bank statements, delay in informing the bank of any mistake, duress, forgery or fraud suffered by the Originator, direct implication of the Originator in any fraud which implies the completion of the Credit Transfer, negligent failure to detect a forgery or alteration of signature, forgery or alteration of signature carried out by any duly empowered employee or representative of the Originator, etc.) or which cannot in any event be imputable to the Originator's Bank (such as a fraud committed against the Originator, but which could not be detected by the bank even using the diligence of the good *pater familias*).

(b) On whom is the burden of proving that a transfer has not been authorised?

71. There are no specific rules concerning the burden of proof in a case of an unauthorised Credit Transfer; the general rules would therefore apply: Section 2697 of the Civil Code (Burden of proof) states that the party who wishes to enforce a right in court has to prove the facts which constitute the ground thereof; the counterparty who objects that the right has been amended or has been extinguished has to prove the facts on which the defence is based: it can be argued that it would be the Originator's interest that of challenging an "unauthorised" Credit Transfer, and it would therefore be his burden to provide the relevant means of proof.

A.11 If the Credit Transfer is not completed (for whatever reason) is the Originator entitled to have the funds returned to him?

72. Assuming that the reason for the non-completion of the Credit Transfer is imputable to a bank other than the Originator's Bank, the answer depends on the nature of Credit Transfers: if the Credit Transfer is a mandate to pay there is no doubt that the Originator's Bank is liable towards the Originator, even if with the restrictions set forth by Section 1717 of the Civil Code,[34] if, on the other hand, the

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34 Section 1717 of the Civil Code states that when the mandatary substitutes himself engaging other persons without authorisation or without it being necessary in light of nature of the mandate, he is liable for the operations of the substituted persons. In case the principal had authorised the substitution without specifying the substituted person, the mandatary is liable only if he has been negligent in the choice. In any event the mandatary is liable for the instructions given to the substituted person. The principal has direct action against the substituted person.

Credit Transfer is a mandate to instruct another bank to make a payment, then the Originator's Bank would be liable only for mistakes in transmitting the instructions and in formulating the instructions.

73. In the absence of a direct liability of the Originator's Bank, the Originator in the first hypothesis would have direct action against the Beneficiary's Bank, while in the second one he would only have recourse to the action for unjust enrichment against the Beneficiary's Bank.

74. If the reason for the non-completion is imputable to the Originator's Bank, there is no doubt that such bank is liable towards the Originator and has to return the funds to him.

A.12 If the Credit Transfer is delayed or is otherwise mishandled, does any party have a claim for damages in respect of direct and/or consequential loss and/or interest? Can you give examples, with particular reference to any published case-law?

75. In case the Credit Transfer is delayed or otherwise mishandled for causes imputable to the Originator's Bank, then the Originator's Bank is liable to refund all damages suffered by the Originator.

76. Pursuant to Section 1223 of the Civil Code, the refundable damages in case of breach of an obligation include the actual losses suffered as well as the loss of profits, provided that they all are an immediate and direct consequence of said breach.

77. In addition, where the obligation concerns sums of money ("obbligazioni pecuniarie"), Section 1224 of the Civil Code states that the creditor is entitled to interest for delay in the "legal" rate (presently 10%) from the date the debtor is legally obliged to perform his obligation, even if no conventional interest was previously due; if conventional interest was agreed upon, and if same was at a higher rate than the legal one, then the interest due because of delay shall be computed at such higher rate. The creditor is entitled to prove that the actual damages are higher than the interest for delay, but only if interest for delay was not agreed upon in advance. The last part of this article has been generally invoked in order to obtain compensation for devaluation, when same was higher than the

legal interest (which, until recently, was calculated at the rate of 5%, while devaluation has reached 20% or more in the eighties).

78. In practice, a delayed or mishandled Credit Transfer, may constitute one or more of the following hypothesis of breach of contract (or of obligation): (a) of the Originator towards the Beneficiary; (b) of the Originator's Bank towards the Originator; (c) of the Originator's Bank toward the Beneficiary's Bank (or any Intermediary Bank); (d) of the Beneficiary's Bank towards the Beneficiary.

79. Any one of the involved parties to a Credit Transfer who has suffered damages because of delays or mishandling has therefore title to seek for damages against the party who has caused such damages (if the same are imputable to the breaching party), provided the two parties are bound by a contractual relationship which entitles such action; in fact, in light of the structure of the Credit Transfer, it is normally held that there are no contractual relationships between the Originator's Bank (or any Intermediary Bank) and the Beneficiary; furthermore, it has been inferred that, should the Credit Transfer be construed as a mandate to issue payment instructions, in such a case no actions whatsoever would be available to the Originator against the other banks involved in the Credit Transfer other than the Originator's Bank.

80. Damages arising from a delayed or mishandled Credit Transfer do not differ from damages arising from any other contract or obligation, and no specific case-law has been traced on this specific subject matter. Case-law has generally examined the most frequent cases of cashing of falsified or otherwise adulterated checks.

A.13 Is there in operation a "two tier" system so that the Originator or the Beneficiary has the option to pay a higher fee in respect of a Payment Transfer which excludes a "no liability" clause?

81. This does not seem to be an operation which is common in Italy.

A.14 With regard to questions A.11 - A.13, are wholesale and retail transactions treated differently?

82. Wholesale and retail are not treated differently with regard to questions A.11 - A.13.

Cross-Border Payments

Questions relating to Scenario A:

A.15 How would your answers to questions A.1 - A.14 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(b) the Beneficiary's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

(d) the Beneficiary's Bank was located outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

83. Awaiting the enactment of the UNCITRAL Model Law, it is the duty of the law on conflicts of law to ascertain the applicable law to international Credit Transfers.

84. The prevailing doctrine states that international Credit Transfers are complex operations which can be divided into more "segments", each constituted by a bilateral relationship, but all bound in a broader economic point of view:[35] each segment may therefore be governed by a different law.

85. Pursuant to the Rome Convention of 19th June 1980 on the applicable law to contractual obligations, in the absence of a specific choice of the parties, the governing law of each segment would be that of the country of the party which

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35 Radicati di Brozolo, **Operazioni bancarie internazionali e conflitti di leggi**, Giuffré, Milano, 1984, pages 178 ff.

performs the characteristic contractual performance: in a Credit Transfer it is unanimously held that this is the bank.[36]

86. It is therefore maintained that the relationship between the Originator and the Originator's Bank is governed by the law of the country of the Originator's Bank; that between the Originator's Bank and the Beneficiary's Bank by the law of the country of the Beneficiary's Bank; the latter law would also govern the relationships between the Beneficiary's Bank and the Beneficiary.

87. The currency of the Credit Transfer would not, per se, have any influence on the answers to questions A.1 - A.14.

88. The above "segment" structure implies that the answers to questions A.1 - A.14 would not change but only with regard to those segments which would fall under the Italian law, the other segments being governed by a non-specified foreign law: in hypotheses (a) and (c) the last two segments would be governed by Italian law (Originator's Bank/Beneficiary's Bank and Beneficiary's Bank/Beneficiary), while in hypotheses (b) and (d) only the first segment would be governed by Italian law (Originator/Originator's Bank).

89. Irrespective of the law governing any given segment of the Credit Transfer, Italian laws deemed "of public order", such as Law 5th July 1991, No. 197 (against so-called "money laundering"), or Law 17th February 1992, No. 154 (on transparency of banking operations), shall in any event apply to the operations which take place in Italy, even if, for any reasons, the governing law in respect of those operations taking place in Italy would otherwise be the law of another country.

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36 Radicati di Brozolo, **Operazioni bancarie internazionali e conflitti di leggi**, Giuffré, Milano, 1984, pages 144 ff.

INTER-PARTY RELATIONS 2: SETTLEMENT OF CREDIT TRANSFERS

Finality

Questions relating to Scenario A:

A.16 When is the Credit Transfer considered to have been completed:

(a) as between Originator and Beneficiary?

90. The Credit Transfer is deemed as completed when the funds are credited on the Beneficiary's current account, irrespective of any notice thereof to the Beneficiary.[37]

(b) as between the participating banks (including any Intermediary Banks)?

91. The answer to this question depends on the kind of structure within which the Credit Transfer is construed: if it is a mandate to make a payment, the Credit Transfer will be considered to have been completed only when actually made (credited on the Beneficiary's current account); while, if the Credit Transfer is deemed as a mandate to instruct another bank to make a payment, any participating bank would exhaust its own duties by issuing the proper instructions, and therefore the Credit Transfer would, for any bank other than the Beneficiary's Bank, be "completed" upon delivering the instructions to the other bank.

A.17 When completed, is the Credit Transfer:

(a) recognised as discharging the underlying obligation as between the Originator and the Beneficiary?

(b) treated as legal tender?

92. Case-law is almost unanimous in assessing the perfect equivalence between Credit Transfers and payment in cash.[38] The reasoning of the Courts is based on Section 1852 of the Civil Code ("Disposal of credit by customer"), which states: "When a

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37 See point 14 above.

38 See, among the many, Cass. 26th July, 1989, No. 3507, **Foro Italiano**, 1990, I, pages 128 ff.

deposit, an opening of credit or another banking transaction is made for current account, the customer can dispose at any time of the balance in his favour, subject to the observance of any agreed terms concerning notice."; this is why funds transferred by way of accounting entries are generally referred to as "scriptural money" ("moneta scritturale").

93. Doctrine, on the other hand, is divided; some authors deem that the above solution would only apply when a Credit Transfer has been agreed upon by the parties as a payment means,[39] while in the absence of such an agreement, Section 1188, second paragraph, of the Civil Code[40] would apply;[41] other authors, finally, state that to the unauthorised Credit Transfer, Section 1268 of the Civil Code[42] would apply, even if they tend to mitigate the solution by stating that in Credit Transfer matters the discharging declaration may well be implicit, by way of actually using the sums, accepting the transfer or the prolonged silence towards the bank (the Beneficiary's Bank).

94. Now, the Law dated 5th July 1991, No. 197 (against so-called "money laundering"), expressly states (Section 1, paragraph 1) that the notice to the creditor of the acceptance of the operation by the intermediary, produces the effects of the first paragraph of Section 1277 of the Civil Code, i.e. the perfect equivalence with Italian Lire in cash.

95. Pursuant to the Law of 4th August, 1990, No. 227, all international Credit Transfers whose amount exceeds Italian Lire 20,000,000 have to be notified, for tax and statistical purposes, to the Ufficio Italiano Cambi (Monetary Authority) by the resident person involved in the operation or by the intermediary.

Questions relating to Scenario B:

B.1 When is the Credit Transfer completed as between the participating banks?

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39 **Molle**, "I contratti bancari", Giuffré, Milano, 1981, page 535;
Ferri, "Bancogiro", Enciclopedia del Diritto, V, Giuffré, Milano, 1959, page 33;
Campobasso, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, page 249.

40 Section 1188, second paragraph, of the Civil Code states that "payment made to whom was not entitled to receive it discharges the debtor if the creditor ratifies it or takes advantage thereof."

41 **Campobasso**, "Bancogiro e moneta scritturale", Cacucci, Bari, 1979, pages 248 ff. and 258 ff.;
Porzio, "I contratti bancari", UTET, Turin, 1985, pages 885 ff.

42 Section 1268 ("Cumulative Delegation") states:
"If the debtor assigns to the creditor a new debtor, who binds himself to the creditor, the original debtor is not discharged from his obligation, unless the creditor expressly declares that he discharges him.
However, the creditor who has accepted the obligation of the third person has no remedy against the delegor unless he has previously requested payment from the delegee."

96. As has been examined above,[43] irrespective to the answer to the problem of establishing the legal structure within which Credit Transfers are construed (mandate to pay or mandate to issue payment instructions), a Netting Payment between banks would never be considered as having any relevance whatsoever on completion of a Credit Transfer: the answer to the question is therefore the same as in Scenario A.

B.2 When completed, is the Credit Transfer treated as having discharged the two banks from any obligations towards each other?

97. Completion of a Credit Transfer (either actual crediting of the sums on the Beneficiary's account, or issuance of the mandate to pay) surely discharges the main obligation arising between the two banks in connection with a Payment Order transmitted from one bank to the other, but does not, *per se*, mean that the two banks have been discharged from any reciprocal obligation arising from such a Credit Transfer: the actual settlement of the net position of the two banks takes place at the end of the banking day, and would therefore be subsequent to the completion of the Credit Transfer.

Questions relating to Scenario C:

C.1 When is the Credit Transfer completed as between the participating banks?

98. See answer in point 96 above.

C.2 When completed is the Credit Transfer treated as having discharged the two banks from any obligation towards each other?

99. See answer in point 97 above.

<u>Cross-Border Payments</u>

A.18 How would your answers to questions A.16 and A.17 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

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43 See point 91 above.

(b) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of your country?

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another jurisdiction (say US$)?

(d) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another jurisdiction (say US$)?

100. Reference is made to the answers to question A.15 above for the general question of the applicable law to international Credit Transfers.

101. Answers to points (a) and (c) would therefore not differ from answers to questions A.16 and A.17 since the governing law of at least the last two "segments" (Originator's Bank/Beneficiary's Bank and Beneficiary's Bank/Beneficiary) would be Italian law.

102. Answers to points (b) and (d) would be governed by the competent foreign law, with the exception of the first segments (Originator/Originator's Bank).

Settlement in general

Questions relating to Scenario A:

A.19 Assuming that the Payment Order is in the currency of your own country, must settlement be effected in any particular way as between the Originator's Bank and the Beneficiary's Bank? For example:

(a) by a credit entry to an account kept by the Beneficiary's Bank at the Originator's Bank;

(b) by a debit entry to an account kept by the Originator's Bank at the Beneficiary's Bank;

(c) debit and credit entries to the accounts of the two banks kept at a correspondent commercial bank;

(d) debit and credit entries to accounts kept by the two banks of your country's central bank;

(e) some other method.

103. All the above methods (in particular the first four) are practicable between Italian banks, since there are no compulsory ways of settling reciprocal positions between banks.

104. There are presently three main settlement systems in Italy: two official (one gross, "Bank of Italy's Continuous Settlement System" - "BISS",[44] and the other net, also managed by the Bank of Italy through the clearing houses), in which settlement is effected on the accounts that banks hold with the Bank of Italy; and one "unofficial" circuit, where transactions are settled through bilateral inter-bank

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44 The BISS came into operation in 1989 and consists of four sub-systems:

1. the wholesale Inter-bank Payment System sub-system ("SIPS") for large-value paperless transactions (it handles inter-bank transfers of external Italian Lire and the settlement of foreign exchange transactions);
2. the wholesale "Electronic Memoranda" sub-system ("ME"), also for large-value electronic transactions (it is used mainly by banks to effect the liquidity adjustments necessary to complete settlement of their final clearing balances);
3. the retail sub-systems for low-value paperless payments ("sottosistema Dettaglio");
4. the local clearing sub-system ("Recapiti locale") for paper based operations (which has existed since 1881).

correspondent accounts, mostly governed by bilateral agreements, and where balances of correspondent accounts are settled on the official circuit.[45]

105. The Bank of Italy has, in recent years, taken many measures in order to discourage recourse to the "unofficial" circuit because, if banks settle a large portion of their payments on reciprocal correspondent accounts, the pivotal role of central bank money is weakened, with a loss of security, since the finality of payments is ensured only through settlement in monetary base, and a narrowing of the base on which monetary policy can act.[46]

106. Notwithstanding the above, at least until very recently, only large-value Credit Transfers (i.e. exceeding Italian Lire 500,000,000) were settled on banks' accounts with the Bank of Italy mainly via the clearing system (which is in any event confined to deposit-taking institutions): the low-value transfers not yet included in the retail clearing sub-system are mainly settled by debiting and crediting banks' correspondent accounts.[47]

107. Such accounts are governed either by multilateral agreements amongst groups of participating banks[48] or, more frequently, by bilateral agreements.

A.20 Explain what different rights may arise in respect of each method of settlement employed in your country.

108. The different rights arising in respect of each method of settlement depend on various factors, mainly on the specific rules governing each settlement method: in general, the Bank of Italy has the power to draft regulations and policies which govern the "official" settlement systems and sub-systems[49] and to enforce the respective rules.

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45 See "Payment systems in EC Member States", September 1992, pages 180 ff.

46 See "Payment systems in EC Member States", September 1992, pages 192 and 193.

47 "Payment systems in EC Member States", September 1992, page 178.

48 The "White Book on the Payment System in Italy", published by the Bank of Italy in April 1987, mentioned (page 110) the so called agreement of the "reciprocal concentrated accounts" ("conti reciproci accentrati" between fifteen major Italian banks.

49 See, for a list of said systems and sub-systems, and for detailed information on the technical aspects of their operations, "Payment systems in EC Member States", September 1992, page 182 ff.

109. Most of the "official" settlement systems and sub-systems are operated through the SITRAD electronic network for data transmission;[50] the first defence against credit and liquidity risks is the extent to which members of the various systems control their own operations.

110. The Bank of Italy's continuous Settlement System ("BISS"), which is the gross settlement system operated by the Bank of Italy, and which allows banks to transfer funds directly to centralised accounts via the inter-bank network (SITRAD), provides instantaneous settlement of transactions. Each transfer is debited or credited immediately to the account of each counterparty, settlement is immediate and final. Once transactions have been posted to the centralised accounts they are irrevocable. A posted transaction cannot be cancelled; however, upon agreement between the parties concerned, a reverse transaction for the same amount and value date can be entered to offset an earlier transfer. The BISS cannot generate liquidity or credit risks, as each payment is irrevocable only if the paying bank has a sufficient account with the Bank of Italy.[51]

111. The rights arising from operations carried out through the "unofficial" settlement system may originate from the multilateral or bilateral agreements, which regulate all terms and conditions of the settlement.[52]

Cross-Border Settlement

Questions relating to Scenario A:

A.21 How would your answers to questions A.19 and A.20 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(b) the Beneficiary's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

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50 In order to encourage the use of computerized procedures for the movement of funds, the charges for paper-based operations are currently from three to six times higher than those for transactions carried out via the inter-bank network.

51 "Payment systems in EC Member States", September 1992, page 183.

52 "White Book on the Payment System in Italy", page 111.

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

(d) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

112. Reference is made to the answers to question A.15 above for the general question of applicable law to international Credit Transfers.

113. Answers to points (a) and (c), except as hereinafter specified, would in principle not differ from answers to questions A.19 and A.20 since the governing law of at least the last two "segments" (Originator's Bank/Beneficiary's Bank and Beneficiary's Bank/Beneficiary) would be Italian law.

114. In case (a) it would be likely that large-value transfers in Italian Lire for the settlement of international transactions would be channelled through the wholesale "SIPS" sub-system, within the recently established Bank of Italy continuous Settlement System ("BISS"). It is important to underline that SIPS only handles giro transfer of external Lire,[53] and/or the equivalent of foreign exchange transactions.

115. The SIPS adopts the "store and release" technique which allows each participant to make irrevocable ("release") a payment (previously entered as "stored") only after the funds necessary for its settlement have been made available by the operator originating the transaction. There are four types of message: revocable advance payment notices; final credit transfers; confirmation of payment notices and cancellation of payment notices.[54]

The SIPS processes electronic transactions only. The SIPS is a system in which novated bilateral net balances are settled through the national clearing system. Thus there is no actual transfer of funds until settlement time (i.e. the close of the clearing cycle at the end of the working day). The application to novation affects only bilateral net balances at the end of the day. The exposure of each bank is

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53 An external lire payment is any transfer of monetary resources between economic agents resident in different countries. The concept of "residence" is defined in the foreign exchange legislation ("disciplina valutaria").

54 "Payment systems in EC Member States", September 1992, page 184.

governed by gross items during the operating cycle and by bilateral net balances at the end thereof.[55]

116. In case (a), low-value transfers in Italian Lire are executed through correspondents: the Italian Beneficiary's Bank, pursuant to instructions received from the foreign correspondent (the Originator's Bank or an Intermediary Bank), debits the loro account in Italian Lire and credits for the same amount to the current account of the Beneficiary.

In case (c), since Italy has no inter-bank systems or sector-wide agreements for the clearing of foreign currencies,[56] transfers in foreign currencies and their settlement are executed exclusively through correspondents: the foreign Originator's Bank debits the Originator's current account and credits the nostro account of the Italian Beneficiary's Bank, instructing the same to credit the corresponding amount on the Beneficiary's account.

117. Answers to points (b) and (d) would be governed by the competent foreign law, with the exception of the first segment (Originator/Originator's Bank). To carry out the instructions received from Italian Originators' Banks, foreign Beneficiaries' Banks will use their local clearing and settlement systems.

118. In case (b), the Italian Originator's Bank would debit the Originator's account and would credit the same amount on the loro account of the Beneficiary's Bank kept in Italy by the Originator's Bank, and would instruct the Beneficiary's Bank to credit the Beneficiary's account.

119. In case (d), the Italian Originator's Bank would debit the Originator's account and would instruct the Beneficiary's Bank to debit the same amount on the nostro account of the Originator's Bank kept abroad by the Beneficiary's Bank, and would instruct the Beneficiary's Bank to credit the Beneficiary's account.

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55 "Payment systems in EC Member States", September 1992, page 184.

56 "Payment systems in EC Member States", September 1992, page 186.

Netting

Questions relating to Scenario B:

B.3 Does the informal netting arrangement between Bank A and Bank B have any legal effect? Can it be justified by applying any legal concept other than set-off?

120. An "informal" netting arrangement between Bank A and Bank B would in any event constitute a "contract" under Italian law; it is in fact still to be evaluated by Italian doctrine and case-law, of the impact of the recent Law of 17th February 1992, No. 154, which at Section 3 imposes the written form for all contracts concerning bank operations and services. Since such law states that one copy of the contract has to be returned to the "customer", it could be inferred that the law does not apply to inter-bank arrangements.

121. There are two official settlement systems in Italy, and one unofficial, where transactions are settled through bilateral inter-bank correspondent accounts, mostly governed by bilateral agreements, and where only balances of correspondent accounts are settled on the official circuit. For the purposes hereof, Scenario B and Scenario C both appear to fall under the hypothesis of the unofficial "circuit", and will therefore be treated similarly, it being stressed that in any event the hypothesis of lack of a written contract between two national correspondent banks appears to be unrealistic in Italy.

122. The low-value transfers not yet included in the retail clearing sub-system are mainly settled by debiting and crediting banks' correspondent accounts,[57] such accounts are governed either by multilateral agreements amongst groups of participating banks[58] or, more frequently, by bilateral agreements.

123. It is unchallenged, within the Italian doctrine, that such agreements fall under the provisions set forth by the Civil Code for the current account banking operations (Sections 1852 to 1857 inclusive of the Civil Code).

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57 "Payment systems in EC Member States", September 1992, page 178.

58 The "White Book on the Payment System in Italy", published by the Bank of Italy in April 1987, mentioned (page 110) the so-called agreement of the "reciprocal concentrated accounts" ("conti reciproci accentrati" between fifteen major Italian banks.

124. Section 1853 of the Civil Code states that if between a bank and the customer there is in existence more than one relationship or account, even if in different currencies, the negative and positive balances are subject to a reciprocal set-off, unless the parties have agreed to the contrary. This rule, as has been stated above, applies also to correspondent accounts between banks.

125. Considerable freedom is therefore left to banks in establishing the bilateral (more seldom, multilateral) rules governing their correspondent accounts; it seems, however, that an "informal" (as well as a more formal one) netting arrangement would in any event imply the legal concept of set-off, expressly referred to by the bank current accounts' rules.

126. Set-off is governed in general by Sections 1241 to 1252 inclusive of the Civil Code; it occurs only between two equally liquid and due debts concerning amounts of money (or amounts of replaceable goods of the same kind); set-off generally operates automatically (in such a case is called "legal set-off", to distinguish it from "judicial set-off", which is declared by the Judge when the debt is not yet liquid but of easy and quick liquidation) from the day the two debts coexist.

127. Section 1252 of the Civil Code ("voluntary set-off") expressly provides that parties may establish (even in advance) the terms upon which they may set-off - and this may be done (contractually) even where a right of set-off would otherwise not legally exist: this provision seems relevant within the scope of the question, since it gives full legal effect to the netting arrangements between correspondent banks.

128. It must be specified that the concept of set-off is included, in Italian law, within the methods of extinction of an obligation different from fulfilment of the obligation; the current account, on the other hand, is a typical contract (i.e. one of the contracts specifically regulated by the Civil Code).

B.4 Assuming that the netting arrangement is legally binding, is it subject to any limitation? For example, must the debts either way be "mutual"? Is it possible in certain circumstances for other claims between the two banks to be brought into the netting arrangement?

129. Section 1853 of the Civil Code[59] seems to be very clear in providing a negative answer to the first question, and a positive answer to the second question; it is customary that banks, via correspondent accounts, settle many reciprocal claims, such as those arising from cheques, securities, etc.; in addition, the rule of Section 1252 of the Civil Code (voluntary set-off) seems to be broad enough to allow the banks to include as many claims as they wish within the netting arrangement.

B.5 Would your answer be different if the payments made either way were in a currency other than your own - or if the payments from Bank A were in your currency or a foreign currency and the payments from Bank B were in a different foreign currency (say US$)?

130. No, the answer would be the same even in case of payments made in currencies other than Italian Lire (and in fact Section 1853 of the Civil Code expressly contemplates the case of different currencies); in such a case, however, the recourse to the nostro account scheme would seem unavoidable:[60] the Italian bank which is debtor of sums in foreign currency instructs a foreign correspondent bank to debit the same sums on its account (kept by the correspondent bank) and to credit the same to the account of a correspondent bank of the Italian bank to which the sums are due.

131. The foreign correspondent banks are generally referred to as "clearing banks"; normally, each Italian bank has only one "clearing bank" for each currency.

132. It may be useful, at this point, to remember that in Italy there are no inter-bank settlement systems, nor inter-bank settlement agreements, concerning the settlement of foreign currencies.[61]

B.6 At what moment are the underlying obligations of the parties (taking the Originator, Originator's Bank and Beneficiary's Bank separately) discharged?

133. The actual netting system employed by the banks should not imply different answers from those already given more generally above.[62] The Credit Transfer is deemed as completed (between the Originator and the Beneficiary) when the funds

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59 See point 124 above.
60 See answers to question A.21 above.
61 "White Book on the Payment System in Italy", page 154.
62 See answers to point A.16 above.

are credited to the Beneficiary's current account, irrespective of any notice thereof to the Beneficiary,[63] and irrespective of any settlement between the banks involved, which cannot revoke the Credit Transfer once it has been completed.[64]

134. With regard to the Originator's Bank, the answer to the above question depends on the kind of structure within which the Credit Transfer is construed: if it is a mandate to make a payment, the Credit Transfer will be considered to have been completed only when actually made (credited to the Beneficiary's current account); while, if the Credit Transfer is deemed as a mandate to instruct another bank to make a payment, any participating bank would exhaust its own duties by issuing the proper instructions, and therefore the Credit Transfer would, for any bank other than the Beneficiary's Bank, be "completed" upon delivering the instructions to the other bank. Since the debate on this matter may not be deemed as concluded, no conclusive position may be taken. With regard to the Beneficiary's Bank the answer is simpler, since the NUB (see point 16 above) and Law dated 5th July 1991, No. 197 (against so-called "money laundering") imply that the Beneficiary's Bank will be discharged upon actual crediting of the funds to the current account of the Beneficiary.

B.7 How would your answers to questions B.3 - B.5 differ if Bank B were established outside your country in a foreign jurisdiction?

135. In this case it would be difficult to find the applicable law, since it is not easy to individuate the characteristic performance: if this is the settlement of the position of Bank A and Bank B, then it could be argued that the governing law should be that of the third bank (the common correspondent); otherwise, the governing law should be that one of the place where the contract ("informal arrangement") has been concluded.

136. Our answers to questions B.3 - B.5 would therefore be unchanged if the governing law were Italian law. Concerning the possibility that a foreign bank participates in a domestic informal netting arrangement, we recall that such arrangements are quite common between Italian banks and foreign banks: the only uncertain point would be the applicable law.

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63 See point 14 above.

64 The Tribunal of Padua, 22nd May, 1982, **Banca, Borsa e Titoli di Credito**, has in fact stated that the Originator's Bank is not entitled to revoke the Credit Transfer once the sums have been credited on the Beneficiary's current account.

Questions relating to Scenario C:

C.3 Having touched (briefly) upon any particular agreement or set of Club Rules which might be applicable, state whether or not they are enforceable as a matter of law - or do they constitute an agreed practice without being binding as a matter of law?

137. As anticipated above, since there would be no legal difference between an "informal" (i.e. not written) and a formal netting arrangement, answers to questions concerning Scenario C will not substantially differ from those concerning Scenario B.

138. The "White Book on the Payment System in Italy" mentions[65] one agreement between 15 of the major Italian banks, the so-called agreement of the "conti reciproci accentrati" (reciprocal concentrated accounts).

139. The reciprocal concentrated accounts agreement foresees that the netting of liquid balances takes place at fixed dates by way of remittances to clearing houses and that for each couple of participating banks the operations have to be accounted on one single reciprocal account (i.e. "concentrated").

140. Concerning the legal enforceability of such netting agreements, the answer is provided by Section 1372 of the Civil Code, which expressly states that between the parties the contract has the same efficacy as the law.

C.4 What is the effect of the netting arrangement on any underlying transactions?

(a) Is it possible to vary the contract or the Club Rules? If so, how can this be achieved?

141. If the netting arrangement originates from a contract, the general rules on contracts will apply: it may be varied only by mutual consent of all concerned parties (they can be more than two).

142. It is possible that two or more participants may wish to amend the Club Rules, but only as far as they themselves are concerned: in this case all amendments will be

65 "White Book on the Payment System in Italy", page 110.

enforceable between the concerned participants, provided the amendments do not violate mandatory provisions of law.

(b) Does a single obligation to make a net payment replace the bilateral obligations as between the two banks? If this concept is recognised under your law, is it treated as a novation?

143. Novation is a well recognised concept under Italian law; as it has been explained above for set-off, also novation constitutes one of the methods of extinction of an obligation different from fulfilment of the obligation, and is dealt with by Sections 1230 to 1235 inclusive of the Civil Code.

144. The main characteristic of novation is that, contrary to what normally happens with set-off, it can only operate where all the parties unequivocally agree that a previous obligation should be replaced with a new one; furthermore, novation is without any efficacy if the original obligation did not exist (Section 1234 of the Civil Code).

145. From the above principles it appears that a single obligation to make a net payment may well replace by way of novation the bilateral obligations as between the two banks, but only if this is the clear and indisputable understanding of the parties.

C.5 How would your response to question C.2 differ if Bank B were established outside your country in a foreign jurisdiction?

146. In the absence of a validly established law[66] governing the netting agreement,[67] this question should be answered pursuant to the general principles which have been described above (see points 85 and 86): if the Beneficiary's Bank is located in Italy, Italian law would apply to the relationships of the two banks; pursuant to Italian law, when the Credit Transfer is completed, the two banks are surely discharged from any reciprocal obligations with regard to the completion of the Credit Transfer at issue, but all other respective obligations are not affected by the completion of the Credit Transfer until they are actually settled in compliance with the provisions of the netting agreement. On the contrary, if the Beneficiary's Bank

66 To be ascertained pursuant to the Rome Convention of 19th June 1980 on the applicable law to contractual obligations.

67 Which would likely govern all respective obligations of the participating banks, and therefore also the effect of the completion of the Credit Transfer on any other respective obligation of the two banks.

is located outside Italy, the answer to this question should be submitted to the foreign governing law.

Questions relating to Scenario D:

147. The various settlement systems operating in Italy have been mentioned and briefly described in answers 104 ff. above. Below we will provide some further description of the various steps of the clearing processes which lead to the centralised settlement at the end of the banking day.

148. All clearing operations start at 8.30 a.m.; the first to close is the retail system (at 12.00 noon), followed by the local clearing system at 1.30 p.m. and SIPS at 2.00 p.m. Treasurers can subsequently cover their positions by using the M.E. sub-system, which is the last to close (4.00 p.m.). At 4.00 p.m. the automated national clearing procedure ("Compensazione nazionale dei recapiti") calculates a single multilateral net position at national level for each participant.

149. The settlement of the multilateral net balances resulting from all the above clearing sub-systems is effected through the bank's centralised accounts with the Bank of Italy; now the Bank of Italy continuous Settlement System ("BISS") is available until 5.00 p.m. (see below).

150. On 7th May 1991 the Minister for the Treasury issued a decree aiming at regulating participation in the clearing system and enhancing risk control by the Bank of Italy. The Decree provides for the possibility of establishing two different levels of participation (direct and indirect) in each clearing sub-system on the basis of objective requirements, such as solvency ratios and organisational standards.

151. Participation in the clearing systems is still restricted to deposit-taking institutions; it must noted that participation in the four sub-systems that flow into the national clearing procedure varies: the larger banks participate in all the clearing sub-systems, while smaller banks participate only in some, according to their operational needs.

152. The Bank of Italy continuous Settlement System ("BISS") was introduced in April 1989; it allows the transfer of funds to centralised accounts via the inter-bank network "SITRAD".

153. The BISS allows the making of electronic giros between 8.00 a.m. and 5.00 p.m. via SITRAD.

154. Within the electronic direct transfer system, each transaction is entered by the paying bank; an automated procedure notifies the counterparties of the operation and the resulting balances on their accounts in real time. At the end of the working day the Bank of Italy forwards an updated statement to each participant. The communications system consists of the electronic inter-bank network and the internal network of the Bank of Italy. Message security within the inter-bank network is ensured through authentication codes and encryption.

155. It is the duty of the Bank of Italy to draft regulations and policies for the BISS, to monitor compliance thereto by the participants and to enforce the rules.

156. As has already been pointed out, the BISS provides instantaneous settlement of transactions. Each transfer is debited or credited immediately to the account of each counterparty, settlement is immediate and final. Once transactions have been posted to the centralised accounts they are irrevocable. A posted transaction cannot be cancelled; however, upon agreement between the parties concerned, a reverse transaction for the same amount and value date can be entered to offset an earlier transfer. The BISS cannot generate liquidity or credit risks, as each payment is irrevocable only if the paying bank has a sufficient account with the Bank of Italy.

D.1 At the end of the banking day, are the respective net positions enforceable as a matter of law between the participating banks?

157. The answer to the question is surely positive; in case a participating bank has not sufficient funds to cover its position, and if the Bank of Italy does not intervene with an overdraft facility (the so called "anticipazioni a scadenza fissa", granted for no more than 22 days[68]), such participating bank would be declared insolvent and would be excluded from the settlement, which would thereafter be repeated.

D.2 (a) Is any obligation of Bank A to pay Bank B enforceable?

68 "White Book on the Payment System in Italy", page 109.

(b) If so, is this dependent upon the nature of the specific contractual arrangements which exist between them or any Club Rules or anything else?

(c) Is multilateral netting by novation possible, without the substitution of an intermediary (such as a Central Bank) as counterparty? (See also C.2 above.)

158. The enforceability of the respective net positions is grounded on general principles governing obligations and contracts and would therefore depend on the provision which states that the contract, between the parties thereto, has the same force and effect as the law (Article 1372 of the Civil Code): the enforceability would therefore arise both from any specific contract between the two banks and from any Club Rules applicable to them.

159. Multilateral netting by novation seems possible, but it would appear as the result of more bilateral netting: we have examined above, for instance, that the "SIPS" sub-system is a system in which novated bilateral net balances are settled through the national clearing system; thus there is no actual transfer of funds until settlement time (i.e. the close of the clearing cycle at the end of the working day); the application to novation affects only bilateral net balances at the end of the day; the exposure of each bank is governed by gross items during the operating cycle and by bilateral net balances at the end thereof.[69]

69 "Payment systems in EC Member States", September 1992, page 184.

SYSTEMIC RISK: INSOLVENCY

Questions relating to Scenario A:

Assume that the Originator's Bank is closed and a receiver is appointed, by a court or other competent authority, to wind up it affairs after the Payment Order has been received by the Beneficiary's Bank, but before settlement has been effected between the Originator's Bank and the Beneficiary's Bank.

A.22 Who bears the risk of closure of the Originator's Bank - the Originator, the Beneficiary's Bank, or the Beneficiary? (Assume that the payment is made in the currency of your own country.)

160. Banks are not subject to the ordinary bankruptcy proceedings (which take place under supervision of a Court - the Bankruptcy Court), but to a liquidation procedure ("liquidazione coatta amministrativa") carried out by a liquidator under governmental supervision.[70]

Section 78 of the Bankruptcy Law expressly states that the bankruptcy (insolvency, in case of banks) declaration has the effect to automatically resolve any and all current account and mandate agreements: it is commonly held that

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70 This special discipline of banks' insolvency has been confirmed by the new Banking Law, enacted by Legislative Decree 1st September 1993, No. 385, which will come into force as of 1st January 1994.
Such Decree provides (Sections 70 ff.) that in case of serious irregularities in the management of a bank, or in case of material breaches of the rules which govern the activity of the bank, or in case of major losses, or in case of request of the bank's management or of the extraordinary shareholders' meeting, the Minister of Treasury, upon request of the Bank of Italy, may put the bank into extraordinary administration ("amministrazione straordinaria") for a period of time not to exceed one year (which can be prolonged by up to no more than six additional months). During such period of time the management of the bank is assigned to one or more extraordinary commissioners appointed by the Bank of Italy.
Should the above irregularities, losses or violations be of extraordinary significance, then the Minister of Treasury, upon proposal of the Bank of Italy, may impose the winding-up ("liquidazione coatta amministrativa") of the bank (Sections 80 ff.).
Extensive reference is made to the Bankruptcy Law with regard to the effects of the "liquidazione coatta amministrativa" on the bank, on the bank's creditors and on the pending contracts and obligations (Section 83 of the Decree).
Specific provisions (Sections 84 ff.) regulate the powers of the liquidators and the procedure to assess and liquidate the bank's liabilities.
Also the leader bank of a group of banks, as well as the participating banks, may be subject to the extraordinary administration (Sections 98 ff.) or to the "liquidazione coatta amministrativa" (Sections 101 ff.).
Whenever in the course of this report reference is made to a "receiver", such term should be construed as "commissioner liquidator" ("commissario liquidatore").
Similarly, whenever the term "bankruptcy" is quoted by the provisions of the Bankruptcy Law which are referred to by the above Decree, such term may be well substituted by the "insolvency" which has caused the declaration of the "liquidazione coatta amministrativa".

such rule applies also to bank current accounts:[71] this implies that all Credit Transfers which were under completion as of the bankruptcy date are automatically terminated and should not be completed.[72]

Section 1829 of the Civil Code states that, unless differently agreed upon, the inclusion in the current account of a credit towards a third person is made under the condition of actual payment by the third person; should the credit remain unpaid, it can be removed from the current account: this rule, which is set forth with reference to the general hypothesis of current account, is expressly declared applicable also to bank current accounts (Section 1857 of the Civil Code).

161. The above rules (confirmed also by Rule 4, second paragraph, of the NUB applicable to current accounts) implies that the above risk, in the first instance, is borne by the Beneficiary, in the sense that, if the Credit Transfer has already been completed, the Beneficiary's Bank will be entitled to debit the Beneficiary's current account of the sums previously credited, while if the Credit Transfer has not yet been completed, then the Beneficiary's Bank simply refrains from completing it.

162. In both cases, however, the underling obligation between the Originator and the Beneficiary is not fulfilled, and therefore the Beneficiary may well require payment from the Originator, even if he has already been debited the amounts by the Originator's Bank, and therefore it will be the Originator who will finally bear the risk described in question A.22. In this latter case the Originator will be entitled to file an application with the receiver for recovery of its credit towards the bank, but he will participate together and proportionally with the other unprivileged creditors, and only full payment of the privileged creditors (employees' salaries, credits of the State, etc.).

A.23 In what circumstances might a receiver be able to bring a claim based on fraudulent preference or preferential transfer otherwise seek to set aside or claw back any payment?

163. Section 65 of the Bankruptcy Law states all payments of debts which are due on the date of declaration of the bankruptcy or thereafter are without effect towards

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71 **Zanarone**, "Effetti del fallimento sui rapporti giuridici preesistenti", Commentario Scialoja-Branca. Legge fallimentare, 1979, pages 326 ff.

72 If completed, i.e. if the funds have been actually credited on the current account of the Beneficiary, then Section 44 of the Bankruptcy Law would be applicable: see point 167 below.

the creditors, if made in the course of the two years prior to the bankruptcy declaration. Therefore, if a Credit Transfer has been ordered for the purpose of settling an underlying obligation to pay a sum of money owed on the date of the bankruptcy or later, such Credit Transfer would be automatically ineffective towards the creditors, in the sense that the receiver will be entitled to set aside such payment and to recover all amounts actually paid, if any, without the need to provide any proof of the prejudice suffered by the creditors.

164. Section 66 of the Bankruptcy Law states that the receiver may also recur to the ordinary revocatory action ("azione revocatoria") which is governed by Sections 2901 to 2904 inclusive of the Civil Code.

165. The ordinary revocatory action is available to the creditor for five years after the date of the act or agreement to be revoked, and may be brought against acts by which the debtor disposes of his assets in prejudice of the creditor's reasons, provided that the debtor and the third party were aware of the prejudice to the creditor, or, if the credit did not exist yet, they fraudulently acted in order to create prejudice to the creditor's reasons. In practice, this action is available against the fraudulent acts of disposal made by the bankrupt in the course of the five years preceding the bankruptcy declaration. Among the "acts of disposal" are surely included any Credit Transfers which took place during such period of time.

166. Section 67, second paragraph, of the Bankruptcy Law enables the receiver to ask revocation of all payments (also if made by way of Credit Transfer) of due debts made by the bankrupt during the year preceding the bankruptcy declaration, provided that he proves that the party who received payment was aware of the insolvency status of the debtor.

A.24 Can the receiver avail himself of any zero-hour rule in the winding-up to challenge payments which have been made?

167. A "zero-hour" rule is not expressly set forth in any provision of law, but it is implied by various rules of the Bankruptcy Law.

Section 42 of the Bankruptcy Law states that by virtue of the judgement which declares the bankruptcy the bankrupt may not dispose of any of his assets existing as of the date of the bankruptcy declaration: this means that the relevant moment to evaluate the consistency of such assets is midnight of the preceding day.

Section 44 of the Bankruptcy Law provides that all acts and all payments made by the bankrupt after the bankruptcy declaration are ineffective vis-a-vis the creditors, as well as all payments received by the bankrupt after the bankruptcy declaration: the ineffectiveness is "automatic", in the sense that the receiver has not to undergo any revocatory or similar action for enforcing it; even actual knowledge by third parties of the bankruptcy (insolvency) declaration is not a requisite for enforcing the above ineffectiveness.

All Credit Transfers which have been completed after midnight on the day preceding the bankruptcy date would be therefore without any effect.

Questions relating to Scenario B:

Assume that Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected between it and Bank B that banking day:

B.8 Is Bank A liable for the net amount or can the receiver disclaim Bank A's obligations and compel Bank B to pay the gross amount of the Credit Transfers issued by it in favour of Bank B?

168. The differences between Scenario A and Scenario B do not imply different solutions to similar questions, since the settlement methods appear to be of no importance vis-a-vis the receiver's faculty to revoke payments made, should it be legally possible.

169. In such a case, in light of the above general rules, all payments made by Bank A of debts which were not yet due would be automatically without effect towards the creditors (including Bank B among them).

170. The above principle, however, in a netting scheme, would be mitigated by Section 56 of the Bankruptcy Law, which states that the creditors have the right to set-off, with their debts towards the bankrupt, their credits towards the same bankrupt, even if such credits were not yet due before the declaration date of the bankruptcy. In this latter case (credits not yet due before the bankruptcy declaration) the set-off does not operate for credits acquired "inter vivos" from third parties (i.e. not by way of inheritance) after the declaration of bankruptcy or in the preceding year. This means that if the credit which is not yet due before the bankruptcy date

originated since the beginning as a credit of Bank B towards Bank A (i.e. was not acquired by Bank B from third parties), then Bank B is fully entitled to set off such credit against its debts towards the bankrupt (Bank A).

The way in which the above rule actually operates, in connection with banking operations, is better understood if construed by taking into account Article 1853 of the Civil Code, which states that, if between the bank and its customer more contractual relationships and/or current accounts are pending (even if in different currencies), the respective active and passive balances are automatically set off, unless differently agreed upon by the parties. It has therefore been inferred[73] that the right to set-off provided for by Section 56 of the Bankruptcy Law does not operate in the presence of only one current account. For the purposes of the above question, however, it will be assumed the existence of more than one current account between Bank A and Bank B, since in Scenario B the settlement is made by means of entries made to the accounts kept by each bank with a common correspondent.

171. Therefore, the answer to the question, should be in the sense that, normally, the set-off would operate and Bank A should be liable only for the net amount.

Similarly, the receiver would not be entitled to disclaim Bank A's obligations and compel Bank B to pay the gross amount of the Credit Transfers issued by Bank A in favour of Bank B, unless for credits which were not yet due before the declaration date of the bankruptcy and which have been acquired "inter vivos" by Bank B from third parties after the declaration of bankruptcy or in the preceding year.

B.9 Is netting - or any form of set-off - available after Bank A has closed?

172. Also in this case, this question has been affirmatively answered by point 170 above, since Section 56 of the Bankruptcy Law expressly contemplates cases of set-off which are intended to take place after the bankruptcy declaration.

73 Prevailing, but not unanimous, opinion.

Questions relating to Scenario C:

Assume Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected that banking day:

C.6 Is the receiver bound by the netting arrangements which exist - or under your country's insolvency law can he unravel them?

173. We have explained above why Scenario B and Scenario C would not be treated differently under Italian law.

174. Therefore, since set-off operates "ex lege" even if not foreseen by the parties, also a contractual set-off scheme such as netting arrangement would be opposable to the bankruptcy (and the receiver would be therefore bound to it), provided, however, that the single operations settled do not fall within the exception set forth by Section 56 of the Bankruptcy Law (the set-off does not operate for credits not yet due at the bankruptcy date acquired "inter vivos" after the declaration of bankruptcy or in the preceding year). It should be clear that the above answer does not imply that the receiver is bound to execute after the bankruptcy declaration any existing netting arrangements: the bankruptcy is a cause of automatic termination of any and all such agreements (see point 181 below); the positive answer to the question only means that the receiver would normally be prevented from revoking settlement of Credit Transfers which took place prior to the bankruptcy declaration by virtue of validly established netting arrangements: the only revocable set-off would be those of debts of Bank A against credits of Bank B which were not yet due at the bankruptcy date and which were acquired by Bank B inter vivos from a third party after the bankruptcy date or in the preceding year.

C.7 What restrictions or conditions (if any) are imposed on the process of contract novation by your country's bankruptcy law?

175. Since novation has the effect of extinguishing the preceding obligation by creating a new one, novation could have the side effect of weakening the position of the payment or set-off, vis-a-vis the revocation risk, since a novated obligation is surely closer to the bankruptcy date, and we have noted above that the date of acts (contracts, payments, etc.) is essential in order to ascertain the enforceability of the revocation: an act, if not novated, could in fact fall out of the "suspected period"

(which, for normal payment of due debts, is of only one year, but in other cases it could also run up to two or even five years, as has been examined above), while if it has been novated it could well fall within such period: when dealing with someone who seems close to an insolvency position, it is advisable to thoroughly examine the benefits and the risks of any envisaged novation.

Questions relating to Scenario D:

Assume Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected that banking day. Bank A is the net debtor of Bank B and the net creditor of Bank C. Taking the two positions together to arrive at a net position, Bank A is the net debtor.

D.3 Are the end of day net positions as between the three banks legally binding?

176. In point 157 we have already provided an affirmative answer to this question. The fact that the net positions are legally binding does not exclude, however, the possibility of the revocation of single Credit Transfers by virtue of Section 56 of the Bankruptcy Law, should it be the case.

177. The situation that Bank A, at the end of the banking day, results a net debtor would in any event enable the creditor bank(s) to file an application for the net balance, as well as for any credit corresponding to amounts that Bank B and/or Bank C may have been compelled to pay back to the receiver as a consequence of revocation actions brought by the receiver against them.

D.4 (a) Can the receiver disclaim the Credit Transfers made during the course of that banking day by Bank A, but affirm the Credit Transfers made to it?

178. As has been discussed above,[74] the receiver can disclaim all Credit Transfers which represent payment of debts which were not yet due on the bankruptcy date. He would also be entitled to revoke the set-off of Bank A debts towards credits which were not yet due on the bankruptcy date and which were acquired inter vivos after the bankruptcy date or in the preceding year. Apart from the above exceptions, he would not be entitled to challenge or disclaim the Credit Transfers

74 See points 169 to 171 inclusive above.

made and affirm those received: the net position resulting from the set-off would be therefore binding for the receiver, as discussed in point 174 above.

(b) Can the receiver unravel the netting arrangement by "cherry picking"?

179. It would seem that the netting arrangement (or better, the participation therein by Bank A), would be automatically resolved by virtue of law: Section 78 of the Bankruptcy Law, in fact, states that the bankruptcy cancels the contracts of current account, mandate and commission, and it could be argued that the netting falls under such rule, the continuation of a bankrupt bank in such a system being inconceivable ; in any event the Bank of Italy would have the power to exclude an insolvent bank from the payment and settlement systems.

The receiver would therefore be prevented from any attempt of unravelling the netting arrangement by "cherry picking", since the bankruptcy (insolvency) declaration would freeze the situation as of such date; he has however the duty to disclaim or revoke any operation which is prejudicial to the interest of the creditors, whenever he deems that there are the requisites and the prospective of achieving a positive result for the bankruptcy (this is the only "discretion" left to the receiver).

(c) Can the receiver avail himself of any zero-hour rule in the winding-up to challenge payments which have been made?

180. It seems that answer 167 above already provides a positive answer to this question.

D.5 Identify the netting arrangements (bilateral, multilateral, by novation or otherwise) which would be effective in the insolvency of any of the participating banks.

181. It seems, from the point of view of the bankrupt bank, that no participation in any of the above netting arrangements would survive a bankruptcy declaration: Section 78 of the Bankruptcy Law would appear to be applicable without exceptions to all such agreements.

Any such arrangement would however be held as validly established in the event of the insolvency of any participating bank, with the consequence that the set-off of the various gross operations until the bankruptcy date should be generally held as opposable to the bankruptcy, with the only exceptions repeatedly discussed above (e.g. see point 178).

For the reasons mentioned in point 175 above, it must be noted that netting arrangements based on novation seem to be more exposed to the risk of being revoked. However, under Italian law and practice, the netting systems are generally based on the set-off technique which does not imply this negative "side effect".

SECTION II

COMPARISONS WITH UNCITRAL MODEL LAW

To what extent does your existing law reflect, conflict with or remain silent in respect of any of matters covered by the provisions of the UNCITRAL Model Law on International Credit Transfers?

If the UNCITRAL Model Law were to be brought into force, and were to apply to consumers, how would the protection which it would offer to consumers differ from the protection already available under existing laws?

182. We will treat jointly the two questions, since answers to the second question are already available while commenting on the UNCITRAL Model Law on International Credit Transfers vis-a-vis the otherwise applicable law pursuant to the Italian law on conflicts of law.

183. The UNCITRAL Model Law on International Credit Transfers is surely much broader and more complete than the existing Italian law on International Credit Transfers, also because the same would apply only to the "segments" falling under it by way of the applicable law on conflicts of law.

184. Concerning the latter point (applicable law), the solution foreseen by the UNCITRAL Model Law on International Credit Transfers (Article Y) would substantially differ from the solution presently reachable through the law on conflicts of law, since the UNCITRAL Model Law on International Credit Transfers indicates that, in the absence of specific agreement between the parties (generally with the absence of the Beneficiary and of the Beneficiary's Bank), it would be the law of the Beneficiary's Bank: this would mean that all rights and obligations are governed by only one law, and it could be easily foreseen that the Originator and the Originator's Bank would hardly risk submitting themselves to a foreign law, so they would likely agree on a specific governing law (possibly their common law), thus binding the Beneficiary and the Beneficiary's Bank to a law which is different from the law usually governing their current account relationships.

185. It is very positive that the UNCITRAL Model Law on International Credit Transfers foresees precise deadlines for acceptance and completion of a payment

order and of the ancillary activities: this aspect is missing in Italian law, which makes a general reference to the mandatary's duties to operate with the diligence of a "pater familias", or which simply refers, in connection with the Beneficiary's Bank's duty to credit as soon as possible the funds on the Beneficiary's account, the quickest available technical means: it is clearly understandable that fixed terms would avoid endless discussions and arguing as to the acceptable degree of diligence of a "pater familias" and/or as to the technical transfer means available to a certain bank or branch thereof.

186. Article 4 ("Variation by agreement") sets forth no limits to the variation, and therefore same could well concern limitation of liabilities and responsibilities, which under Italian law could not be waived by the creditor in cases of fraud or wrongful misconduct (Section 1229 of the Civil Code). On the other hand, the provisions set forth in Articles 14 ("Refund") and 17 ("Liability for interest") of the UNCITRAL Model Law on International Credit Transfers, which are (at least in the most significant provisions) expressly declared as not amendable by contract, would represent a greater protection than that available under Italian law, since such clauses would be amendable by consent, with the only limit of nullity of any responsibility waiver in case of fraud or wrongful misconduct.

187. Article 5 ("Obligations of sender") seems somewhat more restrictive than Italian law with regard to the protection of the Originator against the cases included in the so called "iussum",[75] such as the absence of the order, the defects of the consent (mistake, duress and fraud), and the falsity of the order: Italian Law would appear to provide more defences to an Originator in such cases, or at least the discipline appears to be more complete (the UNCITRAL Model Law on International Credit Transfers only deals with erroneous duplication of the order, or a mistake or "anomaly" in the same order, but leaves uncovered the other hypotheses which are traditionally covered by the legal concept of "iussum"). Also the concept of "anomaly" would have to be carefully examined in order to ascertain what "vices" of the order would be covered by it.

188. Article 6 ("Payment to Receiving Bank") seems to provide a more complex regulation of the completion of payment to the receiving bank than that one foreseen under Italian law: it would appear that the Italian rule of "actual crediting" on the Beneficiary's current account, irrespective of his knowledge thereof, is more easily ascertainable than the various hypotheses set forth by the

75 See point 47 above.

UNCITRAL Model Law on International Credit Transfers; it is however clear that same are not substantially inconsistent with the Italian solution.

189. Article 7 ("Acceptance or rejection of a Payment Order by Receiving Bank other than the Beneficiary's Bank") provides (point 4) for an automatic lapsing of a Payment Order which is unknown under Italian law, but which seems to be appropriate.

190. With reference to Articles 8 ("Obligations of Receiving Bank other than the Beneficiary's Bank"), 9 ("Acceptance or rejection of a Payment Order by Beneficiary's Bank"), 10 ("Obligations of Beneficiary's Bank") and 11 ("Time for Receiving Bank to execute Payment Order and give notices"), we have already commented on the fact that it seems positive to have precise deadlines for completion of the various activities by all persons and entities involved in a Credit Transfer: there is less which is left to the discretional evaluation of the Judges than happens in a system (such as the Italian one) where such matters are governed by a simple mention to the diligence of the "pater familias", with the burden to examine on a case-by-case basis whether or not such diligence has been exercised.

191. Article 12 ("Revocation") also would have the merit to better define the time within which a Credit Transfer order may be revoked, since the solution adopted by Italian doctrine and case-law, although simple (revocation is admitted until the funds have credited on the Beneficiary's current account, irrespective of any notice thereof to the Beneficiary), is however not based on an unchallenged rule of law, and could therefore be reversed or somewhat amended by future case-law, thus jeopardising the certainty of law.

192. It should be only mentioned that in case of the enactment of the UNCITRAL Model Law on International Credit Transfers, there would be the problem of co-ordinating the above Article 12 with Law dated 5th July 1991, No. 197 (against so-called "money laundering"), which states that a Beneficiary is entitled to obtain payment in the province of its domicile starting from the third banking day after acceptance of the Credit Transfer order (by the Originator's Bank): as has been stressed, however, the real "impact" of this rule has still to be explored by doctrine and case law.

193. Section 13 ("Assistance") would also be very convenient for the sake of certainty, since to date it is uncertain in Italian doctrine and case-law what the precise duties

of all banks involved in a Credit Transfer chain are (this matter has been repeatedly mentioned above, when we have described the two hypotheses which are still debated: is a Credit Transfer a mandate to pay or to issue appropriate instruction to pay?).

194. Article 14 ("Refund") would be in line with the Italian doctrine which asserts that a Credit Transfer is a mandate to pay: this solution would surely be the most protective towards the Originator, since he would have direct action against any Intermediary Bank.

195. Articles 15 ("Correction of underpayment") and 16 ("Restitution of overpayment") provide solutions which would be in line with those already available under Italian law.

196. Article 17 ("Liability for interest") has already been mentioned above;[76] it is only convenient to remember that under Italian law it would render null and void any clause aiming at any responsibility waiver in case of fraud or wrongful misconduct.

197. Article 18 ("Exclusivity of remedies") would provide more limited remedies than those available under Italian law, as it seems that it would not generally allow recovery of consequential damages. By way of comparison Italian law does not limit recovery of consequential damages to cases of mishandling either through recklessness or with specific intent to cause loss, where there is actual knowledge that loss would be likely to occur: pursuant to Section 1223 of the Civil Code, in fact, the refundable damages in case of breach of an obligation include the actual losses suffered as well as the loss of profits, provided that they all are an immediate and direct consequence of said breach; in addition, where the obligation concerns sums of money ("obbligazioni pecuniarie"), Section 1224 of the Civil Code states that the creditor is entitled to interest for delay in the "legal" rate (presently 10%) from the date the debtor is legally obliged to perform his obligation, even if no conventional interest was previously due; if conventional interest was agreed upon, and if same was at a higher rate than the legal one, that the interest due because of delay shall be computed at such higher rate; the creditor is entitled to prove that the actual damages are higher than the interest for delay, but only if interest for delay were not agreed upon in advance.

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76 See point No. 187 above.

198. Article 19 ("Completion of Credit Transfer") anticipates the completion of a Credit Transfer: under Italian law, in fact, completion would occur at a later moment than acceptance by the Beneficiary's Bank; it has been already mentioned that under Italian Law a Credit Transfer would be deemed as concluded upon actual crediting of the funds to the current account of the Beneficiary; the solution suggested by the UNCITRAL Model Law on International Credit Transfers would seem less protective towards the Beneficiary, and not consistent at all with any mandate scheme within which Credit Transfers are construed under Italian Law: what would be the object of the mandate: simply the acceptance by the Beneficiary's Bank? And what about the Beneficiary's right to obtain actual disposal of the funds? In such a way, especially if also the optional clause is adopted, the risks of unfulfilment by the Beneficiary's Bank would in all cases be imposed on the Beneficiary, even when he had not previously agreed on this way of payment.

199. The optional clause ("Discharge") would not be consistent at all with Italian doctrine and case-law, as it would consider the underlying obligation as discharged irrespective of actual crediting of the funds on the Beneficiary's current account: as it has been mentioned above, this solution could at least be adopted when the Beneficiary has previously agreed on the payment through Credit Transfer, possibly having designated himself the Beneficiary's Bank: only in such a case it could appear as equitable to impose on the Beneficiary the risk of unfulfillment by his bank.

CONCLUSIONS

Are there any other relevant issues affecting Credit Transfers and their settlement not addressed? Please list them briefly.

200. We deem that, except as hereinafter explained, all relevant issues affecting Credit Transfers and their settlement have been adequately touched upon in the course of this study.

Please list briefly what you consider to be the most important issues affecting Credit Transfers and their settlement. In respect of each of these issues, listed in order of importance, please consider whether harmonisation might assist in the development of European payment systems.

201. The answer could be deemed as influenced by the current period of economic recession, but we think that a field which should be carefully examined should be that of the effects on Credit Transfers of bankruptcy proceedings affecting either the Originator or the Beneficiary (more than their banks): in fact, should there persist a lack of co-ordination among Member States' Bankruptcy laws, it seems that there would continue a condition of uncertainty with regard to the hypothesis of revocation of a duly concluded Credit Transfer order; this subject matter has raised and continues to raise a great debate in Italian doctrine and case-law.

202. We finally refer to the answers concerning the UNCITRAL Model Law on International Credit Transfers, where we have pointed out the major issues affecting a Credit Transfer (e.g. the protection of the Originator from all "defects" of the Payment Order which are not imputable to him; the governing law; the "completion" of the Credit Transfer; remedies available to the Originator and/or the Beneficiary in case of mishandling of the Credit Transfer order).

LUXEMBOURG

CREDIT TRANSFERS AND THEIR SETTLEMENT

LUXEMBOURG

ARENDT & MEDERNACH

PREFACE

Speaking about Credit Transfers in Luxembourg, we have to consider the characteristics of the Luxembourg Monetary system which is unique in Europe. In 1922 Luxembourg entered into a Monetary Association with Belgium, the Belgian National Bank becoming in fact also Central Bank for Luxembourg. The two currencies, Belgian franc and Luxembourg franc, are considered as legal tender in Luxembourg.

The Association was initially supposed to last until 1972, with a possibility to extend it for further periods of ten years. The Monetary Association pact was last renegotiated in 1992, being thus supposed to last until 2002.

The Institut Monétaire Luxembourgeois ("IML") is not a central bank as such. For the moment its role is limited to:

- issuing Luxembourg franc notes and coins,

- being the controlling authority of the financial sector.

The only settlement circuit for Credit Transfers is the Luxembourg Clearing House (Chambre de Compensation). The Clearing House was set up in 1925 and is an entirely manual paper-based settlement system. The present regulations of the Clearing House were adopted in 1954. As the IML does not have the functions of a normal central bank, it does not act as settlement agent in the Clearing House system. Settlement agent for the Clearing System is the Banque et Caisse d'Eparge de l'Etat which is a commercial bank wholly owned by the Luxembourg State. Sessions at the Clearing House take place every business day. The Clearing House system is a multilateral circuit indicating the net net positions of its members by the end of each clearing session.

The manual Clearing House system is supposed to be replaced by an electronic settlement circuit in a couple of years. This system would be functioning through the CETREL circuit already in place, the function of settlement agent being however assumed by the IML.

The Clearing House system is generally used for low value Credit Transfers. Credit Transfers for amounts in excess of LUF100,000 are generally settled by using Intermediary Banks in Belgium, even if the Originator's Bank and the Beneficiary's Bank are in Luxembourg.

CETREL is an electronic clearing system founded in 1985 by nine banks and the Post Office. The CETREL settlement circuit is however only used for credit card payments. (Bancomat, Postomat, Visa.) For each credit card payment, the electronic payment circuit dispatches a message to the banks of both parties involved in the transaction.

Each of the participating banks in CETREL has an account with the settlement agent (Banque et Caisse d'Epargne de l'Etat) which is also one of the participating banks in the system. The settlement agent is advised of every credit card payment and holds a net net balance for all the members of the system.

Belgium and Luxembourg are jointly studying the implications of European Economic and Monetary Union on the Belgo-Luxembourg Monetary Union. In June 1993 the Luxembourg Prime Minister Mr Jacques Santer announced that Luxembourg has to abolish the common institutions it now has with Belgium. The Luxembourg Government will have to modify the statues of the IML, converting it into a fully fledged central bank.

Luxembourg, July 30, 1993.

SECTION I- EXISTING LAW AND PRACTICE

INTER-PARTY RELATIONS 1: EXECUTION OF CREDIT TRANSFERS

General

Questions relating to Scenario A:

A.1 Taking each stage of the transaction, is there any prescribed form which must be used by any of the parties?

1. There does not exist any legally required form for a Payment Order. The order may be given orally or in writing. In practice it is however required for evidential reasons to issue a written instruction or confirmation of an oral order.

2. Under Luxembourg banking practice, the execution of a Credit Transfer instruction would generally be done either through the Clearing House or by the crediting of the Beneficiary's Bank account with its Correspondent Bank in Belgium.

3. As the Clearing House is an entirely manual, paper-based settlement system, banks tend to impose on their clients the use of standardised payment instructions, generally in the form of threefold printed sheets.

4. Instructions for crediting the account with the Belgian Correspondent Bank would generally be given through SWIFT messages, the Originator's Bank requiring however some sort of written instruction, before executing the Payment Order.

5. Article 1341 of the Civil Code requires written evidence for all legal acts concerning amounts over LUF 100,000.

A.2 What are the legal provisions (if any) governing the time within which each bank is required to act?

6. There does not exist any specifically defined period determined by legislation or otherwise to complete a Credit Transfer.

(i) Is there any definite period prescribed within which the Credit Transfer must be completed if it is not to lapse?

7. Unless the parties have agreed that the order lapses after a certain period of time or at a certain date of the order remains valid until completion. The order will however lapse in the case of death or incapacity of the Originator, unless the agency contract specifically provides that the agency relationship will continue even after the death of the Originator (mandat post-mortem).

(ii) If there is no definite period, does custom prescribe the time within which the Credit Transfer must be completed?

8. A Credit Transfer shall be completed within a reasonable period of time.

9. Payment instructions received by banks are usually executed within 24 hours. The members of the Clearing House present all the payment instructions received, for settlement at the clearing session taking place the next business day.

(iii) Is there a duty for each bank to act "within a reasonable time"? If so, is there any case law or principle or anything else giving guidance on what might be considered "reasonable"?

10. There are no specific legislative or regulatory provisions governing the time limit for execution of a Credit Transfer. If the order for executing the transfer is however given for a specific date, then the bank has to act in due time, if not it could be held contractually liable under general principles of law.

11. There does not exist any case law in this respect. Luxembourg courts would refer to French and Belgian case law when asked to determine what is considered as "reasonable" time.

A.3 How would your answers to question A.2 differ if the Payment Order was conditional - for example, if the Originator had given his bank express instructions that the Payment Order should only be executed in certain specific circumstances, such as the receipt of sufficient funds to the Originator's account to cover it?

12. The same principle of promptness would apply once the conditions are fulfilled.

A.4 (a) Are there any rules of value-dating - and how would you define value-dating?

13. Value-dating under Luxembourg banking practices refers to the date on which debit or credit interests respectively begin or cease to accrue. Value-dating must be distinguished from the actual time of a debit or a credit, when the funds are actually transferred out of the account (in the case of a debit) or applied to the account made available (in the case of a credit). There do not exist any legal or regulatory requirements concerning value-dating. No case law exists in this respect.

(b) Assuming value-dating, is there any difference in the treatment of credits and the treatment of debits?

14. Value-dating being a pure contractual obligation there do not exist any specific rules concerning its application. In practice however banks treat credits and debits the same way.

15. For Luxembourg franc credit transfer, value-dating concerning debits is usually one day prior to the date of the debits, whereas value-dating concerning credits is usually one day after the date of the credits. For foreign currencies, the time difference between value-dating and the actual debit or credit to the account is usually two days.

16. In the case of high value transfers, banks sometimes agree for commercial reasons, to debit and credit the accounts with value at the same date. This is also the case for inter-bank transfers settled over the nostri or lori accounts of the respective banks.

A.5 Are there any rules governing the issue of double charging - for example, where the Originator in giving the instructions to his bank has specified that he should bear all the costs, but the Beneficiary nevertheless has charges deducted from the amount credited to the account at his bank?

17. There do not exist any rules governing the issue of double charging. In practice if instructions are given to a bank that the Originator should bear all the cost, the Beneficiary has no charges deducted from the amount credited to his account at his bank.

18. Credit Transfers being settled through the Clearing House are free of any charges for the Originator and the Beneficiary.

A.6 Consider the methods of authentication which would be used and/or which might be considered appropriate.

19. Most credit transfers being settled through the paper-based Clearing House system, the instructions are in a standardised written form, bearing the signature of the Originator. Prior to the debit of the Originator's account the bank checks that all the relevant instructions are mentioned on the form and if the other is signed. For time reasons banks however do not usually make comparison of paper signatures.

20. CETREL, the electronic clearing system for credit card transactions (Bancomat, Postomat, Visa) verifies PIN-code, expiry date, validity and withdrawal limit of the card prior to accepting the payment.

21. Inter-bank transfers are usually settled through the SWIFT system, each message containing a code identifying the sender and the receiver of the message.

Revocation

Questions relating to Scenario A:

A.7 (a) How would you define revocation and in particular how would you distinguish it from other rights e.g. a receiver's entitlement to disclaim on a winding-up?

22. Revocation may be defined as an instruction to the bank to ignore and not to execute prior instructions. Revocation is only possible as long as the Originator's Bank has not yet executed the instruction. On the contrary a Receiver may act to

have an instruction, even executed, declared null and void according to the provisions of articles 444 and 445 of the Commercial Code.

Art. 444 al2: All payments, operations and transactions done by the insolvent debtor or all payments made to the insolvent debtor after the judgment declaring the bankruptcy are null and void.

Art. 445: The following are void and without any effect towards the bankrupt's estate, if they are effected since the date of ceasing of payments as fixed by the court or even ten days before that date:

all transfer deeds on fixed and other property which are free of charges or unbalanced in disfavour of the insolvent debtor (transaction at an undervalue);

all cash payments, set-off, transport, selling or any other form of payments for debts not yet matured or payments not effected either in cash or by way of bill of exchange if they are related to debts not yet matured;

all mortgages, antichresis or pledges on assets of the insolvent debtor for debts contracted prior to the date of ceasing of payments.

(b) In what circumstances might the Originator be entitled to revoke or countermand the Payment Order?

23. The Originator does not have any legal possibility to countermand or revoke a payment order once it has been executed. If he feels that the Credit Transfer should not have been executed, he has a right to claim reimbursement from the Beneficiary.

(c) Until what moment can he do so?

24. There are only limited case precedents and no Luxembourg doctrine on that subject. Luxembourg courts however tend to consider that the Originator is

irrevocably dispossessed out of the ownership of the funds as soon as the debit entry is made to his account.[1]

25. Luxembourg courts have referred to French doctrine on that matter, the debiting of the Originator's account being considered in a virtually unanimous way, as giving the Beneficiary an intangible right to the funds.[2]

26. Luxembourg courts also consider that the Beneficiary has a direct claim against the Originator's Bank after the debit entry to the Originator's account, the Originator's Bank being the debtor of the Beneficiary. After having given instruction to the Beneficiary's Bank to credit the Beneficiary's account, the Originator's Bank is considered to be discharged of its obligations towards the Beneficiary.[3]

27. Therefore, the Originator may only revoke his instructions as long as his account has not yet been debited.

(d) What steps would he have to take?

28. The instruction to revoke or to countermand the payment instruction made orally or in writing shall be given in the same way permitted to issue instructions at first hand.

(e) Can entries be reversed in the case of mistake?

29. According to recent case law a transfer made by mistake may not be reversed as this would mean debiting the account of a third party, the Beneficiary, with no authority. This decision is arguable, it has however not been challenged by the parties. In practice it appears that banks do reverse mistaken entries.

(f) Answer questions (b) and (c) above on the assumption that the Originator's Bank on its own initiative wishes to revoke the Payment Order.

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1 Tribunal d'Arrondissement, no. 405/89, 15.12.1989.
2 J.L. Rives-Lange Et M. Contamine-Raynaud: Précis Dalloz: Droit Bancaire, No. 241, p. 303.
3 Tribunal d'arrondissement, no. 405/89, 15.12.1989.

30. The Originator's Bank acts as an agent on behalf of its client. It has authority to act only within the limits of the mandate which has been given to it. Thus the only situation where we can imagine that the Bank is acting on its own initiative is, if it appears that the client's account does not have sufficient funds standing to its credit, to allow the payment to be executed.

31. If the Payment Order was executed through the Clearing House, then the Originator's Bank is unable to revoke the Payment Order after the Clearing Session. The rectification would have to be done through a reverse entry.

32. If the settlement was done over SWIFT, the Originator's Bank would be able to revoke the Payment Order until dispossession of the funds by the Correspondent Bank. Once the Correspondent Bank has sent the funds to another Intermediary Bank or to the Beneficiary's account, revocation would technically no longer be possible.

(g) Can a situation ever arise where the Originator validly revokes, but the Originator's Bank cannot revoke? (Assume that the Originator's Bank has at all times acted correctly.)

33. We do not believe that such a situation may arise. Indeed the Originator's Bank acts as an agent. Thus all its actions are deemed to be made on behalf of the client.

<u>Responsibility</u>

Questions relating to Scenario A:

A.8 In respect of each of the following:

(i) the Originator's Bank;

(ii) any Intermediary Bank;

(iii) the Beneficiary's Bank.

(a) At what moment does the bank accept the Payment Order (i.e. assume any legal commitment to the party giving such order)?

(i) Originator's Bank

34. The Originator's Bank clearly will have accepted irrevocably to execute the instructions received when it continues the Payment Order to the Intermediary Bank or to its correspondent or when it specifically advises the Originator that it accepts the instructions.

35. No legal or regulatory rules exist however in this matter. We are not aware of any case-law.

(ii) Intermediary Bank

36. It may be assumed that the Intermediary Bank by executing the transfer instructions is irrevocably bound.

(iii) Beneficiary's Bank

37. The Beneficiary's Bank may be deemed to have accepted the payment received once it consequently takes some positive action. This could for instance be upon the crediting of the Beneficiary's account.

(b) At what moment does the Bank execute the Payment Order?

38. The Originator's Bank executes the Payment Order when it instructs the Intermediary Bank to debit its account and to credit the Beneficiary's Bank account.

(c) At what moment is the bank discharged from its obligation - for example, would it be upon delivery of the instructions to effect the payment to the next party in the Credit Transfer chain or would it be upon the Beneficiary receiving value?

39. There do not exist any specific legal or regulatory provisions in this respect. We could find no case law. By reference to general provisions of law it may be argued

that the Originator's Bank is discharged from its obligations only when the Beneficiary's Bank has been credited. Indeed as an agent the Originator's Bank is responsible for choosing its sub-agent to execute the order received. The reply would be different only if the client had instructed his bank to act via a specific transfer procedure. Mutatis mutandis this also applies to the Intermediary Bank and to the Beneficiary's Bank.

(d) In what circumstances, if any, may the bank refuse to accept or execute the Payment Order?

(i) Originator's Bank

40. As long as the client and his bank are in a contractual relationship the bank may not refuse to execute an instruction and to forward the funds to the Beneficiary unless there exists good reason under the contract to do so. A good reason for instance could be insufficient funds, attachment of the accounts, a general legal prohibition to execute the transfer etc.

(ii) Intermediary Bank

41. Normally the Originator's Bank and the Intermediary Bank are in a contractual relationship so the same solution will apply.

(iii) Beneficiary's Bank

42. The Beneficiary's Bank must be considered to have a general power to receive funds on behalf of its client. This power is normally written down in the contract between the client and his bank. A bank thus once again cannot refuse to accept payment unless legitimate reasons exist to do so. Such legitimate reasons could be instructions to the contrary received from the client.

A.9 (a) What contractual duties of care express or implied are owed by each party to the transaction to each of the other parties?

43. Originator - Originator's Bank. There exist various contracts between these parties.

44. The client/bank relationship is first governed by the account agreement whereby the client is opening an account with the bank and is authorised to carry out various transactions via this account. This contractual relationship is essentially governed by the general terms and conditions issued by the bank. Under the account agreement, the Originator might for instance have the obligation of advising his bank of errors in bank statements within a reasonable time or to give clear and precise instructions for a Credit Transfer. The precise determination of the contractual duties of the Originator is however impossible a priori, as these duties are freely negotiable between the parties to the agreement. When issuing a transfer instruction a further relationship is created between the Originator and his bank. The bank becomes the agent of the Originator to execute this transaction. The agent must act with due diligence and do his best to execute the instructions received.

The same principles are also applicable to the Beneficiary and its bank, as we are again considering a client/bank relationship.

45. The same principles apply to the relationship between the Originator's Bank and the Intermediary Bank. There is no contractual relationship between the Originator and the Intermediary Bank and therefore no contractual duties are owed between the two parties.

46. The Beneficiary and his bank have an agreement whereby the bank is entitled to receive a payment on behalf of its client. The same once again applies to the relationship between the Beneficiary Bank and the Intermediary.

(b) Does a contract between the participating banks in itself create a contractual nexus between the parties?

47. The contract between the participating banks in itself does not create a contractual nexus between the parties. Luxembourg Courts consider that the contractual obligations between the Originator's Bank and any Intermediary Bank can be legally challenged by the Originator.[4]

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4 Tribunal d'Arrondissement 12 juillet 1990, no. 39,253 et no. 41,255 du rôle.

48. Belgian Courts however consider that if the Originator's Bank entered into the contractual relationship with the Intermediary Bank or with the Beneficiary's Bank to execute the client's instructions, it probably can resist a claim by the client in respect of the obligations it has to accept in order to carry out the transfer.[5]

(c) Other than contract, what other legal relationship (with attendant duties) can arise between the Originator's Bank and the Beneficiary's Bank?

49. We do not imagine any other legal relationships which can arise between the Originator's Bank and the Beneficiary's Bank.

A.10 (a) In what circumstances (if any) might the Originator be bound by a Credit Transfer which he has not authorised?

50. The Originator's Bank will be liable to repair any damage which it has caused by executing a Credit Transfer which has not been authorised, the Originator's Bank must prove that it is acting under an agency agreement. The Originator will thus normally not be bound by a Credit Transfer which he has not authorised.

(b) On whom is the burden of proving that a transfer has not been authorised?

51. The bank which has executed a Credit Transfer must prove that it has been acting as an agent of the Originator. In the case of a forged or falsified Payment Order, where neither the Originator nor his bank is at fault, the bank can prove that it has been acting under an agency agreement by producing the forged or falsified document. The Originator has to prove that the bank did not make the necessary verifications in order to discover the forgery or falsification, if not he has to bear the loss.

A.11 If the Credit Transfer is not completed (for whatever reason) is the Originator entitled to have the funds returned to him?

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5 Civ. Bruxelles, Ier septembre 1992, inédit, R.G. no. 49832/87 Mons, 7e chambre, 9 octobre 1992, Journal des Tribunaux, 27 février 1993, p.162.

52. We assume that this question is not in relation to any contractual liability of the Originator's Bank or a person instructed by it, but rather relates to a Credit Transfer which cannot be completed because of some reasons which do not entail a liability of a participant.

53. If the Credit Transfer is not completed the Originator is entitled to have the funds returned to him. If the bank refuses to do so, the Originator would be entitled to start legal action in this respect. The legal basis for such a request is the obligation of the agent to render an account to his principal and to reimburse to the principal amounts he has received under the Agency Contract.

A.12 If the Credit Transfer is delayed or is otherwise mishandled, does any party have a claim for damages in respect of direct and/or consequential loss and/or interest? Can you give examples, with particular reference to any published case law?

54. If a Credit Transfer is delayed or is otherwise mishandled, the party which has suffered damage because of such delay or mishandling does have an action against the author of such a delay or mishandling. No case law however exists in this respect.

A.13 Is there in operation a "two tier" system so that the Originator or the Beneficiary has the option to pay a higher fee in respect of a Payment Transfer which excludes a "no liability" clause?

55. There does not exist a two tier system, so that the Originator or the Beneficiary has the option to pay higher fees in respect of a Payment Transfer which excludes a no-liability clause.

A.14 With regard to questions A.11 - A.13, are wholesale and retail transactions treated differently?

56. Wholesale and retail transactions are treated the same way.

Cross-Border Payments

Questions relating to Scenario A:

A.15 How would your answers to questions A.1 - A.14 differ in the circumstances set out below:

Generally

57. The applicable Luxembourg legal provisions do not differ from what has been said hereinbefore when a foreign entity or a foreign currency is involved. Because of the intervention of at least one foreign bank in the settlement of credit transfers, the issue concerning the law applicable to the legal relationship between participants must be solved by application of the provisions of international private law. The main provision is the Rome Convention of 1980 on the Law Applicable to Contractual Obligations (the "Rome Convention").

58. Following article 4 of the Rome Convention, the law applicable is the law of the country with which the contract is most closely connected. This would be the country of the establishment effecting the characteristic performance required by the contract.

59. Considering the settlement of Credit Transfers is a way of executing different distinct contracts existing on the one hand between the Originator and his bank and on the other hand between the Beneficiary and his bank, the law applicable will be the law of the country with which each of these contracts is most closely connected.

60. Therefore the issues concerning rights and obligations between the Originator and his bank will be ruled by the law of the country of the Originator's Bank, whereas the issues concerning rights and obligations between the Beneficiary and his bank will be governed by the law of the country of the Beneficiary's Bank.

61. The problem concerning the law applicable to Intermediary Banks is more difficult to solve, as the contractual relationship in inter-bank transactions is divided between two banks from different countries of origin. We could find no case precedents under Luxembourg law concerning the law applicable to Intermediary

Banks in relation to Cross-Border Payments. The law applicable to the relationship with the Intermediary Bank will most likely have to be analysed on a case-by-case basis.

(a) if the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

62. If the Originator's Bank was established outside Luxembourg, the payment would usually not be in Luxembourg francs. The Originator's Bank would rather credit the account of the Beneficiary's Bank with its Correspondent Bank in Belgium. In accordance with the criterion of characteristic performance set forth in the Rome Convention, the rights and obligations between the Originator and his bank would be governed by the law of the foreign jurisdiction whereas the rights and obligations between the Beneficiary and his bank would be governed by Luxembourg law.

63. The Beneficiary's Bank would generally not receive Luxembourg francs, but Belgian francs. However, the account of the Beneficiary, if it was a Luxembourg franc account, would be credited in Luxembourg francs. As the settlement of the Credit Transfer would be done over a Belgian Correspondent Bank, there would be a possibility of Belgian law being applied to the Correspondent Bank.

(b) if the Beneficiary's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

64. As the Originator's Bank in Luxembourg would use its Correspondent Bank in Belgium in order to make the Credit Transfer, the account of the Beneficiary would certainly not be credited in Luxembourg francs.

65. The law applicable to the Originator's Bank would be Luxembourg law, whereas the law applicable to the Beneficiary's Bank would be the law of the foreign country. It remains uncertain whether the law applicable to the Intermediary Bank would be Belgian law.

(c) if the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

66. The answer to the question remains the same as under question A.15(a) with the difference that the Intermediary Bank would most probably be a United States bank and as such the law applicable to that bank would be United States law.

67. Although there do not exist any legal or regulatory requirements concerning value-dating, the account of the Beneficiary would bear credit interests two days after the actual time of credit, whereas it would generally only be one day in case of a Luxembourg franc Credit Transfer.

(d) if the Beneficiary's Bank was located outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

68. The answer would be the same as for question A.15 (b):

- application of Luxembourg law as concerns the rights and obligations between the Originator and his bank;

- application of foreign law as concerns the rights and obligations between the Beneficiary and his bank.

69. Uncertainty as to the law applicable to the Intermediary Bank with a probability of application of local law, value-dating would generally be two days for the debit of the Originator's account in Luxembourg.

INTER-PARTY RELATIONS 2 : SETTLEMENT OF CREDIT TRANSFERS

Finality

Questions relating to Scenario A:

A.16 When is the Credit Transfer considered to have been completed:

(a) as between Originator and Beneficiary?

70. The Credit Transfer is completed when the funds are credited to the account of the Beneficiary.

(b) as between the participating banks (including any Intermediary Banks)?

71. Considering the Credit Transfer as an execution of different distinct contracts in order to credit the account of the Beneficiary, it is difficult to speak about completion of the Credit Transfer as between the participating banks.

72. The Credit Transfer has to be considered as a whole, commencing with the payment order of the Originator and being completed by the credit of the Beneficiary's account. The transfer will be considered as one single operation which will only be completed once the funds have been credited to the account of the Beneficiary.

73. It is, however, possible to consider the contractual obligations of each participating bank in their inter-bank relations and to speak about the fulfilment of their obligations.

A.17 When completed, is the Credit Transfer:

(a) recognised as discharging the underlying obligation as between the Originator and the Beneficiary?

74. The Credit Transfer will discharge the underlying obligation as between the Originator and the Beneficiary if payment made by such Credit Transfer is in conformity with the contract between the Originator and the Beneficiary. In this respect fund transfers are considered an ordinary means of discharge of obligations in the same manner as payment in cash or by cheque.

(b) treated as legal tender?

75. Credit Transfers are not considered as legal tender in Luxembourg. The creditor cannot be obliged by the debtor to accept funds obtained by means of Credit Transfers as payment.

76. However Credit Transfers are a very common way of payment in Luxembourg, the funds kept at bank accounts being referred to as scriptural money. Unless otherwise provided, the Credit Transfer should be considered as discharging the Originator from his obligations.

Questions relating to Scenario B:

B.1 When is the Credit Transfer completed as between the participating banks?

77. As previously indicated, it is not possible to speak about completion of the Credit Transfer as such. Each bank can, however, be considered as having respected its duties at the close of the banking day when the net position of the two banks is settled.

B.2 When completed, is the Credit Transfer treated as having discharged the two banks from any obligations towards each other?

78. The participating banks can be considered as being discharged from any obligation towards each other, when no breach of duties has been committed in their inter-bank relations. This would generally be the case after the entries to the accounts of a common correspondent settling the net positions of the two banks have been made.

Questions relating to Scenario C:

C.1 When is the Credit Transfer completed as between the participating banks?

79 The response should in principal be the same as for question B.1, but as under Scenario C the netting arrangement is governed by a formal contract or Club Rules, these rules would probably give more details as to the moment when the Credit Transfer is considered as being completed.

C.2 When completed is the Credit Transfer treated as having discharged the two banks from any obligation towards each other?

80. The response would be the same as for question B.2, however the formal contract or Club Rules might give more details about the discharge of the two banks from any obligation towards each other.

Cross-Border Payments

A.18 How would your answers to questions A.16 and A.17 differ in the circumstances set out below:

Generally

81. The answers to questions A.16 and A.17 would in principle be the same, as there are no specific provisions under Luxembourg law for Cross-border Payments concerning the completion of Credit Transfers and the discharge of the Originator or the participating banks.

(a) if the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

82. The participating banks in the Credit Transfer would be in at least two different countries and therefore any breach of duties in their relationships would not necessarily be subject to Luxembourg law.

(b) if the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of your country?

83. In principle, the answer should be the same as for question A.18(a). The Credit Transfer might, however, be treated as legal tender in that foreign jurisdiction.

(c) if the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another jurisdiction (say US$)?

84. See answer to question A.18(a).

(d) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another jurisdiction (say US$)?

85. See answer to question A.18(b).

Settlement in general

Questions relating to Scenario A:

A.19 Assuming that the Payment Order is in the currency of your own country, must settlement be effected in any particular way as between the Originator's Bank and the Beneficiary's Bank? For example:

(a) by a credit entry to an account kept by the Beneficiary's Bank at the Originator's Bank;

86. This method would generally not be used, as the settlement of Credit Transfers is generally done through a multilateral netting system. There is however no regulation under Luxembourg law, prohibiting Banks to settle Credit Transfers through a credit entry of the Beneficiary's Bank nostro account with the Originator's Bank.

(b) by a debit entry to an account kept by the Originator's Bank at the Beneficiary's Bank;

87. See answer to question A.19(a).

(c) debit and credit entries to the accounts of the two banks kept at a correspondent commercial bank;

88. This method might also be possible, but is subject to the same comments as the two previous methods.

(d) debit and credit entries to accounts kept by the two banks at your country's central bank;

89. This would be the ordinary method of Credit Transfers between Luxembourg banks.

90. The settlement agent would however not be the Central Bank, because Luxembourg has no central bank (see above). Until now the IML is not involved in Credit Transfers.

91. The centralising bank under the articles of association of the Clearing House (Chambre de Compensation) is the Banque et Caisse d'Epargne de l'Etat which is a State-owned commercial bank.

92. Credit Transfers due to credit card payments (Bancomat, Postomat, VISA) are settled through the CETREL payment circuit, the settlement agent being also the Banque et Caisse d'Epargne de l'Etat.

(e) some other method.

93. This would generally be the case if the settlement is not done through the Chambre de Compensation, or, if the Originator's Bank or the Beneficiary's Bank do not have an account with the Banque et Caisse d'Epargne de l'Etat.

94. The Luxembourg netting system is a high volume low value system. Credit Transfers for amounts in excess of one hundred thousand Luxembourg francs are generally not settled through a netting system, but are settled through the correspondent banks of the participating banks. In case of a Luxembourg franc Credit Transfer, these correspondent banks are in Belgium.

95. Fourteen banks are considered as being participants in the Clearing House. The settlement circuit is however a two tier system allowing other banks to participate in the clearing through a direct member. A bank which is not a member in the netting system can transfer the funds through one of the members of the Clearing House, which can be considered as its correspondent bank for Luxembourg franc transactions.

96. For non-members of the Clearing House, it would however also be possible to settle the transaction through a Belgian correspondent bank.

A.20 Explain what different rights may arise in respect of each method of settlement employed in your country.

97. For Credit Transfers settled by the methods described under A.19(a), A.19(b) and A.19(c), Luxembourg Courts would most probably consider that the Originator no longer possesses the funds after the debit entry to his account has been made.

98. The banks involved in the transaction would be considered as discharged if no breach in their contractual duties can be noticed.

99. Luxembourg Courts do not consider the Beneficiary's Bank or any Intermediary Bank as a substituted agent of the Originator's Bank. Under general principles of law, the Originator's Bank can therefore not be held liable for any breach of duty committed by another bank participating in the Credit Transfer.[6]

100. These general principles would also be applicable to Credit Transfers settled through the Clearing House. However we also have to consider the regulations of the Clearing House.

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6 Cour Supérieure de Justice, 28 octobre 1992, n° du rôle 12 581, n° 12 853 et n° 14 060.

101. Each member of the Clearing House has to present by the end of the clearing session a note with all its debit and credit entries (feuille de liquidation). This settlement note shows the net balance position of each member of the Clearing House after the clearing session. The settlement note is physically handed over to the official in charge of the Clearing House. After having verified the different net positions the official in charge signs the different settlement notes and hands them back to the representatives of the different members of the Clearing House.

102. The balance of the settlement note corresponds to the multilateral net net position of each member of the Clearing House. Article 40 of the regulations of the Clearing House specifically provides that the restitution of the settlement note by the official in charge does not effect full discharge of the members of the Clearing House. Under general principles of law one might have argued that the restitution effects full discharge, indeed the terms of article 1283 of the civil code provide that the restitution of the original deed effects discharge of the debtor. [7]

103. Each member of the Clearing House has two accounts with the Settlement Agent, Banque et Caisse d'Epargne de l'Etat: an ordinary account and a loan account (comptes avances).

104. If the funds of both accounts are insufficient to cover the debit position of one of the members of the Clearing House, then the settlement agent has the capacity to suspend the operations with the relevant member until there are sufficient funds on its account, or to declare the settlement session void for the operations concerning the defaulting party. The multilateral net net positions are thus not legally binding and an unwind procedure is always possible.

105. For Credit Transfers settled through the CETREL clearing system we would have to consider the regulations of this settlement circuit. Credit card payments are however not covered by this study.

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7 Art. 1283 C.civ.: La remise volontaire du titre original sous signature privée par le créancier au débiteur fait preuve de la libération.

Cross-Border Settlement

Questions relating to Scenario A:

A.21 How would your answers to questions A.19 and A.20 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

106. Due to banking practice the settlement of the Credit Transfer would not be made in the same way as if the Originator's Bank and the Beneficiary's Bank were both in Luxembourg and if the payment order was in Luxembourg francs.

107. The Originator's Bank being established outside Luxembourg the most common method of settlement would be the crediting of the Beneficiary's Bank account with its Belgian Correspondent Bank. The Beneficiary's Bank would use these Belgian franc funds in order to credit the Beneficiary's Luxembourg franc account.

108. If the Originator's Bank has an account with the Beneficiary's Bank another way of settlement could be the debiting of the Originator's account with the Beneficiary's Bank.

109. Other methods of settlement might be possible but are usually not used in international banking practice. The settlement over the Clearing House would not be possible as no foreign bank is a member of this settlement system.

(b) the Beneficiary's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

110. The Crediting of the Beneficiary's account would most probably not be done in Luxembourg francs but in Belgian francs. The common method of settlement would be the use of Belgian Correspondent Banks, the Beneficiary's Bank giving instructions to its Correspondent Bank to credit the account of the Beneficiary's Bank at its Correspondent Bank.

111. Other methods of settlement i.e. the crediting of the Beneficiary's Bank, vostro account or the debiting of the Originator's Bank, nostro account are possible but are generally not used.

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

112. The settlement would most probably be done through Correspondent Banks in the United States. If the Beneficiary's Bank has a US$ account with the Originator's Bank, another possibility would be the crediting of this account. The Originator's Bank would most probably not have a US$ account with the Beneficiary's Bank.

(d) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another jurisdiction (say US$)?

113. The use of Correspondent Banks would be the most obvious way of settling the transaction.

Netting

Questions relating to Scenario B:

114. Collateral Netting Payments are possible under Luxembourg law but are however extremely rare or non-existent because the Luxembourg settlement circuits are based on multilateral netting schemes. Netting payments between two banks without formal contract or Club Rules have therefore to be analysed under general principles of law.

B.3 Does the informal netting arrangement between Bank A and Bank B have any legal effect? Can it be justified by applying any legal concept other than set-off?

115. The informal netting arrangement between the two banks is legally binding because under Luxembourg law the written form is not a condition of validity of contracts.

116. Even without an informal arrangement the legal consequences of the Credit Transfers between the two banks would be the same because under Luxembourg law (Civil Code article 1289 etc.), set-off occurs by operation of law under the following conditions:

- mutual liabilities existing between two persons;
- subject matter of the liabilities being money or fungible things;
- debt due for immediate payment;
- liquid debt.

117. By way of legal set-off the two banks do not have to transfer to each other the gross amount of their mutual liabilities. They only have to settle the net balance. Another consequence of legal set-off is that the reciprocal claims are deemed to be definitely paid, with the exception of a possible balance to the benefit of one or the other party, and therefore legal set-off constitutes some sort of guarantee.

118. Legal set-off is not of public policy and can therefore be excluded by agreement between the two parties. The informal netting arrangement between the two banks under Scenario B does not exclude legal set-off.

119. There are no limitations to legal set-off once the four aforementioned conditions are fulfilled. If the claims fulfil the conditions of legal set-off, they would necessarily, even without an informal netting arrangement, be automatically set-off against the other liabilities in order to constitute a net balance payable.

120. It is unclear whether the informal netting arrangement could also be justified by the principle of novation. The rules of novation are laid down by article 1271 ff. of the Civil Code. In the case of novation the liabilities between the two banks would disappear in order to be replaced by a new obligation. Novation however requires

the express intention of the parties. The concept of current account known under French law is also applicable under Luxembourg law and is based on the principles of novation.

B.4 **Assuming that the netting arrangement is legally binding, is it subject to any limitation? For example, must the debts either way be "mutual"? Is it possible in certain circumstances for other claims between the two banks to be brought into the netting arrangement?**

121. The netting arrangement is not subject to any limitation, all claims fulfilling the conditions of article 1291 of the Civil Code would be set-off by operation of law.

122. This would not be the case if the netting arrangement is based on the legal concept of novation; only claims registered under current accounts would then be concerned.

B.5 **Would your answer be different if the payments made either way were in a currency other than your own - or if the payments from Bank A were in your currency or a foreign currency and the payments from Bank B were in a different foreign currency (say US$)?**

123. The answer would not be different because Luxembourg courts consider claims in a currency other than Luxembourg francs as money. Therefore legal set-off also occurs between a claim in Luxembourg francs and a claim in another foreign currency.[8]

B.6 **At what moment are the underlying obligations of the parties (taking the Originator, Originator's Bank and Beneficiary's Bank separately) discharged?**

124. The existence of an informal netting agreement does not have any effect on the question of discharge of the two banks involved in the Credit Transfer. Therefore the answer remains the same then under question A.8(c) and under question A.17(a).

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8 Cour Supérieure de Justice (appel commercial) 1er octobre 1963.

The Originator is discharged upon the crediting of the Beneficiary's account. As an agent of the Originator, the Originator's Bank can only be considered as being discharged of its obligations upon the crediting of the Beneficiary's account. The Beneficiary's Bank can be considered as being discharged upon the crediting of the Beneficiary's account.

B.7 How would your answers to questions B.3 - B.5 differ if Bank B was established outside your country in a foreign jurisdiction?

125. The answer to this question remains uncertain because the developments about set-off and novation under questions B.3 to B.5 depend on the applicable law. If the two banks intervening in the credit transfer are located in two different countries, they would have to consider general principles of conflict-of-laws in order to find out which would be the law applicable. As mentioned under question A.21 the relevant criterion would be the one of the place of the characteristic performance under the contract.

As already mentioned under paragraph 114, such a situation is highly hypothetical, at least we are not aware of any such arrangements.

Questions relating to Scenario C:

C.3 Having touched (briefly) upon any particular agreement or set of Club Rules which might be applicable, state whether or not they are enforceable as a matter of law - or do they constitute an agreed practice without being binding as a matter of law?

126. We do not have any knowledge of formal contract of Club Rules existing in Luxembourg concerning bilateral nettings between two banks. However such a particular agreement, if existing, would be enforceable as a matter of law. The rules concerning legal set-off and novation are not considered as being of public policy. Therefore the parties can by mutual agreement create rules enforceable as a matter of law between themselves.

C.4 What is the effect of the netting arrangement on any underlying transactions?

(a) Is it possible to vary the contract or the Club Rules? If so, how can this be achieved?

127. Provided that there is mutual consent of the two parties, they can always change the mutual agreement existing between themselves. Existing Club Rules in a written form could be changed orally or in writing, the written proof of the modification being much easier to administer.

(b) Does a single obligation to make a net payment replace the bilateral obligations as between the two banks? If this concept is recognised under your law, is it treated as a novation?

128. The concept of novation under Luxembourg law is treated by articles 1271-1281 of the Civil Code. Luxembourg law considers three different forms of novation. The replacement of the bilateral obligations between two parties by a single obligation to make a net payment can indeed be considered as novation under article 1271.

C.5 How would your response to question C.2 differ if Bank B were established outside your country in a foreign jurisdiction?

129. The answer would in principle be the same as for question C.2. However if the banks are established in two different countries, the precise answer depends on the law applicable. The issue of discharge depends, however, upon satisfaction by the banks of their respective obligations arising out of the relationships existing between them rather than completion of the Credit Transfer itself.

Questions relating to Scenario D:

D.1 At the end of the banking day, are the respective net positions enforceable as a matter of law between the participating banks?

130. During the clearing session each member has to present a settlement note with its respective net positions. These balances are handed over to the settlement agent (Banque et Caisse d'Epargne de l'Etat) with which each member of the Clearing House has two accounts (ordinary account and loan account).

131. The settlement agent has the capacity to unwind the clearing session, if the credit lines of one of the members of the Clearing House are insufficient in order to cover its net debt position. A new clearing session will immediately take place. This session will however exclude the member having insufficient credit lines.

132. If the settlement agent does not use its capacity to unwind the clearing session, then it is in our view, bound by the net positions and the credit and debit orders it has executed on the accounts of each member of the Clearing House. Therefore our opinion is that the net positions after the clearing session are not enforceable as between the participating banks, but between the participating banks and the settlement agent, because the original claims and debts between the participating banks have been replaced by new positions between the participating banks and the settlement agent by way of novation. The regulations of the Clearing House can indeed be considered as operating novation between the participating banks and the settlement agent.

D.2 (a) Is any obligation of Bank A to pay Bank B enforceable?

133. If Bank A had a net debt position towards Bank B by the end of the clearing session, this net debt position would in our view be replaced, by means of novation, by a claim from Bank B towards to the settlement agent, who did not use its capacity to unwind the clearing session.

134. After the clearing session the settlement agent has to make the different credit and debit entries to the accounts which the members of the Clearing House have within their books. Therefore the obligation of Bank A to pay Bank B has been replaced by the obligation of Bank A to pay the settlement agent and the claim of Bank B against the settlement agent.

(b) If so, is this dependent upon the nature of the specific contractual arrangements which exist between them or any Club Rules or anything else?

135. A novation does not occur by operation of the law under the rules of the Luxembourg Civil Code, the obligations of the different members of the Clearing House after the clearing session depend on the regulations of the Clearing House.

(c) Is multilateral netting by novation possible, without the substitution of an intermediary (such as a Central Bank) as counterparty? (See also C.2 above)

136. Multilateral netting by novation would be possible under Luxembourg law even without the substitution of an intermediary but subject to article 1273 of the Civil Code. The intention of the parties is a fundamental requirement of novation.

SYSTEMIC RISK: INSOLVENCY

Introductory Remarks

137. A bank according to Luxembourg law may not be declared bankrupt. A special regime has been set up to provide for the liquidation of a bank which has become insolvent. The relevant provisions are laid down in the law of April 5, 1993 concerning the financial sector, part IV. "Reorganisation and liquidation of undertakings of the financial sector" (Mémorial A, n° 27 April 10, 1993). The same judgment which decides upon the liquidation will also provide for the method of liquidation. It may provide that the general rules concerning bankruptcy be applicable. In practice it appears that the District Court of Luxembourg always provides in its judgments relating to the liquidation of an undertaking of the financial sector that the laws governing bankruptcy, articles 440 to 572 inclusive of the Commercial Code be applicable.

Questions relating to Scenario A:

Assume that the Originator's Bank is closed and receiver is appointed, by a court or other competent authority, to wind up its affairs after the Payment Order has been received by the Beneficiary's Bank, but before settlement has been effected between the Originator's Bank and the Beneficiary's Bank.

A.22 Who bears the risk of closure of the Originator's Bank - the Originator, the Beneficiary's Bank, or the Beneficiary? (Assume that the payment is made in the currency of your own country)

138. The answer to this question is very much linked to the question of when the Credit Transfer is completed.

139. As long as the account of the Originator with his bank has not been debited, the Originator bears the risk of closure of his bank.

140. Once again no case law and no comments by legal authors exist in Luxembourg concerning the legal position when the Originator's account has been debited but the Beneficiary's account has not yet been credited. We may however assume the

risk of closure of his bank will rest with the Originator as long as the account of the Originator's Bank with the Intermediary Bank has not been debited.

A.23 In what circumstances might a receiver be able to bring a claim based on fraudulent preference or preferential transfer otherwise seek to set aside or claw back any payment?

141. The legal provisions according to which a receiver may bring a claim based on fraudulent preference or preferential transfer are laid down in articles 445 and 446 of the Commercial Code. They refer to payments made without consideration or for materially inadequate consideration, payments of debts not due, any other transactions where the beneficiary was aware of the debtor's financial position.

142. We do not imagine a situation where this could be the case, when executing a Credit Transfer, as the Bank always acts upon instructions from its Client and as the funds are transferred out of the account of the Originator.

A.24 Can the receiver avail himself of any zero-hour rule in the winding-up to challenge payments which have been made?

143. The zero hour rule even though not provided for in a law is constantly applied by case law.

Questions relating to Scenario B:

Assume that Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected between it and Bank B that banking day:

B.8 Is Bank A liable for the net amount or can the receiver disclaim Bank A's obligations and compel Bank B to pay the gross amount of the Credit Transfer issued by it in favour of Bank B?

144. The Court Order to wind up Bank A entails that no payments may be made as from zero hour by Bank A. Set-off is a short way to make two payments. In principle it is therefore not possible after the Court Order to set-off claims. Case law does, as an exception, allow set-off if the reciprocal claims have a same economical origin.

145. The receiver could thus disclaim Bank A's obligation and compel Bank B to pay the gross amount of the Credit Transfers issued by it in favour of Bank B.

B.9 Is netting - or any form of set-off - available after Bank A has closed?

146 See B.8 above.

Questions relating to Scenario C:

Assume Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected that banking day:

C.6 Is the receiver bound by the netting arrangements which exist - or under your country's insolvency law can he unravel them?

147. The receiver is bound by the netting arrangements which exist, subject however to our remarks under question A.23 above. He may however opt to discontinue such netting arrangements in the future even if they have not yet matured.

C.7 What restrictions or conditions (if any) are imposed on the process of contract novation by your country's bankruptcy law?

148. The receiver may agree on behalf of the closed bank to enter into a novation agreement, very much the same as he may enter into any other contract. Before doing so he must however obtain the approval of the juge-commissaire and in some circumstances the ratification of such agreement by a Court Order is required.

Questions relating to Scenario D:

Assume Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected that banking day. Bank A is the net debtor of Bank B and the net creditor of Bank C. Taking the two positions together to arrive at a net net position, Bank A is the net debtor.

D.3 **Are the end of day net positions as between the three banks legally binding?**

149. Under the zero-hour rule the end of day net positions could be questioned. Arguments to sustain the contrary do however exist. The end of day net position is the result of a netting arrangement agreed upon in temporae non suspecto and all banks only agreed to enter into such arrangement on the assumption that an end of day net position would be final.

D.4 **(a)** **Can the receiver disclaim the Credit Transfers made during the course of that banking day by Bank A, but affirm the Credit Transfers made to it?**

150. No.

(b) **Can the receiver unravel the netting arrangement by "cherry picking"?**

151. Unravelling the netting arrangement by "cherry picking" credit transfers made to Bank A, during the course of the day of declaration of bankruptcy, for the benefit of its clients is not possible.

(c) **Can the receiver avail himself of any zero-hour rule in the winding-up to challenge payments which have been made?**

152. Yes.

D.5 **Identify the netting arrangements (bilateral, multilateral, by novation or otherwise) which would be effective in the insolvency of any of the participating banks.**

153. The provisions described hereinbefore apply to all kinds of netting arrangements.

SECTION II

COMPARISONS WITH UNCITRAL MODEL LAW

The UNCITRAL Model Law (the "Model Law") only covers international payments. In addressing this question, however, the assumption will be made that its provisions might be applicable to domestic payments.

154. The Model Law which is made up of very technical and detailed provisions concerning International Credit Transfer contrasts with the lack of any specific law in Luxembourg concerning international as well as national Credit Transfers. Most provisions of the Model Law are compatible with general principles of Luxembourg law and in some cases even confirm these. The following are the major issues which may cause problems if the Model Law were to be brought into effect in Luxembourg.

Article 4: Variation by Agreement

155. The parties cannot agree to the contrary insofar as provisions of public order are concerned.

Article 6: Payment to Receiving Bank

156. (b)(i) The mere silence of the Receiving Bank would not be sufficient evidence under Luxembourg law.

Article 12: Revocation

157. Revocation as organised by the Model Law would be difficult to implement in practice in Luxembourg. It would be contrary to case law which admits that after a debit entrance has been made to an account, the account-holder no longer has ownership of such funds. Normally death or incapacity would terminate the instructions once the Originator's Bank has become aware of such fact. Upon the occurrence of insolvency or bankruptcy of the Originator the unexecuted Payment Order would lapse.

Article 14: Refund

158. Par. 2: It is a general principle of Luxembourg law that a person may only be held liable for damages caused by his fault or negligence.

159. Par. 4: Reimbursement should be made via the same banks as the original payment.

Article 17: Liability for interest

160. Par. 1: By statute the Postal service is not liable for delays.

161. Par. 7: By agreement the parties may exclude any liability with the one exception of liability for gross negligence or wilful misconduct.

Article 18: Exclusivity of remedies

162. Consequential damages generally can be claimed for.

CONCLUSIONS

163. We believe that the major issues concerning national Credit Transfers have been dealt with in this report.

164. The most important issues concerning Credit Transfers in our opinion are those related to the capacity in which the various banks act, as agent to the Originator or his bank, as agent to the Beneficiary or his bank, or otherwise. Furthermore the zero-hour rule and the uncertainty going with a possible unwinding of settlement positions should be addressed.

NETHERLANDS

CREDIT TRANSFERS AND THEIR SETTLEMENT:

NETHERLANDS

TRENITÉ VAN DOORNE

Payments by order of bank customers

(1) payments between customers of the same bank

(2) payments between customers of the same bank, processed through the Bank Giro Centre

(3) payments between customers of the Nederlandsche Bank

(4) payments between customers of the Postbank

(5) payments from customers of banks to customers of the Postbank

(6) payments from customers of the Postbank to customers of banks

(7) payments from customers of banks to account holders of the Nederlandsche Bank and vice versa

(8) payments between customers of different banks

Payments between banks

(9) payments between banks

(10) payments between banks and the Nederlandsche Bank and vice versa

(11) payments between Postbank and the Nederlandsche Bank and vice versa (and between customers of the Postbank and account holders of the Nederlandsche Bank)

(12) payments between banks and Postbank

(13) payments between Postbank and banks

INTRODUCTION

In The Netherlands there exists no legislation specifically governing Credit Transfers, although certain rules pertaining to aspects of Credit Transfers are found in the Dutch Civil Code. All other rules should follow from general principles applicable in The Netherlands to transactions which are related or similar to the transactions entered into in the course of a Credit Transfer. Consequently, in practice many issues concerning Credit Transfers and their settlement are ruled by civil law principles (as those principles are interpreted by the courts), for example the good faith principle and the principle that contractual parties must act reasonably vis-à-vis each other. As a matter of fact, some of the issues arising have been taken into account in the general banking conditions applicable to the current account contract between the banks and their customers (the *algemene bankvoorwaarden*). It is noteworthy that most banks use identical general conditions, which have been drafted in agreement with two consumers' representatives bodies (*Consumentenbond* and *Konsumentenkontakt*) in accordance with the terms set by the Commission of Consumer Matters for the Social Economic Council (*Commissie voor Consumentenaangelegenheden van de Sociaal Economische Raad*).[1] In addition, the Bank Act of 1948 contains several provisions describing the duties of *De Nederlandsche Bank.* Other rules follow from the contracts between the banks and the clearing institute and between banks themselves.

In this study we have aimed at indicating as well as possible the origin of the various legal obligations between the parties in the Credit Transfer process.

In connection with the above we stress that there is no firm legal basis for giving a clear-cut answer to several, legally quite complicated, questions arising in relation to Credit Transfers.

Before discussing the questions raised in the Questionnaire in respect of this study, we would like to give an outline of the Credit Transfer systems presently operating in The Netherlands. It must be noted that a major part of cashless payments in The Netherlands is effected by means of some form of giro-transfer (a smaller part is made by guaranteed cheques and credit card payments).

Payment services are provided by the Dutch Central Bank (*De Nederlandsche Bank*) and the credit institutions. The Dutch banking sector may be divided in several subsectors such as the commercial banks, banks organised on a co-operative basis, savings banks, mortgage banks and investment institutions. The latter two types of credit institutions only have access to the *Bankgirocentrale* payment system described below through an account with an

1 Any reference made in this document to the "general banking conditions", should be read as a reference to these commonly used general conditions.

institution participating in that payment system and they do not offer payment services themselves.

Article 9 of the Bank Act of 1948 provides that the Dutch Central Bank is the supervisory authority in respect of the Dutch credit institutions. In connection herewith it may give the credit institutions directives for the conduct of their business in the interest of their solvency and liquidity. Secondly, the Central Bank is responsible for the Dutch monetary policy and the total amount of money in circulation in The Netherlands. With regard hereto the Bank Act of 1948 explicitly determines that *De Nederlandsche Bank* must facilitate domestic money transfers. In connection with this task *De Nederlandsche Bank* has agreed to act as settlement institution for the credit institutions.

Presently, there are three operative giro-transfer systems in The Netherlands, in all of which the Central Bank's services as settlement institution are being used. These systems are:

(a) the *Bankgirocentrale* payment circuit in which the commercial banks, the banks organised on a co-operative basis and the savings banks participate;

(b) the *Postbank* payment circuit in which *ING Bank* (a bank in which - as a result of a merger - the formerly State-owned *Postbank* and a commercial bank co-operate) and the *Postbank* are the only participants;

(c) the Dutch Central Bank's own payment circuit, which is only intended for payments between the State, governmental institutions, credit institutions and the like and which the Central Bank further uses in rendering its services as settlement institution.

It is possible that a Credit Transfer is initiated in one of the two payment systems mentioned in sub-paragraphs (a) and (b) above and is completed in the other payment system (such a Credit Transfer is below also referred to as a "Cross-circuit Credit Transfer"). These Cross-circuit Credit Transfers are processed through an account held by the *Postbank* with the Central Bank in respect of which the *Bankgirocentrale* is authorised to make debit entries for funds transferred by *ING Bank* and *Postbank* account holders and credit entries for funds received by them.

It is obvious that the existence of two payment circuits operating next to each other is impractical and that a Cross-circuit Credit Transfer generally causes delays. In connection herewith a national committee has been set up which is investigating the possibilities of

substituting the two payment systems mentioned in sub-paragraphs (a) and (b) above by an integrated national payment circuit. (Further details of these systems are found in schedule A.)

Ad (a). The *Bankgirocentrale* payment circuit

This payment circuit has been established by the commercial banks, the banks organised on a co-operative basis and the savings banks in order to facilitate Credit Transfers. It is operated by a joint venture company named *Bankgirocentrale B.V.* which acts as clearing house for the settlement of inter-bank claims. For the purpose of such inter-bank settlement the participating banks have agreed to submit all (or nearly all) Payment Orders for Credit Transfers received by them to the *Bankgirocentrale*. The *Bankgirocentrale* processes these Payment Orders. On each banking day - in the morning prior to the settlement - the *Bankgirocentrale* regularly informs the banks about their financial position as a result of the received and processed Payment Orders in order to enable them to arrange that sufficient funds are available in their account with the Central Bank for the actual settlement. The *Bankgirocentrale* further - on the basis of the applicable netting arrangement - calculates the net net position of all the participating banks and at the moment of actual settlement (13.00 hours) the *Bankgirocentrale* - on the basis of an irrevocable power of attorney from the participating banks - instructs the Dutch Central Bank to make the necessary entries in the respective accounts of these banks with the Dutch Central Bank.

The *Bankgirocentrale* operates a separate settlement system for urgent Credit Transfers. In accordance with the provisions of the agreement on the participation in the urgent payment circuit (*overenkomst deelneming spoedcircuit*), to which each participating bank, the Central Bank and the *Bankgirocentrale* are a party, and the provisions of the settlement regulations urgent payment circuit (*reglement verevening spoedcircuit*) attached thereto, the *Bankgirocentrale* also processes Payment Orders for urgent Credit Transfers. In order to achieve that the Beneficiary's account is credited as soon as possible with the amount to be transferred to him, the *Bankgirocentrale* shall immediately after receipt of the Payment Order check whether there are sufficient funds in the special "urgent account" held by the Originator's Bank with the Dutch Central Bank or whether the Originator's Bank has sufficient credit facilities or securities to cover the urgent Credit Transfer. If that is not the case, the *Bankgirocentrale* will refuse to accept and execute the Payment Order. If sufficient funds or other coverage are available, the *Bankgirocentrale* will give notice of the acceptance of the Payment Order to the Beneficiary's Bank and the Originator's Bank. Subsequently, the Beneficiary's Bank will, unless otherwise instructed or agreed and after having checked and accepted the *Bankgirocentrale's* notice, advise the Beneficiary that his account will be

credited. The *Bankgirocentrale* further daily calculates the net net position after settlement of all urgent Credit Transfers it received from the participating banks. At the moment of actual settlement the *Bankgirocentrale* on the basis of a power of attorney from the participating banks instructs the Dutch Central Bank to make (a) the necessary debit entries to the respective urgent accounts and (b) the necessary credit entries to the respective urgent or, as the case may be, regular accounts of these banks with the Dutch Central Bank.

Ad (b). The *Postbank* payment circuit

In 1989 the Postbank, as the successor of the formerly State-owned Postal Cheque and Giro Service operating primarily through the post offices, merged with a commercial bank (*Nederlandse Middenstands Bank*), which combination merged a second time thus forming *ING Bank*, a part of the *Internationale Nederlanden Groep*. Despite these mergers the *Postbank* payment circuit still exists next to the *Bankgirocentrale* payment circuit. As *ING Bank* also remained a participant in the latter circuit, its clients may use the services of both circuits.

It should be noted that the *Postbank* circuit is a closed circuit: a Cross-circuit Credit Transfer is only possible through entries to accounts held by the *Postbank* and *ING Bank* with the Central Bank or through the account which the *Bankgirocentrale* holds with the *Postbank*.

Ad (c). The payment circuit of the Dutch Central Bank

Payments between Dutch banks are mainly effected through the payment circuit of *De Nederlandsche Bank*. Only a limited number of account holders such as banks, governmental organisations, some bill brokers, foreign central banks and international institutions are able to participate in this closed circuit. In addition some current accounts are held by large companies and pension funds. The latter, however, do not have access to the credit facilities provided by the Dutch Central Bank and their use of the transfer system is limited. Most savings banks in The Netherlands do not have their own account with the Central Bank but take part in the transfer system through the account of a universal bank established by them. All account holders participating in the circuit of *De Nederlandsche Bank* can get information regarding payments made through an on-line system which is capable of immediately processing transfer orders and reflecting the results thereof. Statements of account are in the possession of the participants on the following day. The *Bankgirocentrale* is connected with the on-line system as well.

The Central Bank distinguishes between revocable and irrevocable transfer orders. This distinction is related to the issue that under the Bank Act of 1948 the Central Bank may only provide credit facilities to credit institutions if such facilities are sufficiently secured. Therefore, the Central Bank will only execute a transfer order, if the transferor has sufficient funds in its account or if it can provide the Central Bank with security for the repayment of the credit facility. It is possible that a credit institution, although exceeding its credit facility at the moment it gives a transfer order, will be able to meet its obligations at the end of the day, for instance because it expects to receive funds later in the day. In connection herewith the Central Bank has introduced the possibility to give "revocable" transfer orders: the Central Bank does not actually process these orders until the so-called "cut-off time" at the end of the day (3.30 p.m.). Until that time the Central Bank administrates the received transfer orders which administration appears to be - but strictly speaking is not - a clearing of such transfer orders: each of the transfer orders is processed individually and any transfer order in excess of the available funds and/or credit facility of a particular bank is refused by the Central Bank and shall not be executed by it. On the other hand, the bank giving the transfer order may revoke any order given until the moment it has been accepted and processed by the Central Bank (which happens at the cut-off time). Due to the Central Bank's administration, participating banks may during the day inquire on-line about the funds to be transferred to and from their account by means of revocable orders.

As mentioned above, some transfer orders, such as those related to certain wire or telephone transfers effected through the Central Bank, are immediately accepted and processed by the Central Bank. From the moment they are given such transfer orders are irrevocable and they are considered as on-line, real time transfers because the transferee is also immediately credited for the funds transferred. All transfers submitted by the *Bankgirocentrale* to the Central Bank resulting from the clearing in the *Bankgirocentrale* payment circuit are irrevocable orders.

As the payment circuit of the Dutch Central Bank is mainly used for inter-bank transfers we shall not - within the scope of this study - discuss further details of this transfer system.

Note: Part of the information in this Introduction and schedule A attached hereto has derived from a rapport prepared by an ad-hoc working group on EC Payment Systems, September 1992, published in the "Blue Book" pages 215-229.

INTER-PARTY RELATIONS 1: EXECUTION OF CREDIT TRANSFERS

General

Questions relating to Scenario A:

A.1 Taking each stage of the transaction, is there any prescribed form which must be used by any of the parties?

1. As mentioned in the Introduction, under Dutch law there is no specific law nor any specific statute governing Credit Transfers. Most relevant provisions applicable to Credit Transfers can be found in the Dutch Civil Code. The Chapter of the Civil Code on "Obligations"[2] gives provisions regarding "obligations to pay a sum of money" in general. One of these provisions deals with payment by means of Credit Transfer and determines that a debtor can discharge any obligation to pay a sum of money arising from a contract by transferring the amount concerned to the account of the creditor, if there exists an account in the name of the creditor which is destined for giro transfers in a country where payment must or may be made[3]. The debtor may make such payment by means of a Credit Transfer, unless the creditor validly excluded payment to that account.[4] The creditor is commonly at liberty to exclude payment to a certain account or to provide that payment must be made in cash, albeit that he must act reasonably. If, for instance, the amount is too high to pay in cash the Beneficiary can not exclude payment through Credit Transfer.[5]

2. For the sake of answering this question we have distinguished three stages in the processing of a Payment Order, being:

   (1) the Originator instructs the Originator's Bank to effect a Credit Transfer by sending it a Payment Order, pursuant to which the Originator's Bank debits the Originator's account;

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2 Dutch Civil Code (or: *Burgerlijk Wetboek*, abbreviated as BW), 6th Book, 1st Chapter (the provisions regarding obligations to pay a sum of money are found in the 11th Section of this Chapter).

3 The Dutch Civil Code also gives rules for determining the place where payment must or may be made (articles 6:115-118 BW).

4 Article 6:114 section 1 BW.

5 This rule is found in the Explanatory Memorandum to the Civil Code (*Memorie van Antwoord Parlementaire Geschiedenis Boek 6*, p. 460). On the other hand, by decree of 13th November 1987 (Official Gazette 1987, nr. 507) it has been provided that no person need accept an amount in coins in excess of NLG 1000 in fifty guilder coins, NLG 500 in ten or five guilder coins, NLG 100 in two and a halve guilder or one guilder coins, NLG 25 in quarters or dimes and NLG 5 in five cent coins.

(2) the Originator's Bank agrees with the Beneficiary's Bank that the Beneficiary's Bank credits the Beneficiary's account; in connection herewith these banks further agree on the manner of settlement between themselves;

(3) the Beneficiary's Bank credits the Beneficiary's account.

3. Whether there is a prescribed form which must be used by any of the parties in any stage of the transaction, depends on the contractual relationship between the parties acting in that particular stage.

4. As regards the first stage of the transaction, in which the Originator and the Originator's Bank are parties, it is important to note that overall their contractual relationship is governed by the current account agreement between them as well as the general conditions of the Originator's Bank.[6] Pursuant to this general agreement the Originator's Bank is prepared - upon certain terms and conditions, most of which are laid down in the general banking conditions - to effect individual Credit Transfers, each of which shall be initiated by a Payment Order given by the Originator. Each such Credit Transfer constitutes an agreement in itself subject to the terms and conditions of the general agreement, and is each time entered into[7] upon the Originator's Bank's acceptance of the Payment Order.

5. When it concerns an "ordinary" Credit Transfer the Originator instructs his bank either in writing or by other means such as electronic data interchange or diskette to debit his account with the amount indicated on the Payment Order completed by him, in order to achieve that the Beneficiary's account with the Beneficiary's Bank, as likewise indicated by the Originator, is credited. Practically all non-recurrent payments in trade and industry, as well as some household payments, are effected by means of ordinary Credit Transfers. This payment instrument is also used on a large scale by the central government and local authorities. Article 9 of the general banking conditions provides in respect of ordinary Credit Transfers that "standard forms need to be filled in completely, clearly and correctly and the bank will be allowed to refrain from carrying out payment orders, if customers do not use forms

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6 It should be noted that there is no consensus on the exact contents of this agreement, which is partly due to the circumstance that the current account agreement itself is usually not laid down in writing. This being the case it is subject to the general principle of article 140 of the Sixth Book of the Dutch Civil Code which provides that such an agreement purports to an automatic and continuous set-off of mutual obligations, so that at any one time only the balance is due. In paragraphs 34ff, we shall elaborate further on the nature of the agreement between the Originator and the Originator's Bank.

7 Article 6:217 BW.

or other means of communication, prescribed or approved by the bank. The bank is entitled to demand that statements will be made in a certain form."

6. Aside from the ordinary Credit Transfer initiated by the Payment Order given by the Originator, in The Netherlands a distinction can be made between three categories of prepared Credit Transfers each requiring its own form:

(a) the Standing Order;

(b) the *acceptgiro*;

(c) the direct debit.

7. Ad (a). The Standing Order

The Originator gives his bank a single Standing Order by completing the applicable standard form to transfer, on fixed days, fixed amounts to an account indicated by him. This (otherwise non-paper-based) form of payment is frequently used for rent, subscriptions etc. On the fixed date the bank effects the Credit Transfer and no further action on the part of the Originator or the Beneficiary is required.

8. Ad (b). The *acceptgiro*

This form of prepared Credit Transfer is initiated by the creditor. Together with his bill he sends the debtor a fully prepared Payment Order (referred to as an *acceptgiro*), which in most cases also states the debtor's account number as known to the creditor from previous payments. All the Originator has to do is sign the Payment Order and send it to his bank. This payment medium is used both for recurrent and for non-recurrent payments of either fixed or various amounts, e.g. for insurance premiums and subscriptions as well as for bills for deliveries to regular customers. Unlike the Standing Order this prepared transfer is a paper-based instrument. In some cases, the original paper form needs to be returned to the creditor in order to enable him to adjust his debtor administration. For these *acceptgiro* transfers the banks and Postbank have developed a joint procedure.

9. Ad (c). The direct debit

The direct debits (*automatische incasso-opdrachten*) are deemed a separate category, although they have much in common with *acceptgiro* transfers. The Credit Transfer is again initiated by the creditor, who has been authorised beforehand by the debtor by way of a standard form to charge his account for goods delivered or services rendered. No further action on the debtor's part is required. This procedure is frequently used, for example, by public utilities. Direct debiting may occur in the form of frequent transfers as well as a single transfer. Both companies and private customers pay by way of the direct debit system. Debtors who authorised their creditors to debit their account, may revoke a payment made as a result thereof.[8]

10. In the second stage of the transaction, in which the Originator's Bank and the Beneficiary's Bank are parties, their mutual rights and obligations will depend on their implicit or explicit agreement in respect of effecting the payment contemplated by the Originator's Payment Order. This agreement may give provisions concerning the form to be used by the parties. In practice, one will find that in the netting arrangements in effect in The Netherlands the parties thereto will have prescribed a form which must be used by the participants in order to enable the clearing house efficiently to complete the netting process.

11. As regards the third stage of the transaction, in which the Beneficiary's Bank and the Beneficiary are parties, their contractual relationship is also governed by standard conditions, this time the general banking conditions of the Beneficiary's Bank. These do not specifically determine in what manner the Beneficiary must be informed of the credit entry. Article 140 of the Sixth Book of the Dutch Civil Code only provides that the bank should annually close the current account and inform the client of the balance as per the closing date including such items in the current account as had not previously been notified to the client. An implied rule is that the Beneficiary's Bank should inform the Beneficiary of certain details regarding the payment, such as the Originator's name, which enable the Beneficiary to establish the cause of the payment.

12. The form in which transfer instructions are given is gradually changing. The share of ordinary Credit Transfers, submitted to the banks on Payment Order forms which have to be converted manually into machine-legible transfer instructions,

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8 Compare paragraph 53 for the revocation procedure.

decreased from 21% of the total of bank transfer items in 1977 to 12% in 1990. This is partly due to the fact that business customers are increasingly using Payment Orders that are machine-legible.

13. Payment instructions are generally given in writing as far as it concerns private clients. They may also be given orally (which for obvious reasons hardly ever occurs without a written confirmation), by telefax, telex, diskette, magnetic tape or any other electronic means. Of course it depends on the co-operation of the bank whether it admits its clients to instruct the bank to effect a Credit Transfer upon an oral instruction.

14. Since Dutch law does not specifically require that a contract is effected in writing,[9] there is no reason to take a different approach towards electronic contracts. Consequently, for the purposes of answering question A.1, electronic or computerised Credit Transfers should be treated in principle as "ordinary" Credit Transfers.

A.2 What are the legal provisions (if any) governing the time within which each bank is required to act?

Considering in particular:

(i) Is there any definite period prescribed within which the Credit Transfer must be completed if it is not to lapse?

(ii) If there is no definite period, does custom prescribe the time within which the Credit Transfer must be completed?

(iii) Is there a duty for each bank to act "within a reasonable time"? If so, is there any case-law or principle or anything else giving guidance on what might be considered "reasonable"?

15. The answers to these questions are found in the general banking conditions and the case law pertaining thereto.[10] Below we shall set forth which guidelines are upheld for the time within which a Credit Transfer must be completed. Please note

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9 Article 3:37 BW.

10 According to article 29 of the general banking conditions, in the case of conflicts between a bank and its client, the client may either bring an alleged claim before the Committee for Bank Disputes (*Geschillencommissie voor het Bankbedrijf*) or before the regular courts.

that the question of the consequences attached to exceeding the prescribed time limits, if any, are addressed in our answers to question A.12.

16. There are no rules in statutory law prescribing a definite period within which the Credit Transfer must be completed. Naturally, as any party to a contract the bank must observe its duty of care vis-à-vis its client arising from the general banking conditions in particular and the Dutch law of contracts in general. According to the general banking conditions[11] the bank guarantees the due performance of Payment Orders within a reasonable period of time, provided the Payment Order was given correctly in accordance with the bank's instructions related thereto. In case law the principle has been elaborated that any Credit Transfer must be executed in the period of time commonly necessary therefor. Resultingly, a bank must execute a Payment Order upon receipt thereof in accordance with the usual procedure. Should any questions or difficulties arise, it may be held that the bank should nevertheless execute the Payment Order if it only concerns a minor detail.[12] The Committee for Bank disputes, finally, has ruled that no guarantees can be given in respect of the time necessary for a Credit Transfer.[13]

17. We would like to emphasise that in the netting arrangements effective in The Netherlands (which are examples of Scenario D), the usual practice is that, if a Payment Order has been given before 12.00 a.m. by an Originator, whose bank is a commercial bank, the completion of the Credit Transfer will take about three days, provided that the Beneficiary has an account with another commercial bank. If the Beneficiary has an account with the *Postbank*, completion of the (Cross-circuit) Credit Transfer will take about five days (of course it will also take five days in the case where the Originator has an account at the *Postbank* and the Beneficiary has an account at one of the other banks).

18. In the case that an Originator wishes to make an urgent payment by means of Credit Transfer, it is possible for him to use the services banks provide through the *Bankgirocentrale*'s circuit for urgent Credit Transfers.[14] If an Originator opts for an urgent transfer, it follows from article 10 of the general banking conditions and the applicable case law, that he needs to indicate explicitly whether he wishes the Payment Order to be executed on a certain date within the *Bankgirocentrale spoedcircuit*. In accordance with the procedure for an urgent transaction the

11 Article 10 of the general banking conditions.
12 Committee for Bank Disputes (13th July 1989; Case 8939). Compare the answers to Question A.12.
13 Committee for Bank Disputes (29th December 1989); Case number 8981.
14 The so-called *Bankgirocentrale spoedcircuit*. The operation of this payment circuit is set forth in more detail in the Introduction.

Beneficiary's Bank shall be advised by telephone or telefax of a forthcoming Credit Transfer and the Beneficiary's Bank will thus be able to credit the Beneficiary's account on the same day. The inter-bank settlement will be effected later through a special clearing system. Each bank which is associated with the *Bankgirocentrale spoedcircuit* has contractually guaranteed,[15] in the event of an urgent transfer, to pay the amount of the urgent order to the Beneficiary's Bank.

A.3 How would your answers to question A.2 differ if the Payment Order was conditional - for example, if the Originator had given his bank express instructions that the Payment Order should only be executed in certain specific circumstances, such as the receipt of sufficient funds to the Originator's account to cover it?

19. In principle, our answers to question A.2 would not be different, albeit that the period of time is extended to include the time it takes to fulfil the condition. In practice, clients will find that not all banks are equally willing to accept conditional Payment Orders from their clients. Generally it can be held that a bank will hesitate to accept conditional Payment Orders, since most banks' administrative systems for processing Payment Orders are not adapted thereto.

20. As mentioned in paragraph 62 below, the Originator's Bank will check whether there are enough funds in the Originator's account to cover the Credit Transfer. If there are not sufficient funds it may refuse to effect the Payment Order and return the instruction form pertaining thereto to the client. Thus, a client, whose bank does not admit conditional Payment Orders, can only give a Payment Order hoping that there will be enough funds on the execution date, which will be the next day if the Order is received by his Bank after 12.00 a.m.

21. According to the case law consulted it appears that the burden of proof that a Payment Order was conditional lies with the client.[16]

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15 By the so-called *overeenkomst deelneming spoedcircuit*.

16 In Case 8843 (25th October 1988) the Committee for Bank Disputes held that the bank was not responsible for executing a Payment Order contrary to the condition attached thereto, as the client should explicitly and very clearly indicate that a Payment Order is conditional, which apparently was not the case.

A.4 (a) Are there any rules of value-dating and how would you define value-dating?

22. The value date (*valutadatum*) is defined as the date as of which the funds to be debited from the account of the Originator cease to accrue interest for the benefit of the Originator or the date as of which the funds to be credited to the account of the Beneficiary start to accrue interest for the benefit of the Beneficiary.[17]

23. There are no statutory provisions nor any clauses in the general banking conditions relating to value-dating. The general banking conditions do not give any provisions concerning value-dating either.[18]

24. Originator's Banks participating in the *Bankgirocentrale* clearing system may opt to effect the debit entries in respect of Payment Orders either prior to or after delivery of the clearing details to the *Bankgirocentrale*. In the first option the bank effects the debit entries and - simultaneously - converts the details of hand-written or typed Payment Orders into machine-legible transfer instructions (these converted details are jointly referred to as a "batch"; compare footnote 39 below) which are then delivered to the *Bangirocentrale* (this option is referred to as *voordebiteren*). In the second option the bank converts the hand-written or typed Payment Orders, except for the details regarding the Beneficiaries, and sends the batch to the *Bankgirocentrale*. The *Bankgirocentrale* adds the Beneficiaries' details and returns the batch, which then serves as a basis for the debit entries (*nadebiteren*). Banks usually prefer the first option in order to accelerate making the debit entries.[19]

(b) Assuming value-dating, is there any difference in the treatment of credit and treatment of debits?

25. In Dutch banking practice, the value date in respect of funds to be debited to the account of the Originator shall usually be some days (sometimes one day) prior to settlement, whereas the value date in respect of funds to be credited to the account

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17 Bankleer, Het bankwezen, zijn kernfuncties en taakuitoefening, NIBE (1988), p. 246.

18 This issue should be distinguished from general clauses pertaining to interest calculation such as article 4 of the Postbank Savings account conditions providing: "Interest will be calculated from day to day, the day of arrival of funds will be included in interest calculations and the day of withdrawal of funds will not be considered for interest calculations."

19 Bankleer, Het bankwezen, zijn kernfuncties en taakuitoefening, NIBE (1988), p. 236.

of the Beneficiary shall usually follow some days (sometimes one day) after settlement.[20]

A.5 Are there any rules within the issue of double charging - for example, where the Originator in giving the instructions to his bank has specified that he should bear all the costs, but the Beneficiary nevertheless has charges deducted from the amount credited to the account at his bank?

26. The Dutch Civil Code does not give specific rules concerning double charging. The general banking conditions do not mention this subject either.

27. In the national payment circuit until now costs in connection with Credit Transfers are only to a limited extent directly charged by the banks to their clients, which may change in the near future. It further happens, in the case of cross-border payments, that the Beneficiary's Bank and/or the correspondent bank make(s) a deduction from the amount transferred (compare paragraph 142 below).

A.6 Consider the methods of authentication which would be used and/or which might be considered appropriate. (Ignore comparisons of paper signatures).

28. The methods of authentication should be subdivided between the ways transfers are being initiated, that is to say by paper or diskette/tape or by electronic means.

29. In case of a Credit Transfer which is initiated by paper, the Beneficiary's Bank checks the details stated in the Payment Order as mentioned before and the signature.

30. With regard to Payment Orders made by diskette/tape or cassettes, the banks execute a data check on their computer system in order to verify the authenticity of the Beneficiary, before sending the means to the Bankgirocentrale.

31. Again, in drafting the verification procedures used by them, Dutch banks have only considered the possibility of Scenario D. In this Scenario, when the Payment Orders prepared by the banks, are being sent through to the clearing house (*Bankgirocentrale*), the *Bankgirocentrale* performs a simple investigation of the details provided by the Originator in respect of the Beneficiary's account number:

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20 Most Dutch banks will invest the funds which are in the process of being transferred through Credit Transfers and - between these value dates - do not bear interest for the benefit of their clients thus creating interest earnings for themselves which are used to partly compensate the costs of maintaining the giro system.

the so-called "eleven check".[21] Aside from the "eleven check", the *Bankgirocentrale* lists all Credit Transfers by which payment is made of amounts in excess of NLG 10,000 and of tax restitutions in excess of NLG 1,000. These lists include details such as the names and account numbers of the Originators and the names and account numbers of the Beneficiaries. The *Bankgirocentrale* sends these lists to the Beneficiaries' Banks, which will verify the accuracy of the data provided. If they find that any error has been made, the further processing of the erroneous Credit Transfer will not be completed and further research will be done in order to find out the right destination for the Credit Transfer.

32. The *Postbank* follows a different verification procedure: the *Postbank* runs a so-called "number-name-check". If the Beneficiary's name as indicated in the Payment Order does not coincide with the name of the account holder registered for that account number with the *Postbank*, the Credit Transfer will not be completed. In the event that an Originator wishes to effect a non-paper-based order, for instance by modem-communication or other means of data communication, the computer files the Originator uses to prepare the Payment Orders are checked by the *Postbank* for inconsistencies between names and account numbers (these checked files are also referred to as "clear files"). The Originator may only submit to the *Postbank* Payment Orders prepared upon the basis of clear files and these Payment Orders are not independently checked. Should the Originator wish to add any details to the clear files, he must request the *Postbank* to perform a number-name check in respect of the additional details.[22]

33. Electronic signatures are accepted practice in The Netherlands. Originators will use a secret password when communicating Payment Orders to their bank by modem or other means of data communication. Authentication of such signatures is normally carried out by combining identification and verification. The user identifies himself by logging in through a generally known user code which will be the bank account number in our case. After this, the user must log in a secret password (which could be a PIN code). This code is used to verify whether the user is who he says he is. This authentication method is expected to be further elaborated through the use of so-called smart cards.

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21 When multiplying the first number of the account number with nine, the second with eight, the third with seven etc., the sum of these amounts has to be dividable by eleven. If the outcome can not be divided by eleven there is an error in the Beneficiary's account number and the *Bankgirocentrale* will return the incorrect Payment Order to the Originator's Bank.

22 Compare Van Esch, Giraal Betalingsverkeer (1988), p. 89.

Revocation

Questions relating to Scenario A:

A.7 (a) How would you define revocation and in particular how would you distinguish it from other rights e.g. a receiver's entitlement to disclaim on a winding up?

34. Before answering questions A.7 and A.8 it is important to consider the nature of the relationship between the Originator and the Originator's Bank. In the course of time legal commentators have offered quite a few theories on this relationship, none of which has been definitely accepted in case law. Some writers agree that the contract between these parties contains several elements of specific agreements for which the Dutch Civil Code gives provisions, such as the agency agreement (*lastgeving*) and the loan agreement (*overeenkomst van geldlening*).[23] Other writers are of the opinion that this agreement has a character of its own, a contract *sui generis*.[24] The Supreme Court never resolved this matter, although it regularly applies the rules of Dutch agency law - by analogy or directly - in giving a decision.[25] It should be noted that on 1 September 1993 a new Chapter of the Civil Code (the Chapter "Instruction" or, in Dutch, Opdracht) came into force which gives provisions pertaining to the agreement whereby a party (not being an employee) commits itself to perform certain duties for another party. This Chapter, inter alia, qualifies the agency agreement as a species of the instruction agreement. On the basis of this legislation and the case law available to this date, we believe that the overall agreement between a bank and its client may, to the extent it concerns the bank's general commitment to effect Credit Transfers, be qualified as an instruction agreement, whilst each individual Credit Transfer would be best qualified as a specific mandate (last) to the bank under or pursuant to the overall agreement.

35. Considering the extensive literature on the subject of the relationship between a bank and its client, we doubt whether all writers will agree that the new provisions concerning the instruction agreement will fully cover all aspects of the bank-client

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23 Mijnssen, Geld in het vermogensrecht (1984), p. 46.

24 Snijders, Betaling per giro, Van Opstall-bundel (1972), p. 176.

25 Supreme Court, decisions of 18th February 1926 (NJ 1927, p. 574); 29th May 1981 (NJ 1982, no. 191); 31st March 1989 (NJ 1990, no. 1). In the last decision the Supreme Court held that the Originator's liquidator can reclaim an amount paid through Credit Transfer, if the giro-institution receiving the payment instruction, on the day of the Originator's bankruptcy, had not yet performed all necessary acts which it should perform as the Originator's agent in order to effect payment. The Supreme Court further held that the Originator's Bank had not fulfilled its duties on the day of the bankruptcy, as it had not yet debited the Originator's account.

relationship. However, regardless of the dissenting opinions on the nature of the relationship between a bank and its client, we are inclined to conclude that the most important aspect of this relationship is that the Originator's Bank does not assume the Originator's underlying obligation to pay the Beneficiary, but that it rather - as the Originator's agent - accepts to arrange a Credit Transfer on behalf of the Originator. After completion of this Credit Transfer, the Beneficiary has been given a claim either vis-à-vis the Originator's Bank or the Beneficiary's Bank, which claim substitutes the Beneficiary's claim arising from the underlying agreement vis-à-vis the Originator and, consequently, the Originator is discharged from his underlying obligation. In this view the Originator's Bank, furthermore, by mandate (*last*) is the Originator's agent (*lasthebber*), as it effects a payment for the account of the Originator,[26] and by power of attorney (*volmacht*) it is the Originator's attorney-in-fact (*gevolmachtigde*), as it effects that payment on behalf of and in the name of the Originator.[27]

36. Furthermore, another aspect of the bank-client relationship is that, in paying by means of Credit Transfer, the debtor uses the bank's services. In the relationship between debtor and creditor, the bank thus has to be considered an auxiliary (*hulppersoon*). Under Dutch law a party performing under a contract, thereby using the services of an auxiliary, is liable for the errors and omissions of the auxiliary as if they were his own.[28]

37. Returning to question A.7 (a), revocation can be defined as the act initiated by the Originator or the Originator's Bank to countermand a Payment Order, when it is still within the power of the Originator or the Originator's Bank to do so, in order to prevent the Credit Transfer from being completed. In The Netherlands there are no specific statutory provisions regarding the revocation of a Payment Order as such, nor do the general banking conditions refer to this issue.

38. On the basis of our conclusion in paragraph 34ff above as to the nature of the relationship between a bank and its client and the common practice in The

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26 The bank does not effect the payment for its own account as it makes a debit entry to the account of the Originator (compare article 7:414 BW).

27 When sending the Payment Order on to the following chain in the Credit Transfer process the bank mentions that the payment is initiated by and must be executed on behalf and in the name of the Originator (compare article 3:60 BW).

28 Article 6:76 BW. Compare: Huizink, Betaling is geen rechtshandeling (1990), WPNR 6022, p. 710; Snijders, Van Opstall-bundel (1972), p. 173ff; Rank, Contractenrecht VI-F (Kluwer), par. 2572 sub a; Rank, Kwartaalbericht NBW 1989, p. 81.

Netherlands, we are of the opinion that the Originator's Bank's authority to act on behalf and for the account of the Originator is revocable.[29]

39. Revocation as defined in the above paragraph should be distinguished from a liquidator's or receiver's right to disclaim either the payment contemplated by the Credit Transfer or the Credit Transfer itself.

40. Under the Dutch Bankruptcy Act a liquidator is empowered in certain defined circumstances to disclaim a payment resulting from an otherwise irrevocable or completed Credit Transfer, for instance on the grounds that the Beneficiary profits from a payment made just prior to a bankruptcy knowing that the interests of other creditors are prejudiced by that payment.

41. Furthermore, a liquidator may disclaim the Credit Transfer itself, if on the day on which the Originator is declared bankrupt, the Originator's Bank has not fully completed the acts necessary on its part to effect the Credit Transfer. Upon such a disclaimer, the Beneficiary must repay the amount involved to the Originator's estate.[30] It should be emphasised that, in the decision mentioned in footnote 30 below, the Originator's Bank also happened to be the Beneficiary's Bank. In connection herewith the Supreme Court ruled that, that being the case, the liquidator could have disclaimed the Credit Transfer up to the moment the Beneficiary's account was credited.

(b) In what circumstances might the Originator be entitled to revoke or countermand the Payment Order?

42. In the absence of specific rules relating thereto,[31] the question whether the Originator is able to revoke or countermand the Payment Order must be answered upon the basis of general principles of the Dutch law of contracts as well as principles of Dutch agency law.

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29 It is conceivable that the Originator's Bank stipulates that it has an irrevocable power of attorney/mandate to execute the Payment Order on behalf and for the account of the Originator. If the general banking conditions, however, were to determine that this is the case, such a stipulation might be voided by an individual as being too onerous on the basis of article 6:237 BW.

30 This rule follows from article 23 of the Dutch Bankruptcy Act (*Faillissementswet*, or "*Fw*") as interpreted by the Supreme Court (hereinafter also abbreviated as "HR") in its decision of 31st March 1989 (NJ 1990, 1). Article 23 Fw determines that a bankrupt is deprived of his powers to transfer and/or encumber his assets as of the beginning of the day he was declared bankrupt. In the case decided in 1989, this resulted in the liquidator being capable of claiming repayment from the Beneficiary of the amount paid through a Credit Transfer initiated by the meanwhile bankrupt Originator.

31 With the exception of the rules applicable to direct debits; compare paragraph 53 below.

43. In principle, the Originator is entitled to revoke the power of attorney and mandate given to the Originator's Bank in any circumstances and at any time.[32] Quite another issue is, to what extent the Originator is able to invoke such termination vis-à-vis third parties, such as the Beneficiary's Bank or an Intermediary Bank, which issue is addressed in our answers to question A.7 (c) below.

44. Furthermore, other circumstances of the case, such as the actual possibilities for the Originator's Bank to refrain from executing the Payment Order or to cancel the performance thereof, need to be taken into account. As ordinarily these possibilities for revocation shall prove to be limited, it may well be that the Originator is not even vis-à-vis his own bank in a position to successfully invoke all consequences of the termination of the power of attorney and mandate.[33] Furthermore, we would assume that the Originator's Bank does not have any discretion in this matter: it must co-operate to the fullest extent possible in revoking or countermanding a Payment Order and the Originator need not specify the reason therefor.[34]

45. It is noteworthy that an Originator could have a duty to revoke the Payment Order, in the event that the Beneficiary's claim vis-à-vis the Originator is arrested by one of the Beneficiary's creditors. The Supreme Court[35] held that, if the Originator has sent in a Payment Order in order to pay the claim concerned prior to the moment that the arrest was made but at that moment the Credit Transfer has not been completed yet, the Originator has the obligation to use his best endeavours to revoke the Payment Order and he must be able to prove that he has done so.

(c) Until what moment can he do so?

46. It is disputed until when an Originator may revoke a Payment Order. Different theories arise mainly from the different ways writers qualify the agreement between a bank and its client and from some writers' inclination to model theory after practice. Theoretically, it could be argued that a Payment Order can be revoked or countermanded until the moment the payment contemplated thereby has been effected (this would be the moment at which the Beneficiary's account has been credited [36]). This would follow from the (most widely supported) definition

32 This follows from articles 3:72 sub c and 7:408 section 1 BW.

33 This rule follows from article 3:66 BW, section 1 of which article determines that any act performed by the attorney-in-fact on the basis of the power of attorney binds the principal.

34 Compare the Originator's right to revoke a Payment Order in respect of a direct debit (paragraph 53).

35 Decision of 21st March 1969 (NJ 1969, 304).

36 In the past, writers have suggested various moments during the transaction as being decisive for the moment when the payment is effected as between the Originator and the Beneficiary. This discussion has been ended

of the relationship between the client and the bank as an agreement *sui generis* with characteristics of the instruction agreement (opdracht), in general, and the agency agreement (*lastgeving*), in particular.

47. We would underwrite this argument be it that, as mentioned above, in our opinion the real question should be what the consequences are of the revocation of a Payment Order or, to be more precise, until what moment the Originator can invoke the consequences of such revocation against others.

48. It goes without saying that the Originator, by sending a Payment Order to the Originator's Bank, has given the impression that the Originator's Bank is authorised to execute the Credit Transfer contemplated thereby. As soon as the Originator's Bank sends this Payment Order to an Intermediary Bank or the Beneficiary's Bank, the latter parties may rely on this impression. Should the Payment Order meanwhile have been revoked, the Originator remains bound unless they know of the revocation or otherwise should have doubted the existence of the authorisation.[37]

49. Again, it is likely that, in practice, banks have limited possibilities to unwind a Payment Order after revocation thereof. In connection herewith it will be difficult for the Originator to successfully invoke the consequences of the revocation: the Originator must keep in mind that, if the Originator's Bank has executed the Payment Order to such an extent that it can no longer cancel the Payment Order without harming either its own interests or the interest of its other clients or the efficiency of the Credit Transfer system in general,[38] it cannot reasonably be required to co-operate.

50. In the Credit Transfer system serviced by the *Bankgirocentrale*, the consequence of the above is that an Originator can only effectively revoke if the Originator's Bank has not yet sent the Payment Order to the *Bankgirocentrale* and is still able to separate the Payment Order from Payment Orders given by other clients without causing considerable delay in the execution of the Payment Orders given by other

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with the introduction of the present Civil Code on 1st January 1992, which enacted the rule that a payment is effected as between the Originator and the Beneficiary at the moment the Beneficiary's account is credited (article 6:114 BW). Also compare the Explanatory Memorandum to the Civil Code, Book 6, p. 461; Asser-Rutten 4-I, p. 347; Hofmann-Drion-Wiersma, p. 320; Snijders, Betaling per giro, Van Opstall-bundel (1972), p. 179; Rank, Betaling per giro volgens NBW, een introductie, NJB (1983) p. 1132; Supreme Court decisions of 21st March 1969 (NJ 1969, 304) and of 3rd April 1974 (BNB 1974, 107); Pabbruwe, Het tijdstip van betaling in het bankverkeer, WPNR 5105 (1971), p. 501.

37 Article 3:61 section 2 BW and article 3:76 section 1 BW.

38 In a different context it has been argued that an undisturbed Credit Transfer system is a matter of public order (and therefore overruling civil obligations) (Blomkwist, Het girale betalingsverkeer, WPNR 5845, p. 549).

clients. However, from a commercial point of view we would not deem it impossible that a bank interprets its duties in this respect differently according to the importance of the Originator and/or the amount of money involved with the transaction.[39]

51. We would like to add that, if the Originator is authorised to send batches (as defined in footnote 39) with Payment Orders directly to the *Bankgirocentrale*, and any such batch has been sent to (and processed by) the *Bankgirocentrale* more than once or has been processed regardless of a timely revocation order in respect of that batch, he can ask his bank to request the *Bankgirocentrale* to restore the transfers involved.[40]

52. Supposing for a moment that the Originator's revocation entails that the Originator's Bank must in its turn revocate the order it has given to the Beneficiary's Bank to effect the Credit Transfer, the question arises whether the Beneficiary's Bank upon receiving such a revocation order has any obligation towards the Originator and/or the Originator's Bank to (make as much effort as possible to) stop the process whereby the Beneficiary's account will be credited, if technically possible, or even to reverse the entries made. As a result of different theories concerning the bank-client relationship, authors have also expressed different opinions about this question.[41] The new provisions concerning the instruction agreement only provide in general terms that the bank as the instructed party (or "assignee") should perform its duties with the care of a "good assignee". In addition, the assignee only needs to follow specific instructions when they have been given in time. We are, therefore inclined to conclude that both the Originator's Bank and the Beneficiary's Bank would have the obligation to co-operate to the best of their ability with the Originator in effecting the revocation. However, it should be noted that the Originator's Bank using the services of the *Bankgirocentrale* has given the latter an irrevocable authorisation to effect the debit or credit entry with the net amount the Originator's Bank is due or is owed as a result of the netting process that banking day.[42] [43] Upon the basis hereof, we

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39 It has come to our knowledge that in practice it is deemed technically possible for a bank, after having completed a magnetic tape with Payment Orders ("batch"), to notify the *Bankgirocentrale* that an individual Payment Order should be excluded (indicating the names of the Beneficiary and Originator concerned) in connection with the revocation thereof. However, we feel that the Originator would be in a difficult legal position if he were to demand that the Originator's Bank does so.

40 This rule is laid down in the so-called restore transfer arrangement (*regeling herstelboeking*) established by the *Bankgirocentrale*. According to article 3 thereof a timely revocation order is an order given prior to the moment upon which the *Bankgirocentrale* starts to process the batch. Compare paragraph 57.

41 Van Ravenhorst, Vergissing van de bank bij uitvoering van een opdracht tot girale betaling, WPNR 6070, p. 849.

42 Article 2 of the *Bankgirocentrale* Settlement Rules (*Vereveningsreglement*). In the event of an urgent Credit Transfer, furthermore, it is explicitly agreed that the Originator's Bank may not revoke his obligations arising

conclude that the Originator can only reasonably require his bank to co-operate in effecting the revocation, if the Originator's Bank is still in a position to achieve vis-à-vis the *Bankgirocentrale* that the revocated Payment Order will not be taken into account in the netting and settlement process.

53. We would like to call attention to the fact that a specific arrangement is in place for annulling direct debits. All the Originator has to do in order to annul such a Credit Transfer is to send a standard form to his bank which will automatically cause it to execute the annulment[44], if the request is made, by private clients, within 35 calendar days after the original transfer and, by corporate customers, within 9 business days after the original transfer. Whether the Credit Transfer is annulled validly or not is determined by the underlying relationship between the creditor and the debtor, but the bank does not need to make an independent investigation into this matter. Any risks of non-recovery are for the account of the client. If the annulment has successfully taken place, the result is that the payment effected by the Credit Transfer in the end proved to be a non-valid payment.[45]

(d) What steps would he have to take?

54. Revocation of a Payment Order can be effected by a statement sent by any means of communication. More important anyhow is whether the bank is still able to act upon such revocation as mentioned before. Therefore a client should act as quickly as possible in case he wants to revoke.

55. In the event of an oral revocation the banks can ask for a confirmation bearing an authorised signature. This request does not necessarily have the character of a condition for the validity of the revocation but is more intended to confirm the revocation on the part of the client.

(e) Can entries be reversed in the case of mistake?

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from the processing of the Payment Order (article 4 of the participant contract urgent Credit Transfers or *overeenkomst deelneming spoedcircuit*).

43 Furthermore, the banks participating in the *Bankgirocentrale* system have committed themselves to process within that system all Payment Orders received by them in respect of Credit Transfers contemplating payment of amounts in Netherlands Guilders to giro-accounts within The Netherlands (article 5 standard contract *Bankgirocentrale*).

44 The annulment is effected by means of reversing the entries made. As such, it is not a "revocation" in the sense of the definition mentioned in paragraph 37 above.

45 Compare the Explanatory Memorandum to article 6:114 BW, p. 463.

56. It must be assumed that, in the event of an erroneous credit entry, the Beneficiary's Bank is not allowed to recall this amount from the Beneficiary's account without the Beneficiary's prior consent. This appears to follow from the circumstance that such a right to reverse a credit entry has not been attributed to either the Originator's Bank or the Beneficiary's Bank by any statutory law or contractual provision nor does it follow directly from the general banking conditions.[46]

57. It is possible that the Originator's Bank or an Originator who is authorised to send batches (as defined in footnote 39) with Payment Orders directly to the *Bankgirocentrale*, makes a mistake. As mentioned in paragraph 51 above, there is an arrangement for the cases that any batch has been sent to (and processed by) the *Bankgirocentrale* more than once or has been processed regardless of a timely revocation order in respect of that batch. Any such error may be rectified by the *Bankgirocentrale* in accordance with the Restore Transfer Arrangement. The main conditions of this arrangement are:

(a) restore transfer will be effected by the *Bankgirocentrale*;

(b) restore transfer will be carried on the initiative of the *Bankgirocentrale* or at the request of the Originator's Bank;

(c) the *Bankgirocentrale* will effect a restore transfer on its own initiative in case:

- it has processed a batch more than once;
- it has not responded to a timely revocation request in respect of a batch;

(d) the *Bankgirocentrale* will effect a restore transfer, at the written request of a bank when a batch:

- has been sent more than once to the *Bankgirocentrale* and also has been processed more than once;
- has been carried out despite a timely revocation request;

46 This rule can also be deducted from the Explanatory Memorandum to article 6:114 BW, p. 463. In our opinion the Beneficiary's Bank is, however, entitled to make a credit entry under proviso (compare paragraph 67 below).

- a restore transfer should have been effected on the *Bankgirocentrale*'s initiative.

The Restore Transfer Arrangement contains the provision that a Beneficiary, who perceives that an individual Payment Order by which he receives payment is restored in the manner referred to above, is entitled to request his bank to cause that such restore transfer is undone.

58. Another matter involves the question what should happen, if it appears that a Beneficiary received a payment by means of Credit Transfer but the amount thus credited to his account was not (or was in excess of the amount) due to him and such payment is a result of an error of either one of the Originator, the Originator's Bank and the Beneficiary's Bank, for example when referring to the account number (compare the following paragraph), and that credit entry cannot be reversed. Such a mistake will need to be resolved in one of the following manners:

(a) If the Originator has made the error, he shall be able to reclaim the amount paid or paid in excess from the Beneficiary on the grounds of undue payment (*onverschuldigde betaling*)[47] or unjustified enrichment (*ongerechtvaardigde verrijking*).[48]

(b) If the Originator's Bank has made the error, this is deemed a circumstance which in the relationship between the Originator and the Beneficiary is for the risk of the Originator. Resultingly, the Originator has not been discharged from his obligation to pay the Beneficiary. However, the Originator's Bank is liable to the Originator and should compensate the Originator for its damages.[49] [50]

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47 Article 203 of the 6th Book of the Dutch Civil Code provides that anyone making a payment without any legal obligation to do so is entitled to reclaim the amount concerned as undue payment.

48 Article 212 of the 6th Book of the Dutch Civil Code determines that any one who has been enriched without any justification but at the account of someone else must, inasfar as reasonable, pay the damages of the other up to the amount of his enrichment.

49 This has been explicitly determined in article 2 of the general banking conditions.

50 In 1927 the Dutch Supreme Court (NJ 1927, p. 574) ruled in respect of a Credit Transfer mistakenly effected by the Originator's Bank that the Originator's Bank could not reclaim the amount concerned as an undue payment from the Beneficiary. The error in question involved that the Originator's Bank executed a - conditional - Payment Order on behalf of a party which was not the debtor of the Beneficiary (as the condition for making the payment had not been fulfilled). The Originator's Bank mistakenly executed the Payment Order on behalf of a party which was related to the Originator but had not given the Payment Order (it should be noted that the Beneficiary was owed monies by that party). The Supreme Court ruled that the Originator's Bank, acting with third parties in its capacity as agent, may not reclaim the amount from the Beneficiary merely on the ground that it had no Payment Order for that payment. For a more extensive discussion of this situation please compare our answers to Question A.10 (a).

(c) If the Beneficiary's Bank has made the error, it is important to note that the originator under Dutch law, in principle, does not have any direct claims vis-à-vis the Beneficiary's Bank as there is no contractual relationship between them (compare footnote 64). However, as the Credit Transfer implies that the Beneficiary's claim vis-à-vis the Originator is substituted by a claim towards the Beneficiary's Bank[51] and it is generally held that in the relationship between the Originator and the Beneficiary any error on the part of the Beneficiary's Bank is for the risk of the Beneficiary,[52] the Originator may, when sued by the Beneficiary, allege to his defence that he no longer owes any amount to the Beneficiary and that the Beneficiary should sue the Beneficiary's Bank instead.[53] [54]

59. Which party is liable for the damages resulting from an error or omission in executing the Payment Order, depends entirely on the question who is responsible for the error or omission made. For instance, if the Originator did not correctly indicate the account number of the Beneficiary and the Originator's Bank could reasonably mistake the number written down for another one, it is likely that the Originator will be responsible for any damages caused by completion of the Credit Transfer.[55] In a similar case where the Beneficiary did not receive what was due because he did not provide the correct account number to which that amount should be transferred, the Court of Appeal held that neither the Originator nor the Originator's Bank (which was also the Beneficiary's Bank) was liable.[56] In the case that the Originator's handwriting is simply illegible or the account number or amount to be transferred is not clearly written, it could be alleged that the duty of care of the Originator's Bank entails that it should refrain from executing the Payment Order and contact the client for further explanation. If the bank does not do so it will be held liable for any damage resulting from such transaction.

(f) Answer questions (b) and (c) above on the assumption that the Originator's Bank on its own initiative wishes to revoke the Payment Order.

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51 Mijnssen, Geld in het vermogensrecht (1984), p. 65-67, Mijnssen, De Rekening-courantverhouding (1988), p.74-77, Asser-Rutten (1981), p. 442, Conclusie Mr Asscher to HR 8th July 1987, NJ 1988, 104.

52 Rank, Nieuw BW Tekst en Commentaar (1990), p. 540.

53 The Originator will in all likelihood need to prove that settlement in favour of the Beneficiary's Bank has been effected.

54 It should be emphasized that the actions described in paragraphs (b) and (c) do not preclude the Originator from taking action against the Beneficiary on the grounds of undue payment.

55 Compare Van Esch, Giraal Betalingsverkeer (1988), p. 95.

56 Court of Appeal of Amsterdam, 22nd July 1986, NJ 1987, 690.

60. The answers to questions (b) and (c) would not be different, whether the Originator's Bank in revoking a Payment Order may be deemed to be acting as the Originator's agent or whether it can be held that the Originator's Bank is acting in its own right (for instance, after having noted that it had implemented the Payment Order concerned erroneously). Again, it should be noted that the real question should be what the consequences are of such a revocation, which issue we have addressed in our answers to questions (b) and (c). We would stress that in each case the Originator's Bank should of course at all times observe its duties of care vis-à-vis the Originator.

(g) Can a situation ever arise where the Originator validly revokes, but the Originator's Bank can not revoke? (Assume that the Originator's Bank has at all times acted correctly.)

61. We refer to our answers to question A.7 (c). If that situation should arise, the Originator will not be in a position to invoke all the consequences of his - valid - revocation, as he cannot reasonably require the Originator's Bank to co-operate in effecting the revocation order.

<u>Responsibility</u>

Questions relating to Scenario A:

A.8 In respect of each of the following:

i. the Originator's Bank;

ii. any Intermediary Bank;

iii. the Beneficiary's Bank.

(a) At what moment does the bank accept the Payment Order (i.e. assume any legal commitment to the party giving such Order)?

(b) At what moment does the bank execute the Payment Order?

<u>Ad i. The Originator's Bank</u>

62. The Originator's Bank and the Originator agreed - when they entered into a current account relationship - that the Originator's Bank shall execute Payment Orders on behalf of and for the account of the Originator upon the terms and conditions laid down in the general banking conditions.[57] In this respect an important condition is the one stipulating that the bank reserves the right to refrain from effecting a Payment Order, if there are not sufficient funds in the account of the Originator or if there are any other reasons which obstruct the Credit Transfer such as an arrest of all the amounts due by the Originator's Bank to the Originator or the bankruptcy of the Originator.

63. Provided that all conditions have been met, the Originator's Bank will accept the Payment Order by starting to execute it: that would generally be at the moment of the debit entry (in the case of *voordebiteren*[58]) or at the moment of preparing the batch to be sent to the *Bankgirocentrale* (in the case of *nadebiteren*). In other words, the acceptance of the Payment Order, in the meaning of the Originator's Bank's act whereby it assumes legal commitment (the *rechtshandeling*) in respect of that Payment Order vis-à-vis the Originator, is evidenced by the execution thereof. The Originator may generally assume that the Originator's Bank has accepted the Payment Order, when it has not returned it to the Originator within a week approximately.

64. It is furthermore important to realise that the Originator's Bank has nothing to do with the underlying relationship between the Originator and the Beneficiary. This underlying relationship shall therefore not be a reason for a bank to refrain from accepting a Payment Order, unless it concerns cross-border payments which fall within the scope of the rules pertaining to the trade of strategic goods or similar regulations (compare paragraphs 139 and 140 below).[59]

Ad ii. Any Intermediary Bank

65. An Intermediary Bank likewise usually accepts a Payment Order by starting to execute the instructions given thereby (compare paragraph 63 above). The execution of the Payment Order is carried out based on the contract between the parties, which may be an existing contract to assist each other in effecting Credit

57 Therefore, the Payment Order is a further completion from the contract with the accountholder (see further Supreme Court October 7, 1988, RvdW 157, Amro-THB).

58 Compare paragraph 24 above.

59 According to the general opinion in Dutch legal literature it is not the bank but the creditor who accepts or refuses payment by means of Credit Transfer. The bank is not and need not be aware of the underlying relationship between the debtor and the creditor and thus the cause of payment. (Van Ravenhorst, Aanvaarding en weigering van girale betaling, WPNR 5947, p. 72).

Transfers or a contract entered into for that specific Credit Transfer. The Intermediary Bank may wish to set certain conditions prior to accepting the Payment Order.

Ad iii. The Beneficiary's Bank

66. The Beneficiary's Bank and the Beneficiary agreed - when they entered into a current account relationship - that the Beneficiary's Bank shall credit the Beneficiary's account in connection with Payment Orders received by it, each of which credit entries shall be made upon the terms and conditions laid down in the general banking conditions.

67. It may generally be held that the Beneficiary's Bank accepts a Payment Order at the moment the settlement between the Beneficiary's Bank and the Originator's Bank has been completed (whether or not through the intervention of an Intermediary Bank). At that point in time, the Beneficiary's Bank is prepared to credit the Beneficiary's account. Again, the acceptance of the Payment Order, in the meaning of the Beneficiary's Bank's act whereby it assumes legal commitment in respect of that Payment Order vis-à-vis the Originator's Bank, is evidenced by the execution thereof. Some writers state that a Beneficiary's Bank can however credit an amount under the proviso that the amount involved might not be destined for the client. In case of a doubt on the final destination of the transfer, the bank can "credit under proviso" with notice that a correction can follow and therefore the amount can be debited in the near future.[60]

A.8. (c) At what moment is the bank discharged from its obligation - for example - would it be upon the delivery of these instructions to effect the payment to the next party in the Credit Transfer chain or would it be upon the Beneficiary receiving value?

68. As any other contractual party a bank is generally discharged from its obligations, when it has fulfilled its contractual duties.

Ad i. The Originator's Bank

69. Consequently the Originator's Bank will be discharged from its obligations at the moment upon which the following steps have been completed:

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60 Van Esch, Giraal Betalingsverkeer (1988), p. 88 and 89.

(a) the Originator's Bank has debited the account of the Originator in accordance with the instructions indicated in the Payment Order;

(b) the Originator's Bank has delivered the Payment Order to the Intermediary Bank, if any,[61] or the Beneficiary's Bank for the purposes of settlement of the amount concerned;

(c) settlement of the amount concerned either (i) by crediting the account held by the Beneficiary's Bank with the Originator's Bank or causing the account held by the Originator's Bank with the Beneficiary's Bank to be debited or (ii) by causing the account held by the Originator's Bank with the Intermediary Bank to be debited and the account held by the Beneficiary's Bank with the Intermediary Bank to be credited.

70. It is somewhat unclear to what extent the Originator's Bank is responsible for the due completion by the Beneficiary's Bank of the Credit Transfer, i.e. for the actual credit entry to the account of the Beneficiary. There is no consensus as to the nature of the obligations of the Originator's Bank. Many feel that pursuant to these obligations the Originator's Bank should make all reasonable efforts to ensure that the Beneficiary's Bank effects the credit entry.[62] In this view the relationship between the Originator and the Originator's Bank would entail that the Originator's Bank, if its efforts do not lead to a credit entry in favour of the Beneficiary, is discharged from its obligations arising from the Payment Order and consequently may (and should) reverse the debit entry made to the Originator's account. If on the other hand the obligations of the Originator's Bank amount to a guarantee of a certain result, i.e. a credit entry for the benefit of the Beneficiary, it follows that the Originator's Bank in that case is not free to refrain from executing the Payment Order, but is instead committed to see to it that the Credit Transfer shall be

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61 In connection herewith we would like to point out that, according to article 3 of the general banking conditions, the bank is allowed to use the services of third parties and that the bank cannot be held responsible for shortcomings of such third parties, if it can prove that it has acted with reasonable care when choosing such third parties. Notwithstanding this provision, article 10 of the general banking condition remains applicable. Compare paragraph 106.

62 This view is also incorporated in the general banking conditions, article 10 of which inter alia determines that the bank, in the event no credit entry is made to the account of the Beneficiary, shall investigate the matter and use its best efforts to accomplish that such a credit entry shall be made. Article 2 of the general banking conditions also establishes that the bank has a duty of care.

completed, if necessary by suing the Beneficiary's Bank.[63][64] There are no examples in case law which resolve this issue.

71. As regards the question whether the Originator's Bank is responsible for the acts of the Intermediary Bank, we refer to paragraph 36.

Ad ii. Any Intermediary Bank

72. The Intermediary Bank, if any, will generally be discharged from its obligations at the moment upon which the following steps have been completed:

(a) settlement of the amount indicated in the Payment Order by debiting the account held by the Originator's Bank with the Intermediary Bank and crediting the account held by the Beneficiary's Bank with the Intermediary Bank;

(b) the Intermediary Bank has delivered the Payment Order to the Beneficiary's Bank for the purposes of crediting the Beneficiary's account.

Ad iii. The Beneficiary's Bank

73. The Beneficiary's Bank will generally be discharged from its obligations at the moment upon which the following steps have been completed:

(a) the Beneficiary's Bank has credited the account of the Beneficiary in accordance with the instructions indicated in the Payment Order;

(b) the Beneficiary's Bank has sent a statement in respect of the Beneficiary's account to the Beneficiary evidencing that the amount concerned has been credited.

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63 The general banking conditions further determine that the bank guarantees the completion of a Payment Order in guilders which can be effected within the *Bankgirocentrale* payment circuit. Considering this guarantee it could be held that the Originator does have a claim vis-à-vis the Originator's Bank (albeit that his claim for damages resulting from non-completion is limited; compare the answers to Question A.12).

64 As the Originator does not have a direct relationship with the Beneficiary's Bank, it goes without saying that the Originator would from a legal point of view be in an awkward position if the Originator's Bank would neither unwind the Payment Order nor take action vis-à-vis the Beneficiary's Bank. The only remaining actions would be the one vis-à-vis the Beneficiary's Bank on the basis of tort or, possibly on the basis of the articles 7:419 through 421 BW (which determine that in certain circumstances the principal has or can acquire a direct action vis-à-vis the contractual party of the agent).

A.8 (d) In what circumstances, if any, may the Bank refuse to accept or execute the Payment Order ?

Ad i. The Originator's Bank

74. As already stated before, the Originator's Bank generally has to execute Payment Orders: only due to a lack of funds can it refrain from doing so.

75. The Originator's Bank may further refuse to accept or execute the Payment Order, in the event that the Originator has been declared bankrupt or has otherwise been deprived of his powers to transfer and/or encumber his assets in general or over the funds in his account with the bank specifically (such as in the case of an arrest). In the latter situation (a creditor of the Originator arrests the funds in the Originator's account with the Originator's Bank) the situation may arise that the Originator's Bank has been notified of the arrest after having made a debit entry to the Originator's account but prior to completion of the Credit Transfer. Although this specific situation has not been the subject of any published court decision, we would assume that - as in the case of revocation - the arrest only affects that specific Payment Order if the Originator's Bank is able to stop the execution of the Credit Transfer. If the execution of the Payment Order cannot be undone anymore, it would be the bank which would have to prove that it has done all that is in its power to stop this execution (compare the case published in NJ 1969, 304).

Ad ii. Any Intermediary Bank

76. An Intermediary Bank may only refuse to accept or execute a Payment Order in case of bankruptcy of the Originator's Bank or in the event there are no sufficient funds to effect the settlement between the Originator's Bank and the Intermediary Bank, unless they have agreed to effect the settlement regardless thereof.

Ad iii. The Beneficiary's Bank

77. As soon as the settlement is effected the Beneficiary's Bank must make a credit entry to the Beneficiary's account. It may, however, well be that the amount thus credited is subject to an arrest made after the settlement is effected but prior to the credit entry, which affects the Beneficiary's ability to dispose of the funds credited to his account.

A.9 (a) What duties of care express or implied are owed by each party to the transaction to each of the other parties?

78. As explained above in paragraphs 34ff, the contractual duties of the Originator and the Originator's Bank are found in the rules pertaining to the common law of contracts generally, as well as the rules of agency law (including the new provisions pertaining to the instruction agreement in general) and the rules pertaining to current account relationships particularly. These rules are also applicable to (a) the relationship between the Beneficiary's Bank and the Beneficiary and (b) the relationship between the Originator's (Intermediary) Bank and the Beneficiary's (Intermediary) Bank, although one will find that the latter relationship is usually also governed by specific contracts entered into regarding the settlement of Credit Transfers (for instance, the *Bankgirocentrale* Settlement Rules). In all these relationships the general guideline following from the common law of contracts is that contractual parties must behave themselves vis-à-vis each other in accordance with the principle of good faith, implying for example that any rights and powers conferred upon a party may only be exercised in a reasonable manner.[65] This general principle has been elaborated in the general banking conditions[66] which determine that a bank is under the express duty to execute Payment Orders diligently and carefully always taking its clients' interests into account.

79. Where there is no direct contractual relationship between the parties involved (which is for instance the case between an Originator and an Intermediary Bank), the rules referred to in paragraphs 34ff strictly speaking do not apply. An action for damages caused by one of the parties involved could, also in the absence of a contractual relationship, likewise be based on the argument that that party did not comply with its general duties of care and therefore acted tortiously vis-à-vis the party suffering the damages.

80. The Originator and the Beneficiary should check the accuracy of written statements from their banks immediately upon receipt thereof. Furthermore, the Originator should verify whether his Payment Orders have been duly executed and advise his bank of any errors and omissions made, in which case the bank undertakes to rectify those errors and omissions made by the bank.[67]

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65 Articles 6:2 and 6:248 BW.
66 Article 2 of the general banking conditions.
67 Articles 12 and 13 of the general banking conditions.

81. It is difficult to establish whether the Beneficiary has the duty to report to the bank that any amounts credited to his account were not due to him.

82. In this connection we also refer to the verification procedures performed by the banks participating in a Credit Transfer (vide paragraphs 28ff).

83. Rules of good faith may also in certain circumstances imply that any contractual or statutory rights to set-off that the Beneficiary's Bank has towards the Beneficiary are limited by Dutch bankruptcy law. This will be the case, for instance, if it can be held that the Beneficiary's Bank knew of the forthcoming bankruptcy at the moment it credited the account of the Beneficiary.[68]

A.9 (b) Does a contract between the participating banks in itself create a contractual nexus between the parties?

84. A contract between the participating banks in itself does not create a contractual nexus between the parties because there is no connection between the underlying relationship of the Originator and the Beneficiary on the one hand and the relationships the Originator and the Beneficiary have with their respective banks on the other hand.[69] The Civil Code considers a Credit Transfer merely as a means of payment of a sum of money, which is an alternative for making payment of that sum in cash. This entails that upon completion of the Credit Transfer for a certain amount, or rather when the Beneficiary's account has been credited with that amount, the Originator is discharged up to that amount from the payment obligation arising from the underlying relationship between the Originator and the Beneficiary. Any contract between the banks participating in effecting the Credit Transfer does not affect that underlying relationship.

A.9 (c) Other than contract, what other legal relationships (with attendant duties) can arise between the Originator's Bank and the Beneficiary's Bank?

85. Under Dutch law obligations either arise from contract or from the law as enacted. It is noteworthy that certain legal concepts which are applicable to the parties involved in a Credit Transfer, such as agency and depository, are in the Dutch Civil Code explicitly defined as contractual relationships (which may arise either

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68 HR 8th July 1987 (NJ 1988, 104) and HR 7th October 1988, (RvdW 1988, 157).

69 There are some theories trying to explain the legal relationship between a bank and its client: compare Snijders, Betaling per giro, Van Opstall-bundel (1972), p. 176.

from a written document or an oral agreement). Furthermore, as stated before, under Dutch law contractual parties have to act in accordance with the general principles of good faith. Apart from this main principle arising out of a contractual relationship, the Dutch civil law system recognises that in the absence of a contractual relationship specific obligations[70] might arise between two parties, such as the Originator's Bank and the Beneficiary's Bank, upon several other grounds, of which grounds - for the purposes of this study - we shall discuss the following:

(a) an act of either the Originator's Bank or the Beneficiary's bank may be considered tortious vis-à-vis the other;

(b) it is possible to reclaim any amount paid to an other party on the grounds of unjustified enrichment (compare paragraph 58);

(c) special duties of care vis-à-vis other creditors of a contractual party exist, which for instance (especially in the event of a (threatened) bankruptcy or moratorium) prohibit fraudulent preference or restrict the possibilities of set-off.

Ad (a).Action for tort

86. According to the Dutch rules on tort as laid down in the Civil Code[71] an act could be considered tortious, if, for instance, the acting party infringes the right of another party or does not abide by implicit rules of law pertaining to proper conduct. In the event an act of the Originator's Bank or the Beneficiary's Bank could be considered tortious vis-à-vis the other and is imputable to the acting party, the damages resulting therefrom could be claimed on the basis of such action.

Ad (b).Unjustified enrichment

87. This general principle of Dutch law has also been discussed in paragraph 58 above. It is conceivable, for example in the situation where settlement took place in favour of the Beneficiary's Bank but the Beneficiary's Bank refrained from making a credit entry to the account of the Beneficiary, that the Originator's Bank may be in

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70 This paragraph does not treat the obligations arising out of contracts not made in writing but merely assumed to be existing by Dutch law on the basis of the actual relationship between the parties. The obligations dealt with in this paragraph arise from statutory rules or are related thereto.

71 Dutch Civil Code, 6th Book, 3rd Chapter.

the position that it is responsible for the Beneficiary's Bank's omission vis-à-vis the Originator and therefore needs to appeal to the principle that the Beneficiary's Bank must co-operate in reversing the settlement on the grounds of unjustified enrichment.

88. Ad (c).Duties of care in a (threatening) bankruptcy or insolvency situation

These rules are more specifically addressed in the Chapter on Systemic Risk (compare paragraphs 218ff below).

In paragraph 58 we touched on the Dutch provisions pertaining to undue payment: anyone making a payment without having any legal obligation for doing so is entitled to restitution of the paid amount. This action would generally be preferable from the point of view of the claimant, because, if successful, it would lead to restitution of the paid amount, whereas the action based on unjustified enrichment can in principle only lead to payment of damages (although Dutch law provides for the possibility to claim "compensation in another manner", in cases such as these it might, for instance, be appropriate to claim reversal of the entries made). However, it should be noted that we believe that it is unlikely that the Originator's Bank can reclaim amounts from the Beneficiary's Bank on the basis of undue payment, because (a) there is a legal obligation for effecting a Credit Transfer, which obligation arises from the Originator's Payment Order, and (b) executing a Payment Order in itself does not change the financial position of the Originator's Bank because of the debit entry made to the Originator's account, for which reason from the Originator's point of view there is - strictly speaking - no "payment" (the actual "payment" in the legal sense takes place between the Originator and the Beneficiary).

A.10 (a) In what circumstances (if any) might the Originator be bound by a Credit Transfer which he has not authorised? (Consider mistake, forgery and fraud.)

89. In answering this question, we shall consider the following possible situations:

(a) the Originator's Bank makes an error in executing a Payment Order;

(b) the Beneficiary's Bank makes an error in executing a Payment Order;

(c) the Payment Order is forged or otherwise fraudulent.

Ad (a). The Originator's Bank makes an error

90. As stated above in paragraph 58, if the Originator's Bank makes an error, this is deemed a circumstance which in the relationship between the Originator and the Beneficiary is for the risk of the Originator. This is based on the rule that the Originator - as principal - is bound by transactions which the Originator's Bank - as agent - has entered into on behalf of the Originator. However, if the Originator's Bank exceeds its power of attorney the Originator is only bound if third parties have relied on the existence of that power of attorney. Naturally, in such a situation the Originator's Bank is liable vis-à-vis the Originator and it should compensate the Originator for its damages. In practice, one will find that the Originator's Bank, to the extent necessary, re-executes the Payment Order and debits the Originator's account in conformity with the Originator's Payment Order. If, as a result thereof, the Beneficiary receives an amount which was not due to him or which is in excess of what was due to him, the Originator's Bank will try to recover such amount from the Beneficiary. This action will be based on unjustified enrichment, because, again, there was an obligation to make the credit entry pursuant to the Originator's Payment Order and the payment in the strict sense of the word took place between the Originator and the Beneficiary (compare paragraph 88). It has appeared in case law that this action is only successful if the Beneficiary had no other claims vis-à-vis the Originator.[72]

91. It should be noted that the general banking conditions do not influence the rules mentioned above albeit that the Originator's Bank is only fully liable[73], if it can be blamed for the shortcoming in the execution of the Payment Order or if the consequences thereof should come for its account.

Ad (b). The Beneficiary's Bank makes an error

92. As mentioned above (compare paragraph 58), it is generally held that in the relationship between the Originator and the Beneficiary any error on the part of the Beneficiary's Bank is for the risk of the Beneficiary.[74] Consequently, although the Originator is bound by his Payment Order as - correctly - executed by the

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72 The decisions of the Supreme Court of 18th February 1927 (NJ 1927, p. 574) and 29th May 1981 (NJ 1982, 191).

73 On the basis of article 10 of the general banking conditions the Originator's Bank is liable up to a maximum amount of NLG 500, if it was not to blame for the shortcoming.

74 Rank, Nieuw BW Tekst en Commentaar (1990), p. 540.

Originator's Bank, he cannot be held liable for an error on the part of the Beneficiary's Bank. The Beneficiary should act vis-à-vis the Beneficiary's Bank instead.[75]

Ad (c).Forgery and fraud

93. In general, the Originator is bound by a Payment Order which he has not authorised, if he has by certain acts or by negligence caused the Originator's Bank to be under the impression that the Payment Order was authorised. Recent case law furthermore shows that, if the Originator is a company, it is responsible for all the persons it employs, especially those employees having access to special authorisation procedures.

94. Article 14 of the general banking conditions gives a specific rule concerning this issue. It determines that the client should treat any standard forms with care. In case of loss, theft or fraud in respect of standard forms (or other means of communication which are being used for Payment Orders) the client has to inform his bank at once (with written confirmation). Until the moment the bank has been informed as mentioned, the consequences of the use of such forms and other means of communication, are for the risk of the client, unless the client demonstrates that the bank is to be blamed. According to this article, therefore, the Originator might be bound by an unauthorised Credit Transfer if he did not inform his bank in a situation as just has been described or in the case that the damage was caused by intent or gross negligence on the part of the Originator.

95. In case law it has been held that the Originator's Bank has a strict duty to exercise due care in executing a Payment Order.[76] Below we shall give a few examples of the bank's duties.

96. The Committee for Bank disputes[77] held that the Bank had not exercised due care in fulfilling the Payment Order since it could not demonstrate that it was the client himself who had given a Payment Order by telephone. The Bank is obliged to check the identity of the client in case of a Payment Order made by telephone.

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75 The Originator will in all likelihood need to prove that settlement in favour of the Beneficiary's Bank has been effected.

76 This duty is based on article 2 of the general banking conditions.

77 For example, the decisions of 28th March 1990 (case number 9018).

97. The Committee for Bank disputes[78] has further held that a Bank is negligent if it executes a Payment Order received from a client which was signed by an unauthorised person. The Bank must authenticate by means of comparison of paper signature.

98. A Bank may only release newly ordered standard forms for Payment Orders to persons who have adequately proven their identity. A Bank must also be able to prove that such forms are prepared at the request of the client.[79]

A.10 (b) On whom is the burden of proving that a transfer has not been authorised?

99. According to general principles of the Dutch law applicable to civil proceedings, more in particular the rules of evidence, each party has the burden of proving its statements and allegations. As it is the Originator who will allege that the Credit Transfer was not authorised, it is he who must prove this fact.

100. However, as explained above, in connection with the duties of care which banks must observe in executing Payment Orders (compare our answers to question A.10 (a) above), the bank shall need to prove that it has duly checked the signature and other items determining the authenticity of the Payment Order (especially if it is made by telephone).

A.11 If the Credit Transfer is not completed (for whatever reason), is the Originator entitled to have the funds returned to him?

101. As mentioned above in paragraph 70 in respect of question A.8 (c), the question to what extent the Originator's Bank is responsible for the due completion by the Beneficiary's Bank of the Credit Transfer, i.e. for the actual credit entry to the account of the Beneficiary, has not yet been resolved. However, we would like to note that whatever the answer to the questions raised in paragraphs 34ff as to the nature of the obligations of the Originator's Bank, a breach of those obligations from which the Originator's Bank is liable will entitle the Originator to claim the damages resulting therefrom.

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78 Decisions of 5th December 1989 (case number 8974), 9th January 1992 (case number 9120) and an undated decision (case number 9155). In one of these cases the client did not suffer any damages from the unauthorised payment, but the Committee nevertheless decided that the client's interests were harmed since the bank did not recognize its mistake nor did it apologise towards its client. The client has a right to be sure that its bank checks Payment Orders for unauthorised signatures.

79 Committee for Bank Disputes, decision of 11th June 1990 (case number 9038).

102. In the event that it appears that the Credit Transfer cannot be completed prior to the moment of settlement between the Originator's Bank and the Beneficiary's Bank, the Originator's Bank will generally have the obligation to reverse the debit entry to the account of the Originator, which follows both from the contractual relationship between the Originator and the Originator's Bank (the latter is no longer capable of performing its duties as the Originator's agent) and from the principle that the Originator may claim damages, for instance by reclaiming the debited amount upon the ground that the Originator's Bank has been unjustifiably enriched (compare paragraphs 58 and 88).

103. A more difficult situation arises when the Credit Transfer is not completed, but the amount concerned has been settled between the Originator's Bank and the Beneficiary's Bank. In this situation the Originator's Bank will naturally not be inclined to resolve the matter simply by reversing the debit entry to the account of the Originator, thereby assuming the risk of non-recovery. The Originator will only be entitled to such a reversal of the debit entry, if the Originator's Bank is liable as defaulting party or as responsible party (in the event of a mistake of another party involved in the payment process) under the applicable contracts and general banking conditions or on the grounds of tort.

104. As regards the question what should happen, if, due to an error on the part of the Originator, the Originator's Bank or the Beneficiary's Bank, a Beneficiary receives a payment by means of Credit Transfer, but the amount thus credited to his account was not (or was in excess of the amount) due to him, we refer to our answers to question A.7 (e) (compare paragraph 58). It should be noted that these answers do not reckon with the possibilities the Originator has of claiming any amounts on the basis of tort, as such claims will strictly speaking not lead to the reversing of entries.

A.12 If the Credit Transfer is delayed or is otherwise mishandled, does any party have a claim for damages in respect of direct and/or consequential loss and/or interest? Can you give examples, with particular reference to any published case-law?

105. The answer to this question is related to our answers in respect of question A.9 (a) concerning the duties of care owed by each party to the transaction to each of the other parties. Whether these duties entail that claims for damages may arise upon a breach of those duties, such as delay or mishandling, shall be discussed below. In

general, under Dutch law both direct losses and consequential losses are claimable. In addition, it should be noted that Dutch law provides for interest being due in the case of delay in the payment of a debt in money. Such interest is due, at a rate set from time to time by the government, over the period the debtor was in default. Other than that, the Dutch Civil Code specifically acknowledges damages caused by exchange rate fluctuations, collection charges, legal costs and costs of execution of judgements.

106. First of all, as explained above, the general banking conditions[80] elaborate on the general principle that the Originator's Bank must observe due care in executing Payment Orders. As regards the liability arising from negligence of these duties, we would like to call attention to the general banking conditions which give the following provisions dealing with a bank's contractual position in this respect[81]:

(a) shortcomings in executing a Payment Order, which is given correctly and is entirely capable of being processed within the *Bankgirocentrale* circuit, entitle a client to damages resulting therefrom up to a maximum amount of NLG 500 to be compensated by the bank;

(b) the bank is, however, exonerated from any and all liability, if it demonstrates that it cannot be blamed for the shortcoming concerned or that the shortcoming should not be for the account of the bank;

(c) the bank is further exonerated in the event of force majeure (such as, for instance, international conflicts, government regulations, strikes, etc.);

(d) in the circumstances described in paragraph (c) the bank is only committed to take those measures which can reasonably be required of it;

(e) any shortcomings as referred to in paragraph (a) do not prejudice the bank's duty to ensure that the Payment Order concerned is executed correctly and without further costs;

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80 Article 2 of the general banking conditions.

81 Articles 3, 10 and 31 of the general banking conditions. An issue has arisen in the sources consulted as it has been pointed out that some phrases in articles 10 and 31 contradict each other. Compare Van Leeuwen, Algemene Bankvoorwaarden (1990), p. 22). We agree that the provisions are confusing: they are only logical if one interprets the liability arising from the rule mentioned under (a) as existing in the situation that the bank is not to blame (if it were to blame it would be fully liable; compare paragraph (f)) but the shortcoming is for the risk of the bank. In that case the bank's liability is limited to an amount of NLG 500.

(f) the bank may not allege that its liability is limited to an amount of NLG 500, if the bank can be blamed for the shortcoming concerned;

(g) if a Payment Order, which is given correctly, cannot be wholly processed within the *Bankgirocentrale* circuit and if no credit entry is made to the account of the Beneficiary the bank shall investigate the matter (without costs) and try to accomplish that a credit entry is made;

(h) without prejudice to any liability arising from the rules stated in paragraphs (a) to (g) inclusive, the bank is not liable for shortcomings of third parties rendering services to the bank in executing a Payment Order, if the bank proves that it took due care in selecting those third parties.

107. Most case law in respect of delayed or otherwise mishandled Credit Transfers is found in the published awards of the Committee for Bank Disputes.[82] Some examples are set forth below:

In case number 8939 [83] it was ruled that the bank was to blame for a delay in the execution of the Payment Order. The bank had, prior to executing the Payment Order, decided that it should resolve a question regarding a detail of the Payment Order. This detail was, however, considered insignificant and in the opinion of the Committee the bank should have gone ahead with execution. The bank was responsible for the damages resulting from this delay. In connection therewith it had to compensate the client for losses incurred as a result of the exchange rate having dropped during the delay as well as reasonable costs incurred by the client and it should have paid compensation for the interest the client otherwise would have received were it not that the client had omitted to give notice of default in respect of such interest.

In case number 9016 [84] the Originator could not demonstrate that he had requested his bank to effect the Payment Order as an urgent Transfer. The Committee ruled that, therefore, the bank was not to blame since it had executed the Payment Order within the normal period.

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82 Compare footnote 10 above.
83 Committee for Bank Disputes, 13th July 1989.
84 Committee for Bank Disputes, 28th March 1990.

108. Summarising, it may be held that the case law of the Committee for Bank Disputes is primarily based upon the general banking conditions and general principles of the Dutch law of contracts, such as the good faith principle.

A.13 Is there in operation a "two tier" system so that the Originator or the Beneficiary has the option to pay a higher fee in respect of a Payment Transfer which excludes a "no liability" clause?

109. To our knowledge there is no such system in operation.

A.14 With regard to questions A.11-A.13, are wholesale and retail transactions treated differently?

110. To our knowledge there is no difference in treatment between wholesale and retail transactions, albeit that in the case of wholesale transactions the underlying contracts may have been negotiated for other terms and conditions.

Cross-Border Payments

Questions relating to Scenario A:

A.15 How would your answers to questions A.1 - A.14 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(b) the Beneficiary's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

(d) the Beneficiary's Bank was located outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

Introduction

111. When a Dutch bank receives an instruction for a cross-border payment, it will use the services of one or more correspondent banks.[85]

112. Correspondent banks have entered into a (contractual) relationship to support each other's banking services. They have agreed to carry out specific services for each other in relation to the execution of payments. For these purposes the correspondent banks will have reciprocal accounts with each other. These accounts are called "loro-accounts" and "nostro-accounts". Whether such accounts are called loro- or nostro-accounts depends from which bank's point of view one looks at it. For clarity, we will take the point of view of the Originator's Bank in the following to define an account as a loro - or a nostro-account.

113. The account the Originator's Bank has with its correspondent bank is called the nostro-account (*nostro-rekening*) and is an account in the currency of the country in which the correspondent bank is located. The account the correspondent bank has with the Originator's Bank is called the loro-account (*loro-rekening*) and is an account in the currency of the country in which the Originator's Bank is located. The Originator's bank carries out the Originator's instruction for payment by giving its correspondent bank an instruction for payment.

114. If the Beneficiary's Bank is a correspondent bank of the Originator's Bank, the Originator's Bank will instruct the correspondent bank to credit the Beneficiary's account with the relevant amount of money. If the Beneficiary does not have an account with any of the Originator's Bank's correspondent banks, the Originator's Bank will instruct a correspondent bank to ensure that the payment instruction is carried out by an instruction to the Beneficiary's Bank to credit the Beneficiary's account with the relevant amount of money either directly (if the correspondent bank and the Beneficiary's Bank are correspondent banks) or indirectly (via as many intermediary banks as necessary).

115. By carrying out the payment instruction, the correspondent bank obtains a claim on the Originator's Bank. The way this claim is settled depends on the currency in which the payment was made.

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85 Van Esch, ibid., pp. 61-63; Bankleer, ibid., p. 253 et seq.

116. If the payment was made in the currency of the correspondent bank, the claim will be settled by debiting the nostro-account of the Originator's Bank with the relevant amount of money (hereinafter referred to as Scenario Aa meaning the situation set forth in question A.15(a)).

117. If the payment was made in the currency of the Originator's Bank, the claim will be settled by debiting the loro-account of the correspondent bank with the relevant amount of money (hereinafter referred to as Scenario Ab meaning the situation set forth in question A.15(b)).

118. If the payment is made in the currency of a foreign country other than the country in which the correspondent bank is located, say US$, the claim of the correspondent bank will be settled by instructing a US correspondent bank to debit the nostro-account of the Originator's bank and credit an account the correspondent bank has with that or another US bank (hereinafter referred to as Scenarios Ac and Ad meaning the situation set forth in questions A.15(c) and A.15(d)).

119. Instructions for cross-border payments can be made by paper, telephone/voice, diskette/tape and on-line computer links with the bank. Most banks use SWIFT to send instructions to foreign affiliated or correspondent banks.[86]

120. Dutch banks are obliged to report cross-border payments in excess of NLG 25,000 to the *Bankgirocentrale* SWIFT system, which in its turn reports such payments to the Dutch Central Bank.[87]

121. Schematically, the given Scenarios look as follows:

Aa:

O——————OB——————SWIFT——————BB * ——————B

Ab:

O——————OB——————SWIFT——————BB——————B

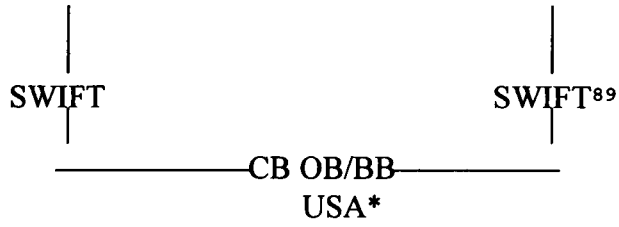
Ac + Ad:

O——————OB——————SWIFT[88]——————BB * ——————B

86 SWIFT is the Society for Worldwide Interbank Financial Telecommunication. It offers so-called Value Added Network Services on a worldwide basis (transmission of cross-border transfer instructions, protocol-conversion and certain security measures to safeguard correct transmission and prevent abuse of the system).

87 See the answer to A15 (A1), paragraphs 135ff.

88 Confirmation of settlement of the inter-bank claim.



O	:	Originator
OB	:	Originator's Bank
B	:	Beneficiary
BB	:	Beneficiary's Bank
CB	:	Correspondent Bank
SWIFT	:	medium
*	:	Place where the inter-bank claim resulting from the cross-border payment is settled.
———	:	Route of payment instruction

Private International Law

122. The rights and obligations between the parties involved in a cross-border payment are governed by the national law which is applicable according to Private International Law.

123. In Dutch Private International Law, the cross-border payment is not regarded as one single transaction with several parties, but as a series of consecutive transactions between different parties. Each of these transactions (and its underlying contract) has to be looked upon separately to decide which national law is applicable.

124. The relevant rules of Private International Law are set out in the Convention on the law applicable to contractual obligations (hereinafter referred to as the "Convention")[90], articles 3, 4 and 7.

125. In the absence of a choice of law by the parties (article 3 of the Convention), contractual obligations are governed by the law of the country with which the contract is most closely connected. The contract is presumed to be most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a corporate body like a bank, its central administration.

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89 Confirmation of settlement of the inter-bank claim
90 Convention of Rome, 19 June 1980.

126. It is the general opinion that the characteristic performance in an average contract is not the payment, but the performance for which the payment is made.[91]

127. This rule is generally not influenced by article 5 of the Convention concerning consumer contracts because, in the case where the Originator directly instructs a bank in a foreign country it will normally be his own initiative and/or the instruction will regard services that can only be supplied to the consumer in that country or at least in a country other than that in which he has habitual residence.

128. The general rules of articles 3 and 4 of the Convention may be influenced by article 7 of the Convention which entails the possibility of the applicability of the mandatory rules (*regels van openbare orde*) of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.

129. According to Dutch Private International Law, the law that governs the obligation also governs its consequences and its termination.[92]

130. As a result of the above, the relation between the Originator and the Originator's Bank is in the absence of a contractual choice of (a different) law, governed by the law of the Originator's Bank. Article 29 of the general banking conditions declares Dutch law applicable to conflicts between clients and the bank.

131. Inter-bank relations are, in the absence of a contractual choice of law, governed by the law of the country in which the bank which received the payment instruction, i.e. the Beneficiary's Bank or any Intermediary Bank, is located.[93]

132. The relation between the Beneficiary's Bank and the Beneficiary is, in the absence of a contractual choice of law, governed by the law of the country in which the Beneficiary's Bank is located.

133. The relation between the Originator and the Beneficiary is, in the absence of a choice of law, governed by the law applicable to the cause of the payment, which may be anything from a contract or tort to a statutory obligation.

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91 See explanatory notes to the Convention, Kluwer loose-leaf edition "Verbintenissenrecht", III 1 aantekening 5.

92 Baak, NJB 1938, Een moderne betalingspuzzle in het Internationaal Privaatrecht; p. 374.

93 According to Dutch Private International Law, the currency in which the payment is made does not have any (conclusive) influence on the applicable law, see Baak, ibid. p. 374.

134. In so far as, according to the above, Dutch national law is applicable, the questions A.1 to A.14 are basically answered in the same way, with the following additions.

(A1)

135. The only requirements in relation to cross-border payments in the The Netherlands are given in the External Financial Regulations Act of 1980 (*Wet Financiële Betrekkingen Buitenland*, hereinafter referred to as the "WFBB")[94] and the regulations promulgated thereunder.

136. This Act and subsequent regulations impose, firstly, reporting requirements on Dutch residents with respect to payments to and from The Netherlands in excess of an amount of NLG 25,000 or the equivalent thereof in other currencies.[95] Dutch residents are obliged to fill in the so-called A/ATR form when the payment is outgoing, upon instructing the Bank to pay, and they need to complete the B/BTR form when the payment is incoming, before receiving the payment.

137. The Bank notifies this information to the Dutch Central Bank. The information supplied to the Dutch Central Bank, and subsequently to the Ministry of Finance, serves to determine the general policy concerning external financial relations.[96] The WFBB and the regulations promulgated thereunder secure the confidential treatment of the individual information the Dutch Central Bank receives as a result of (article 13 of) the WFBB.[97]

138. Under certain conditions the information required by means of form A/ATR can be submitted electronically, i.e. by means of a diskette or an on-line computer link with the bank.[98]

139. The second restriction pursuant to the WFBB in relation to cross-border payments regards payments concerning the trade of strategic goods.

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94 Act of 28 May 1980, Staatsblad 1980, 321. ("Wet houdende regelen inzake de financiële betrekkingen met het buitenland"). Please note that we have not gone into specific regulations imposing sanctions against certain countries (such as Libya), which sanctions may include restrictions to the effecting of Credit Transfers to those countries.

95 Article 13 WFBB and article A1-A6 of the General Reporting Requirements issued by the Dutch Bank pursuant to article 13 of the WFBB ("Algemene administratieve voorschriften betreffende het verstrekken van inlichtingen en gegevens aan de Nederlandsche Bank" (AAV 1989/1), Official Gazette 1989 nr. 180).

96 Article 2 par. 2 WFBB.

97 See the explanatory notes to article 2 par. 2 WFBB, edition Schuurman Jordens nr. 144 (1a) p. 15 and p. 29. The Dutch Central Bank can (conditionally) exempt residents from the obligation to complete the A/ATR and B/BTR form (article A5 of the AAV 1989/1) or admit a resident to provide the relevant information directly to the Central Bank, as opposed to via a bank (AAV 1989/1, article A6).

98 Article A1 AAV 1989/1. Most banks have incorporated the request for information in the software for clients who submit their payment instructions electronically.

140. According to article 13 WFBB and the Regulation concerning Financial Transactions in relation to strategic goods[99] it is forbidden to perform any act concerning financial transactions relating to transito- and tripartite-trade in strategic goods as listed in the appendix to the Regulation concerning strategic goods 1963 (Stb. 128) which are located abroad or in the Netherlands other than on the free market, without a licence.

141. As stated above (paragraph 13) the instruction for a cross-border transfer can be given by paper, telephone/voice, diskette/tape and via an on-line computer link. Most cross-border inter-bank payment instructions are sent via SWIFT.

(A5)

142. In case of cross-border payments, it occurs that the Beneficiary's Bank and/or the correspondent bank make a deduction from the amount transferred. The justification herefor is based on the use of the SWIFT system and/or any additional transfer costs.

(A6)

143. Most cross-border payments are transmitted via SWIFT. SWIFT uses several consecutive methods of authentication.[100]

144. The Originator's Bank sends a message to the SWIFT computer in which it identifies itself, containing an authorisation code. The authorisation code enables the SWIFT computer to determine whether the person using the computer of the Originator's Bank is authorised to do so. The SWIFT computer confirms the receipt of the message with sending a message containing a code (the Response-Key) which confirms to the Originator's Bank's computer that it is actually connected with a SWIFT computer.

145. Upon logging-in as described above, the computer of the Originator's Bank will send the payment instruction, including an Input Sequence Number (*volgnummer*). SWIFT checks whether this number directly follows the number of the previous message from that bank.

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99 Decree of 11th March 1981, Stb. 1981, 118, "Besluit houdende regelen inzake het financieel verkeer strategische goederen".

100 Van Esch, ibid., p. 66-67.

146. The SWIFT computer checks whether the contents of the received message are the same as the contents of the message sent by the Originator's Bank. It transports the (encrypted) message through its network and checks again whether the message has changed during the transport before sending it to the correspondent bank.

147. The correspondent bank has to log-in to the SWIFT-system in the same way as the Originator's Bank.

148. The SWIFT computer adds an Output Sequence Number to the message which is to be delivered, which enables the computer of the correspondent bank to check whether this number follows the number of the previous message from SWIFT.

(A7)

149. According to Dutch law, cross-border payments can theoretically be revoked until the moment when the credit entry is booked to the Beneficiary's account.

150. Payment instructions sent via SWIFT cannot be revoked. They can only be corrected by a second message. If this second message would reach the correspondent bank before it has executed the first instruction by crediting the Beneficiary's account, the payment could be considered as validly revoked.

(A8c)

151. A bank is discharged from its obligations in relation to a cross-border payment when it has made all possible efforts to effectuate the payment and any claims from counterparties deriving from the cross-border payment have been settled.[101] For the specific obligations of each bank involved we refer to the answers to question A.8 (c).

(A8d)

152. A bank may refuse to accept or execute a payment instruction when the Originator's account lacks sufficient funds to cover the transaction or when the nostro-account of the Originator's Bank with the bank in question lacks enough

101 See also the answer to question A.18, paragraphs 170ff.

funds to cover the transaction. However, the latter is very unusual in international banking relations.[102]

153. Furthermore, a bank may refuse to accept or execute a payment instruction when the Originator or Beneficiary does not supply it with the information (or possibly, the licence) required pursuant to the WFBB and the regulations promulgated thereunder.[103]

(A9)

154. Article 3 paragraph 2 of the general banking conditions excludes liability for shortcomings or faults of third parties (i.e. intermediary banks) who have been involved (in the cross-border payment) by that bank, when it has observed due care in choosing that third party.[104]

(A12)

155. Claims for damages in respect of loss and/or interest as a result of delay or otherwise mishandling of the Credit Transfer vis-à-vis the Originator's Bank have been awarded in some cases.[105]

156. Articles 6:119 and 6:125 BW define legal interest and damages resulting from changes in exchange rates as possible damages resulting from a delay in the completion of a payment.[106]

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102 Van Esch, ibid., p. 63.

103 See above, paragraphs 135ff; De Savorin Lohman, SEW 1975, p. 170ff: A Party to an agreement cannot (juridically) demand fulfilment of an obligation from the counterparty when the (unconditional) performance of that obligation is forbidden by the WFBB and/or pursuant regulations.

104 See for an example concerning cross-border payments the ruling of the Committee for Bank Disputes no. 8981, 29 December 1989.

105 See for example the ruling of the Committee for Bank Disputes no. 8939 (13 July 1989). See also our answers to Question A.12.

106 See also HR 8 December 1972 (NJ 1973, 377).

INTER-PARTY RELATIONS 2: SETTLEMENT OF CREDIT TRANSFERS

Finality

A.16 When is the Credit Transfer considered to have been completed:

(a) as between Originator and Beneficiary?

157. The Dutch Civil Code determines that a payment effected by Credit Transfer is completed upon the Beneficiary's Bank having credited the Beneficiary's account.[107] This point in time has been chosen because it is the moment from which the Beneficiary is freely able to transfer or encumber the amount thus credited to his account.[108]

158. It should be noted, however, that in certain circumstances the above mentioned rule is qualified in that the moment of settlement between the Originator's Bank and the Beneficiary's Bank is deemed crucial for completion as the moment upon which the Beneficiary becomes entitled vis-à-vis his Bank to have his account credited.[109] In Scenario A this would be the moment upon which either the Beneficiary's Bank account with the Originator's Bank is credited with the amount concerned or the Originator's Bank account with the Beneficiary's Bank is debited with that amount.[110]

159. A qualification as referred to in paragraph 158 can for instance be made in the case of a seizure under the Beneficiary's Bank of the amounts the latter is due to the Beneficiary.[111] [112]

160. In this light it is interesting to note that the Dutch Supreme Court[113] ruled that Dutch agency law entails that a liquidator in bankruptcy may reclaim from the

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107 Article 6:114 section 2 BW.

108 Explanatory Memorandum to the Dutch Civil Code p. 461.

109 Dissenting opinions: Van Ravenhorst, WPNR 5947, blz. 73, Kortmann, Ars Aequi 38 (1989) 3, 217, Blomkwist. In HR 7th October 1988 (RvdW 157, blz. 221) the Supreme Court assumed that accepting a payment order and starting to execute that order may give rise to an obligation on the part of the bank to credit the account of the Beneficiary, but the Supreme Court did not conclusively resolve at which point in time this obligation leads to a debt of the bank vis-à-vis the Beneficiary. Compare HR 31st March 1989, NJ 1990, 1.

110 Compare Snijders, Betaling per giro (1972), blz. 184.

111 H.R. 7 Juni 1929 (NJ 1929, blz. 1285); Explanatory Memorandum Book 6, blz. 463.

112 Another example, falling outside the scope of this report, is the case that, if the Originator makes the payment through a cash deposit with the Beneficiary's Bank, it is generally held that the payment has been completed at the moment of deposit (Explanatory Memorandum Book 6, blz. 462).

113 HR 31 March 1989 (NJ 1990, 1). In this case the Credit Transfer took place within one bank where both the Originator and the Beneficiary were current account customers.

Beneficiary any amount paid by means of Credit Transfer, if the Originator's Bank effecting the transfer at the Originator's instruction has on the date on which the Originator is declared bankrupt not yet performed all acts which it should perform as the Originator's agent in order to effect the Credit Transfer.[114]

(b) as between the participating banks (including any intermediary banks)?

161. Dutch law does not give explicit rules in respect of each step to be completed in the process of effecting a payment by means of Credit Transfer. In the absence of such rules, this question should be answered in the same manner as question A.16 (a), albeit that the individual obligations of each bank participating in the Credit Transfer are governed by the agreement(s) between such participating bank and its clients and the applicable standard conditions, if any, as well as the duty of care which contractual parties must generally observe vis-à-vis each other according to the Dutch law of contracts. This will generally entail that the participating banks have the obligation to procure that all have done what is necessary on their part to achieve that the Beneficiary's account with the Beneficiary's Bank is credited with the amount indicated in the Payment Instruction.

162. Dutch banks will argue that the Credit Transfer itself has been completed as between the participating banks once they have settled the amount concerned by crediting the Beneficiary's Bank account with the Originator's Bank or debiting the Originator's Bank account with the Beneficiary's Bank. However, at that point in time the payment contemplated by the Credit Transfer usually has not yet been completed (vide paragraph 157 above) and the Beneficiary's Bank must still ensure that the Beneficiary's account is credited.[115]

163. In the case that the Originator is declared bankrupt prior to the completion of the payment contemplated by the Credit Transfer, the Beneficiary can be compelled to repay the amount concerned to the Originator's liquidator in bankruptcy (compare paragraph 160 above). Furthermore, if a creditor of the Beneficiary's were to arrest the claim due to the Beneficiary by the Originator at the moment that the Originator had already given a Payment Order in order to pay that claim but the payment was not yet completed at the time of the arrest, the Originator must be able to prove that he could not revoke the Payment Order. In the absence of such

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114 Compare Huizink, WPNR 6022, blz. 710.

115 The Beneficiary's account may be credited on the date of settlement, or even prior to the time of settlement, in the case of an urgent Credit Transfer as described in the Introduction.

proof the Originator is not discharged of his payment obligation vis-à-vis the Beneficiary's creditor making the arrest (compare paragraph 45 above).

A.17 When completed, is the Credit Transfer:

(a) recognised as discharging the underlying obligation as between the Originator and the Beneficiary?

164. As mentioned above, the Dutch Civil Code determines that if there exists an account in the name of the Beneficiary, which is destined for giro transfers, in a country where payment must or may be made,[116] the Originator may make such payment by means of a Credit Transfer, unless the Beneficiary validly excluded payment to that account.[117] Therefore, a payment effected by means of Credit Transfer is considered a direct fulfilment of the obligation to pay the amount concerned discharging the Originator's underlying obligation towards the Beneficiary. Such discharge is not conditional upon the consent of the Beneficiary.[118]

(b) treated as legal tender?

165. In The Netherlands the Credit Transfer is not treated as legal tender[119], but as a separate means of effecting payment of a certain amount of money. Payment through effecting a Credit Transfer implies that as fulfilment of the obligation to pay a certain amount of money the Beneficiary is granted a claim vis-à-vis a bank.[120] Although the Credit Transfer is not considered legal tender, the aggregate of all claims Beneficiaries have towards their banks are commonly referred to as giro money (*giraal geld*).

B.1 When is the Credit Transfer completed as between the participating banks (no formal contract or Club Rules)?

C.1 When is the Credit Transfer completed as between the participating banks (formal contract or Club Rules)?

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116 The Dutch Civil Code also gives rules for determining the place where payment must or may be made (articles 6:115-118 BW).

117 Article 6:114 section 1 BW.

118 Explanatory Memorandum Book 6, blz. 459.

119 The Dutch Bank Act 1948 (article 10) and the Dutch Coin Act 1987 (article 2) determine which banknotes and coins are legal tender.

120 Compare Van Esch, Giraal Betalingsverkeer (1988), blz. 6, Mijnssen, Geld in het vermogensrecht (1984), blzz. 3, 63, Snijders, Betaling per giro, Van Opstall-bundel (1972), blz. 174.

166. As mentioned in paragraphs 157 and 158 above, the rule that a payment effected by Credit Transfer is completed upon the Beneficiary's Bank having credited the Beneficiary's account is sometimes qualified in that the moment upon which the Beneficiary becomes entitled vis-à-vis his Bank to have his account credited is deemed crucial. In Scenarios B and C this would be the moment upon which the Beneficiary's Bank account with the Dutch Central Bank as common correspondent is credited with the amount concerned.

167. The question when the Credit Transfer is completed as between the participating banks should be answered in the same manner as questions A.16 (a) and A.16 (b). Again it should be noted that the individual obligations of each bank participating in the Credit Transfer as well as those of the common correspondent are governed by the implicit (Scenario B) or explicit (Scenario C) agreement(s) between the participating banks and the common correspondent, the implicit (Scenario B) or explicit (Scenario C) agreement(s) between the participating banks and their respective clients and the applicable standard conditions, if any, as well as the duty of care which contractual parties must generally observe vis-à-vis each other according to the Dutch law of contracts.

B.2 When completed, is the Credit Transfer treated as having discharged the two banks from any obligation towards each other (no formal contract or Club Rules)?

C.2 When completed, is the Credit Transfer treated as having discharged the two banks from any obligation towards each other (formal contract or Club Rules)?

168. As mentioned with respect to question A.16 (b) it could be argued that the Credit Transfer itself has been completed as between the participating banks once they have settled the amount concerned by means of entries made to the accounts of a common correspondent. Again, at that point in time the payment contemplated by the Credit Transfer usually has not yet been completed (vide paragraph 157 above) and the Beneficiary's Bank must still ensure that the Beneficiary's account is credited.

169. A completion of the Credit Transfer itself will have the consequence that, provided the two banks have properly performed their obligations, they are discharged from

the obligations they have vis-à-vis each other in as far as the execution of the Credit Transfer is concerned.

Cross-Border Payments

A.18 How would your answers to questions A.16 and A.17 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(b) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of your country?

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

(d) the Beneficiary's Bank was located outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

170. In general, the answers to questions A.16 and A.17 would be the same regarding scenario Aa and scenario Ac, since in these cases, according to the principles of Private International Law as set out in the answer to question A.15, Dutch law is applicable to the issues of completion and discharge.

171. According to the said principles, the answers to questions A.16 and A.17 regarding scenario Ab and scenario Ad would, in the absence of a contractual choice of (a different national) law, not be governed by Dutch law, but by the law of the foreign country in which the Beneficiary's Bank is located.

172. In addition to the answers given under questions A.16 and A.17 the following has to be considered in relation to cross-border transfers:

(A17a)

173. According to Dutch law, the underlying obligation as between the Originator and the Beneficiary is discharged upon completion of the Credit Transfer if the payment is made in accordance with the following principles.

174. An obligation to pay a certain amount of money has to be fulfilled by payment of the nominal amount unless otherwise determined by law, custom or legal act.[121]

175. The currency in which the payment is made, must be generally acceptable in the country in whose currency the payment is made.[122]

176. Pursuant to article 6:121 BW a debtor is authorised to pay a debt, which is expressed in a different currency than that of the country where the payment has to be made, in the currency of the country where the payment has to be made, unless otherwise determined by law, custom or agreement.[123]

177. When an obligation to pay is to be fulfilled in another currency than that in which the debt was expressed, the amount to be paid will be determined according to the official exchange rates on the day of payment.[124]

178. In principle, the obligation to pay has to be fulfilled in the place of habitual residence of the creditor.[125] Furthermore, the Dutch Civil Code determines that if there exists an account in the name of the Beneficiary, which is destined for giro transfers, in a country where payment must or may be made[126], the Originator may make such payment by means of a Credit Transfer, unless the Beneficiary validly excluded payment to that account.[127]

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121 Article 6:111 BW. See Court of Appeal 's-Gravenhage, 24 June 1976, NJ 1977 no. 261 for an exception to this "nominality-principle".

122 Article 6:112 BW. See about the concept of "legally valid means of payment in the country in whose currency the payment is made" also: Baak, NJB 1938, p. 373, Een moderne betalingspuzzle in het Internationaal Privaatrecht; Baak, NJB 1940, p.825, De Nederlandse Rechtspraak over een moderne Betalingspuzzle in het Internationaal Privaatrecht; Van Gelderen, NJB 1941, p. 29, Een moderne internationale betalingspuzzle and Cavadino, NJB 1941, p. 88, Een moderne internationale betalingspuzzle.

123 Article 6:122 BW determines that a debtor cannot be relieved from his obligation to pay as a result of the impossibility to obtain or pay in a specific currency, for example as a result of national or foreign currency restrictions. In this case the creditor can demand payment in the currency of the country in which the payment has to be made.

124 Article 6:124 and 6:125 BW.

125 Article 6:116 BW. See about the place of payment Asser-Rutten 4 II, p. 470 et seq.

126 The Dutch Civil Code also gives rules for determining the place where payment must or may be made (articles 6:115-118 BW).

127 Article 6:114 section 1 BW.

Settlement in general

Questions relating to Scenario A:

A.19 Assuming that the Payment Order is in the currency of your own country, must settlement be effected in any particular way as between the Originator's Bank and the Beneficiary's Bank? For example:

(a) by a credit entry to an account kept by the Beneficiary's Bank at the Originator's Bank;

(b) by a debit entry to an account kept by the Originator's Bank at the Beneficiary's Bank;

(c) debit and credit entries to the accounts of the two banks kept at a correspondent commercial bank;

(d) debit and credit entries to accounts kept by the two banks at your country's central bank;

(e) some other method.

179. Either of the methods indicated in paragraphs (a) through (d) above may be used in order to effect settlement of the Payment Order and to our knowledge there is no other method presently in use. However, method (d) is most likely to be used, because nearly all Credit Transfers in The Netherlands are completed through the multilateral clearing system serviced by the *Bankgirocentrale*. It should be stressed that this clearing system is in fact a netting arrangement as referred to in Scenario D and not a single payment system as referred to in Scenario A.

A.20 Explain what different rights may arise in respect of each method of settlement employed in your country.

180. In answering this question we will distinguish between the following methods:

(a) the bilateral settlement method whereby the Credit Transfer could be effected either by a credit entry to an account kept by the Beneficiary's Bank at the Originator's Bank or by a debit entry to an account kept by

the Originator's Bank at the Beneficiary's Bank; if this method of settlement is used payment may be effected upon a single transaction basis or upon the basis of a netting arrangement dependent on the understanding between the participating banks;

(b) the 'bilateral' settlement method whereby the Credit Transfer could be effected either by debit and credit entries to the accounts of the two banks kept at a correspondent commercial bank or by debit and credit entries to accounts kept by the two banks at the Dutch Central Bank; if this method of settlement is used payment may be effected upon a single transaction basis or upon the basis of a netting arrangement dependent on the understanding between the participating banks;

(c) the multilateral settlement method whereby all Credit Transfers to be completed by the participating banks in a specific period could be effected by debit and credit entries to accounts kept by those participating banks at the Dutch Central Bank; if this method of settlement is used payment must be effected upon the basis of the *Bankgirocentrale* netting arrangement.

181. **Ad (a)**

In a single transaction, upon receiving a Payment Order the Originator's Bank shall be entitled to debit the Originator's account with the amount specified in that Payment Order. Upon settlement of the Credit Transfer intended by such Payment Order, the Beneficiary's Bank shall be entitled either to have its account with the Originator's Bank credited or to cause the account of the Originator's Bank's with the Beneficiary's Bank to be debited with the same amount. The Beneficiary, ultimately, shall be entitled to have his account credited with that amount, resulting in a claim against his bank.

In the case of completion through a netting arrangement, the rights arising differ in that either the Originator's Bank or the Beneficiary's Bank may be entitled to the balance resulting from netting the rights to payment they have acquired vis-à-vis each other in the course of a specific period.

182. **Ad (b)**

In a single transaction, upon receiving a Payment Order the Originator's Bank shall again be entitled to debit the Originator's account with the amount specified in that Payment Order. Upon settlement of the Credit Transfer intended by such Payment Order, generally the Intermediary Bank shall be entitled to debit the account of the Originator's Bank with the Intermediary Bank, whereas the Originator's Bank shall be entitled to have its account with the Intermediary Bank credited with the same amount. If the Dutch Central Bank acts as common correspondent, it should be taken into account that the Dutch Central Bank will only debit the account of the Originator's Bank, when there is a positive balance in that account or, in the case of a negative balance, the Originator's Bank has an overdraft facility with the Dutch Central Bank. It goes without saying that the Beneficiary, ultimately, shall be entitled to have his account credited with the amount specified in the Payment Order, resulting again in a claim against his bank.

In the case of completion through a netting arrangement, the rights arising differ in that either the Originator's Bank or the Beneficiary's Bank may be entitled to the balance resulting from netting the rights to payment they have acquired vis-à-vis each other in the course of a specific period.

183. **Ad (c).**

In this situation the rights arising do not essentially differ from those arising in situation (b), if in that situation a netting arrangement would apply.

Cross-Border Payments

A.21 How would your answers to questions A.19 and A.20 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(b) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of your country?

(c) **the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?**

(d) **the Beneficiary's Bank was located outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?**

(A19)

184. In general, settlement as between the Originator's Bank and the Beneficiary's Bank in the cross-border payment variations of Scenario A takes place as indicated in the answer to question A.15 (paragraphs 111ff above).

185. Different methods of settlement are theoretically possible but seldom used in practice. One could think of crediting the Beneficiary's Bank's account or debiting the Originator's account in a different currency than that in which the cross-border payment was made, after an exchange transaction.

(A20)

186. The method of settlement of the inter-bank claim does not influence the answer to the question which law is applicable to the relation between the Originator's Bank and the Beneficiary's Bank.

Netting

Questions relating to Scenario B:

B.3 Does the informal netting arrangement between Bank A and Bank B have any legal effect? Can it be justified by applying any legal concept other than set-off?

187. The informal netting arrangement between Bank A and Bank B can only be justified by the legal concept of set-off. As such it may either be construed as a statutory set-off or as a contractual set-off. The principle is that, if there is no agreement between Bank A and Bank B for the settlement of mutual claims

through set-off, the set-off between them is governed by the Dutch rules concerning set-off as set forth in the Dutch Civil Code.

188. On the basis of the Dutch statutory set-off rules[128], each of Bank A and Bank B is authorised to set off mutual claims to payment of an amount in the same currency, provided that it is both authorised to pay the amount due to the other and to collect payment of the amount owed by the other. A statutory set-off is executed by means of a statement to that effect, which statement has retroactive effect until the moment upon which the authority to effect the set-off came into existence.

189. The parties to an agreement are at liberty to agree upon an extension or restriction of their possibilities to set off claims, in which case the statutory rules mentioned above no longer apply.[129]

190. Considering Scenario B, it seems likely that the understanding between Bank A and Bank B will be construed as an implicit agreement to the effect that their mutual claims having arisen in a specific period are settled by means of debiting and crediting their accounts with the common correspondent, therefore, a contractual set-off arrangement. More specifically, the agreement will in all likelihood be construed as creating an indirect current account relationship[130] between Bank A and Bank B (a tripartite netting arrangement). The circumstance that this arrangement is of an informal nature has no consequences for its legal effect: in The Netherlands it is not necessary for agreements to be made in writing in order to be legally binding.

191. The Dutch Civil Code gives a rule with regard to the current account relationship, which inter alia provides that such a relationship entails that set-off is effected by operation of law.[131] Scenario B differs from the situation covered by this provision in that effectively there are two current accounts (both that of Bank A and that of Bank B with the common correspondent) rather than one between Bank A and Bank B.

192. It should be noted that Scenario B is not likely to occur in The Netherlands given the multilateral netting systems described in the Introduction.

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128 Articles 6:127 e.v. BW.
129 Asser-Hartkamp I (1988), pages 473, 495.
130 A so-called *rekening-courant verhouding*.
131 Article 6:140 BW.

B.4 **Assuming that the netting arrangement is legally binding, is it subject to any limitation? For example, must the debts either way be "mutual"? Is it possible in certain circumstances for other claims between the banks to be brought into the netting arrangement?**

193. As mentioned above, the parties to an agreement governed by Dutch law are at liberty to agree upon an extension or restriction of their possibilities to set off claims. This liberty is only restricted to the extent that by an agreement, rules of Dutch public order (such as statutory rules of a mandatory nature) are violated. Other claims may be brought into the netting arrangement, provided that all parties (Bank A, Bank B and the Central Bank) have agreed thereto. In the *Bankgirocentrale* payment system only claims related to Credit Transfers will be brought into the netting arrangement.

B.5 **Would your answer be different if the payments made either way were in a currency other than your own - or if the payments from Bank A were in your currency or a foreign currency and the payments from Bank B were in a different foreign currency (say US$)?**

194. As the parties to an agreement governed by Dutch law are at liberty to agree upon an extension or restriction of their possibilities to set off claims, our answer to question B.4 would not be different if the payments made either way were in foreign currency (whether those payments are made in the same foreign currency or in different foreign currencies). As mentioned in paragraph 188 above, this is not true if the set-off were to be based on the statutory set-off rules: statutory set-off is only possible to the extent that the payments made either way are in the same (Dutch or foreign) currency, unless the party wishing to set off a debt in a specific currency is authorised to pay the debt in another currency.

195. In practice, one is likely to find that the contract between Bank A and Bank B gives provisions regarding the settlement of claims in a foreign currency. These contracts are, however, different from one inter-bank relationship to another.

B.6 **At what moment are the underlying obligations of the parties (taking the Originator, Originator's Bank and Beneficiary's Bank separately) discharged?**

196. The Originator's underlying obligations are discharged upon the Beneficiary's Bank having credited the Beneficiary's account (vide the answers to questions A.16 (a) and A.17 (a)).

197. The underlying obligations of the Originator's Bank are discharged once the amount to be paid has been settled by means of entries made to the accounts of the Originator's Bank and the Beneficiary's Bank with the Central Bank as common correspondent (vide the answers to questions B.2 and C.2), unless it can be held that - generally or in the circumstances of the case - the Originator's Bank has a duty of care to see to it that the Beneficiary's Bank duly credits the Beneficiary's account (vide paragraph 70 above).

198. The underlying obligations of the Beneficiary's Bank are discharged when the Beneficiary's Bank shall have given the Beneficiary written notice of the Credit Transfer.

199. From the above it may be concluded that the circumstance that there is a netting arrangement does not influence the underlying obligations of the parties concerned.

B.7 How would your answers to questions B3-B5 differ if Bank B were established outside your country in a foreign jurisdiction?

200. We emphasise that we have been informed that there are no netting arrangements between any Dutch banks and banks established outside our country in a foreign jurisdiction, albeit that in our opinion the contract between a Dutch bank and its correspondent bank may well contain provisions regarding set-off of mutual claims. Furthermore, some foreign banks have subsidiaries or branches in The Netherlands which have an agreement with the *Bankgirocentrale*. In connection therewith these subsidiaries or banks (in the case of a branch) are required to deposit sufficient funds in a current account held by them with the Dutch Central Bank. In principle, the position of these banks is equal to that of the Dutch banks established in The Netherlands, although we have the impression that they may be supervised more carefully in connection with the extra risks of non-recovery.

201. Assuming for a moment that there were netting arrangements between any Dutch banks and banks established outside our country in a foreign jurisdiction, the answers to questions B3-B5 depend on the law governing the agreement between the participating banks. This would ordinarily be the law chosen by the parties. In

the absence of a choice of law, the applicable law would be the law of the country which has the closest connection with the contract (which is generally the country where the party of the characteristic performance under the contract is established). One could argue that this is the country where the common correspondent is located.

Questions relating to Scenario C:

C.3 Having touched (briefly) upon any particular agreement or set of Club Rules which might be applicable, state whether or not they are enforceable as a matter of law - or do they constitute an agreed practice without being binding as a matter of law?

202. Any agreement(s) regarding Credit Transfers made between two banks and the Dutch Central Bank as common correspondent would be legally binding and enforceable, provided that the terms thereof do not conflict with Dutch law.

C.4 What is the effect of the netting arrangement on any underlying transaction?

(a) Is it possible to vary the contract or the Club Rules? If so, how can this be achieved?

203. The terms of a netting arrangement between two banks and a common correspondent may be amended with the consent of all parties to the agreement.

(b) Does a single obligation to make a net payment replace the bilateral obligations as between the two banks? If this concept is recognised under your law, is it treated as novation?

204. Whether or not the single obligation to make a net payment replaces the bilateral obligations as between the two banks depends entirely on the form of netting arrangement chosen by those two banks. Each of the form of position or payment netting and that of novation or obligation netting is conceivable. It should be noted that the latter form would have to be explicitly agreed and, in the absence of an agreement to novate, under Dutch law the netting will be interpreted as a position or payment netting.

205. Position or payment netting is considered to be an agreement whereby the parties have made a payment arrangement which arrangement does not affect the underlying obligations of the parties in that the mutual obligations as between the two banks are transformed into the single obligation to make a net payment to the common correspondent. The single payment obligation is the result of the two banks' having set off their mutual obligations to the largest extent possible. All mutual obligations thus set off have been extinguished and have therefore not been transformed but simply paid. In multilateral agreements of this kind one generally finds a provision dealing with the situation that one of the parties cannot meet its obligations arising as a result of the netting process, which provision would ordinarily determine that the party concerned no longer participates, that its rights and obligations vis-à-vis other participants therefore remain in full force and effect and that the netting process is implemented by the remaining parties as if the defaulting participant is not a party to the netting arrangement. Naturally, a similar provision would not serve any purpose, if there are only two participants in the netting process.

206. On the other hand, novation or obligation netting is deemed to be an agreement whereby the parties intend to novate all their mutual obligations into a single payment obligation either directly to one of the two (in Scenarios B and C) or more (in Scenario D) participating banks or indirectly to the common correspondent. Under Dutch law novation means that the two banks have revoked all their original claims to receive payment and have simultaneously accepted to be bound by an entirely new agreement creating a new, in this case single, payment obligation.

C.5 How would your response to question C.2 differ if Bank B were established outside your country in a foreign jurisdiction?

207. The answer to this question is, again, dependent on the law governing the relationship between the two banks (vide paragraph 186 above).

Questions relating to Scenario D:

D.1 At the end of the banking day, are the respective net positions enforceable as a matter of law between the participating banks?

208. As explained in the Introduction, there are three giro-transfer systems in The Netherlands:

(a) the multilateral netting system between the banks, in which the commercial, co-operative and savings banks participate;

(b) the system of the *Postbank*;

(c) the system of the Dutch Central Bank.

209. Although there may be some differences in the provisions governing the several systems, it can be held that the answer to question D.1 is equal in respect of each netting system.

210. In the system referred to under (a), for example, which is serviced by the *Bankgirocentrale* acting as an intermediary between the participating banks and as clearing institution for them, the participating banks have authorised the *Bankgirocentrale* to net their positions vis-à-vis each other and consequently effect the daily settlement on their behalf through debiting or crediting their respective accounts with the Dutch Central Bank.[132]

211. None of the net net positions thus calculated by the *Bankgirocentrale* is enforceable as a matter of law, in the event one of the participating banks cannot meet its obligations because it has no positive balance standing to its account with the Dutch Central Bank, is not capable of acquiring additional funds in the capital market and does not have an overdraft facility with the Dutch Central Bank. Should this situation occur, the *Bankgirocentrale* will suspend the settlement and, on the subsequent day, recalculate the net net positions, as if the defaulting bank were no participant in the clearing system.[133]

212. Resultingly, all claims of the defaulting bank against the remaining banks and all obligations of the defaulting bank towards the remaining banks should either be settled individually or not at all.[134]

D.2 (a) Is any obligation of Bank A to pay Bank B enforceable?

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132 Banks participating in the *Bankgirocentrale* clearing system are bound by the BGC Standard Contract. Attached to the BGC Contract are the BGC Settlement Rules and the BGC Contract and Settlement Rules for urgent Credit Transfers.

133 These rules are found in articles 6 and 7 of the *Bankgirocentrale* Settlement Rules.

134 Of course where the defaulting bank and a remaining bank have claims vis-à-vis each other which may be extinguished by statutory set-off, the remaining bank may effect such set-off by a statement to that effect; compare paragraph 188 as well as the Chapter on Systemic Risk.

(b) If so, is this dependent upon the nature of the specific contractual arrangements which exist between them or any Club Rules or anything else?

213. These questions have not been specifically addressed in the literature perused by us. We would feel that from the relationship between Bank A as the Originator's Bank and the Originator it follows that Bank A has the obligation to use its best efforts to accomplish a completion of the Payment Order given by the Originator. If, however, it should appear that the Originator's Bank is not in a position to do so, this matter would in the Dutch law system probably lead to the Payment Order not being executed (compare paragraph 70 above).

214. It may occur (this is most likely in the event of an urgent transaction effected through the *Bankgirocentrale* payment for urgent Credit Transfers) that Bank B as the Beneficiary's Bank has credited the Beneficiary's account, although the Credit Transfer had not been settled yet at the level of the Dutch Central Bank. The general banking conditions[135] provide that, if in such a case it proves that the Credit Transfer cannot be completed, the Beneficiary's Bank is entitled to unwind the credit entry. In the light of this article it is likely that Bank B shall not endeavour to enforce its claim on Bank A, but shall rather unwind the credit entry.

(c) Is multilateral netting by novation possible, without the substitution of an intermediary (such as a Central Bank) as counterparty? (See also C.2 above)

215. Generally speaking, in Dutch law the figure of multilateral netting by novation is recognised. As mentioned above[136], novation or obligation netting is deemed to be the agreement whereby the participating banks intend to novate all their mutual obligations into one or more single, net payment obligations either directly to one of the two (in Scenarios B and C) or more (in Scenario D) participating banks or indirectly to the common correspondent. The answer to this question is therefore affirmative.

216. Furthermore, to our knowledge there are no restrictions as to which parties are allowed to service multilateral netting systems in respect of Credit Transfers or to act as clearing institutions. Nor have we found any rules providing that settlement should be effected through accounts with the Dutch Central Bank. It seems,

135 Article 17.
136 Compare our answer to question C.4.

however, likely that the Netherlands Minister of Finance would intervene, if a clearing system would be designed which is deemed undesirable from the point of view of the Dutch Central Bank in its role as the institution supervising the Dutch credit system.

217. Finally we would like to note that in the past it has been suggested in Dutch legal literature that payment by means of Credit Transfer in the relationship between the Originator and his bank must be construed as novation anyhow: in this view the Originator's underlying payment obligation would be substituted by the Originator's Bank's (or the Beneficiary's Bank's, as the case may be) obligation to pay a certain amount of money to the Beneficiary. This view was never supported widely and has not been reflected in case law nor in the Dutch Civil Code.

SYSTEMIC RISK: INSOLVENCY

Introduction

218. Under the Dutch Bankruptcy Act of 30 September 1893 (*Faillissementswet*, hereinafter: "Fw") there are two insolvency procedures, which equally apply to corporate and personal insolvencies. The Act on the Supervision of the Credit System 1992 (*Wet Toezicht Kredietwezen 1992*, hereinafter: the "WTK") furthermore contains special provisions with regard to insolvencies of credit institutions.

(i) Bankruptcy (*faillissement*)

219. A debtor may be declared bankrupt at the request of one or more of its creditors, if it has ceased to pay its debts. The debtor is considered to have ceased to pay its debts, if it does not pay, when due, the claims of more than one of its creditors. It is not possible to have a debtor declared bankrupt, if only one creditor would not be paid by the debtor. The debtor may also be declared bankrupt at its own request and at the request of the public prosecutor (*Openbaar Ministerie*) on account of reasons of the public interest. The bankruptcy of the debtor is declared by the District Court (*Arrondissementsrechtbank*) of the district in which the debtor is situated/domiciled.

220. A liquidator (*curator*) will be appointed, whose task it is to liquidate the assets of the debtor and to distribute the proceeds thereof to the creditors, with due observance of the priority of the respective claims. Normally, a liquidator would be a solicitor (*advocaat*). As of the beginning of the day in which the bankruptcy is declared, the debtor is deprived of his powers to transfer and/or encumber his assets, and he may no longer enter into any other legal acts.[137] Only the liquidator is authorised to enter into legal acts, which he enters into on behalf of the debtor's estate. The court further appoints a judge (*rechtercommissaris*) who supervises the liquidator and the liquidator should report to him.

(ii) Suspension of payments (*surséance van betaling*)

221. A suspension of payments may be requested by the debtor when it expects that it can no longer pay its debts when due. A suspension of payments would normally

137 Article 23 Fw.

be granted for a period of eighteen months and effectively works as a freeze of payments. The suspension of payments will not have any effect vis-à-vis secured creditors. A suspension of payment will be granted by the District Court of the district in which the debtor is situated/domiciled. A trustee (*bewindvoerder*) will be appointed, who will jointly with the debtor administer its affairs. Neither the debtor nor the trustee may without the co-operation of the other exercise the debtor's powers to transfer and/or encumber his assets. Also in a suspension of payments a judge will be appointed by the District Court, whose task it is to advise the trustee.

222. A suspension of payments is meant to lead to a scheme of arrangement (*akkoord*). If no such scheme of arrangement can be reached, the trustee is obliged to request the District Court to declare the debtor bankrupt.

223. Hereinafter, the indication "liquidator" will be used when answering the questions mentioning a "receiver".

(iii) Special provisions for credit institutions

224. Insolvency situations involving banks are rare in The Netherlands. Recent data are not available. In the 1980's (until 1988) only two banks out of a total of approximately 200 were declared bankrupt. Given the special provisions in the WTK related to the appointment of trustees,[138] it is rather unlikely that a bank will be declared bankrupt unexpectedly. As will be set out in the following paragraphs, several checks are built into the WTK. It should be noted that any information the Dutch Central Bank receives in connection with the WTK must be treated by the Bank with strict confidentiality.

225. A credit institution within the meaning of the WTK cannot be declared bankrupt immediately at the request of its creditors, nor at its own request. According to the definition of credit institutions in the WTK,[139] a bank is considered a credit institution. The Dutch Central Bank (*De Nederlandsche Bank*), the Supervisory Authority for credit institutions, must first be heard by the District Court.

226. The Central Bank further has the power to intervene when it is of the opinion that the liquidity and/or the solvency of a credit institution are endangered or could be endangered.

138 Article 28, Articles 70ff. WTK, see paragraphs 228ff below.
139 Article 1 section 1 under a. WTK.

(a) Power to intervene (article 28 WTK)

227. Under article 28 WTK, the Central Bank may issue a warning to a credit institution which does not comply with its liquidity obligations as provided for in article 21 WTK. A similar provision is in effect for branches in The Netherlands of foreign credit institutions.[140] In the event the credit institution has not satisfactorily responded to the Central Bank's warning within two weeks, the Central Bank may inter alia[141]:

- inform the credit institution in writing that from a certain moment onwards, all or part of the representative bodies of that credit institution may not exercise their powers without the authorisation of one or more persons appointed by the Central Bank;

- inform the credit institution in writing that the Central Bank will publish the warning it has issued;

- advise the president of the representative organisation to which the credit institution belongs.

The Central Bank is at liberty to decide, in the case of extreme urgency, to intervene without warning,[142] provided that the credit institution has been heard.

(b) Emergency arrangement (article 70ff. WTK)

228. As stated above, if confronted with an application for a bankruptcy declaration of a credit institution, the District Court must first hear the Central Bank. Furthermore, contrary to the provisions of the Bankruptcy Act, a suspension of payments (*surséance van betaling*) cannot be granted to a credit institution.[143] Instead a procedure has been established providing for special measures of an emergent nature. This procedure is below referred to as the "moratorium procedure".

229. In this procedure, the Central Bank has the possibility to intervene independently in order to establish a moratorium.[144] In the case of such an intervention, the Central Bank files an application with the District Court where the credit

140 Article 35 WTK.
141 Article 28 section 3 WTK.
142 Article 28 section 4 WTK.
143 Both rules are found in article 70 section 2 WTK.
144 This authority is based on article 71 WTK.

institution is registered for a declaration that the credit institution is in a situation that requires special provisions in the interest of the joint creditors. The court's decision to apply such special provisions contains the appointment of one or more trustees (*bewindvoerders*) in respect of which the Central Bank may make recommendations. These trustees are exclusively authorised to exercise the powers of the banks' representative bodies.

230. As a consequence of the declaration by the District Court that special provisions are required the credit institution can no longer be forced to fulfil its obligations. Furthermore, measures of enforcement that have been initiated are suspended and attachments which have been made are void. These rules, however, do not apply to claims arising from transactions entered into after the date of the declaration by the District Court, neither do they apply vis-à-vis secured creditors. In practice, the declaration has an effect similar to a bankruptcy declaration. Many of the provisions of the Bankruptcy Act apply in the situation that the District Court has declared that special provisions are required. However, it should be noted that contrary to the provisions of the Bankruptcy Act, a credit institution which is subject to the special provisions declaration may only be declared bankrupt if its balance sheet shows that the aggregate amount of its liabilities exceeds the value of its assets. The actual bankruptcy declaration can be issued only after the Central Bank has been heard, either at the request of the trustees, or at the order of the public prosecutor or at the initiative of the District Court.[145]

Questions relating to Scenario A:

Assume that the Originator's Bank is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after the Payment Order has been received by the Beneficiary's Bank, but before settlement has been effected between the Originator's Bank and the Beneficiary's Bank:

A.22 Who bears the risk of closure of the Originator's Bank - the Originator, the Beneficiary's Bank, or the Beneficiary? (Assume that the payment is made in the currency of your own country.)

231. Beforehand, it must be noted that it is unlikely that the situation, as set out under assumption A, will arise in practice. As explained above, in The Netherlands three multilateral netting arrangements are in force, the largest one being the Credit

145 Article 77 WTK.

Transfer clearing system serviced by the *Bankgirocentrale*. In this clearing system, the Payment Order will generally not be sent to the Beneficiary's Bank until after the settlement.

232. If Scenario A were to occur in The Netherlands, the situation would be as follows. If the Beneficiary's Bank decides to refrain from processing the Payment Order in connection with the Originator's Bank's bankruptcy, it is obvious that the risk of the latter's closure is borne by the Originator. However, if the Beneficiary's Bank should wish to proceed with the Credit Transfer, as if the Originator's Bank were not bankrupt, the settlement between the Originator's Bank and the Beneficiary's Bank would have to be effected (i) either by a credit entry to an account held by the Beneficiary's Bank with the Originator's Bank, by which entry the Beneficiary's Bank acquires a claim vis-à-vis the Originator's Bank, or (ii) by a debit entry to an account held by the Originator's Bank with the Beneficiary's Bank, by which the Originator's Bank's claim vis-à-vis the Beneficiary's Bank decreases. Below we shall consider the consequences of such settlement for the parties involved.

233. Considering the assumption at the heading of this question (the Originator's Bank has been declared bankrupt prior to the completion of the Credit Transfer), the following rules need to be taken into account:

(a) the Beneficiary's Bank may require the liquidator to declare whether he wishes to continue to perform the Payment Order (in the meantime the Beneficiary's Bank shall refrain from processing the Payment Order and from crediting the Beneficiary's account, if it is apparent that the Originator's Bank's estate will not meet its obligations, i.e. it will not be able to effect a valid credit entry for the benefit of the Beneficiary's Bank creating an obligation which shall be duly paid);[146]

(b) consequently, if the liquidator of the Originator's Bank would agree to perform (perhaps because he has already performed as a credit entry to an account held by the Beneficiary's Bank with the Originator's Bank has been made), this would result in the Beneficiary's Bank acquiring a claim vis-à-vis the Originator's Bank, and the Beneficiary's Bank may

146 This rule follows from article 37 section 1 Fw. It should be noted that the same rule applies in the moratorium procedure (compare paragraphs 228ff above) on the basis of article 71 section 3 WTK jo. article 236 section 1 Fw.

require the liquidator to grant securities for the due payment of that claim before taking any further action to process the Payment Order;[147]

(c) should the liquidator not be willing to perform, the Beneficiary's Bank has the option to rescind the agreement and/or claim damages which claim shall rank equally with those of other unsecured creditors of the Originator's Bank;[148]

(d) if the Beneficiary's Bank opts to go ahead with the settlement, by making a debit entry to an account held by the - meanwhile bankrupt - Originator's Bank with the Beneficiary's Bank,[149] the Originator's Bank's claim vis-à-vis the Beneficiary's Bank decreases through set-off, which set-off is only valid if the right to make a debit entry has arisen (from a transaction entered into) prior to the bankruptcy;[150]

(e) in making the debit entry the Beneficiary's Bank must have been acting in good faith[151] or otherwise its claim, that its debt to the Originator's Bank has decreased in connection with a set-off, will not be successful;[152]

(f) furthermore, the bankrupt's estate is not liable for any obligation arisen after bankruptcy with the exception of those obligations arising from transactions by which the estate is benefited.[153]

234. In view of the rules set forth above, it is either the Originator or the Beneficiary's Bank who bears the risk of closure. The Originator bears the risk, if the Beneficiary's Bank will not - and need not - proceed with completion of the Credit Transfer. In this case the Originator will have a claim vis-à-vis the Originator's Bank which ranks equally with the claims of the Originator's Bank's other

147 Article 37 section 2 Fw. It should be noted that the same rule applies in the moratorium procedure on the basis of article 74 section 3 WTK jo. article 236 section 2 Fw.

148 Explanatory Memorandum to the enactment of the most recent changes in the Bankruptcy Act (*Memorie van Toelichting Invoeringswet Boeken 3, 5 en 6, eerste gedeelte*).

149 Assuming that the Payment Order does not give specific instructions as to the manner of settlement.

150 Article 53 section 1 Fw. It should be noted that the same rule applies in the moratorium procedure on the basis of article 71 section 3 WTK jo. article 234 Fw.

151 Pursuant to article 54 Fw the Beneficiary's Bank has a special duty of care which rule has been introduced in order to enhance the protection of the interests of other creditors of a party which is (almost) bankrupt or insolvent.

152 This rule has been elaborated in the Supreme Court decisions of 8th July 1987 (NJ 1988, 104) and 7th October 1988 (NJ 1989, 449), which decisions were based on article 54 Fw. It should be noted that it can be held that the same rule applies in the moratorium procedure on the basis of article 71 section 3 WTK jo. article 235 Fw.

153 Article 24 Fw. It should be noted that this rule does not apply in the moratorium procedure on the basis of article 71 section 3 WTK.

unsecured creditors. Should the Beneficiary's Bank opt to go ahead with the settlement, then in principle it bears the risk that the liquidator invalidates the set-off on the grounds set forth in paragraph 233 above sub-paragraph (c) and (d).

235. Although we have not found any specific legislation or case law which addresses the question as to who bears the risk of closure, we believe that effectively the Banks have shifted the risks they bear in their capacity as Beneficiary's Banks to the Beneficiary. This is demonstrated by article 17 of the general banking conditions which provides that any crediting takes place under the reservation of timely and due settlement. If such settlement is not effected, the bank reserves the right to unwind the Credit Transfer. Apparently, such unwinding is performed in practice by debiting the bank account of the Beneficiary.

236. Returning to the situation occurring most often in The Netherlands, i.e. the settlement is effected within the *Bankgirocentrale* system, it should be emphasised that debiting of the Originator's account would occur just prior to or after settlement between the participating banks and crediting of the Beneficiary's account would occur after settlement between those banks, the exception being the settlement in accordance with the Rules for urgent Credit Transfers where settlement usually takes place after a notice to the Beneficiary that his account shall be credited or even after the actual crediting of the Beneficiary's account[154]. In the following paragraphs we shall discuss some issues arising in the Scenario set forth above for the actual situation in The Netherlands.

237. Two situations are likely to occur with respect to the bank account of the Beneficiary in the situation arising under the assumptions mentioned above. Either:

(i) the Beneficiary's bank account has not been credited yet pending settlement, or

(ii) the Beneficiary's bank account has been credited before actual settlement.

238. Assuming that (i) the Beneficiary's bank account has not been credited yet, reference is made first to question A.16 (a): the payment contemplated by the Credit Transfer between the Originator and the Beneficiary has not been

154 Compare the Introduction and paragraphs 18 and 214 above as well as the *Reglement Verevening Spoedcircuit*.

completed.[155] Hence, the Originator has not paid the Beneficiary. Furthermore, the Originator's Bank has not yet fully performed its duties vis-à-vis the Originator, as the settlement has not been - and probably can no longer be effected: the liquidator is likely to freeze all transactions of the Originator's Bank unless any such transaction benefits all creditors. Therefore, the Originator has a claim vis-à-vis his Bank for the performance of the Payment Order.

239. Given the particular (three level) way in which the Credit Transfer transaction is structured, it could be argued that the Beneficiary has a claim against his Bank to receive the amount of the Credit Transfer commissioned by the Originator's Bank. In our opinion, it follows from the rules set forth above that such a claim could only be successful after settlement. Even though the Beneficiary's Bank has received the Payment Order, it could argue under bankruptcy law as well as the law of contracts - including article 17 of the general banking conditions - that it is under no duty to credit the Beneficiary's account, as long as no settlement with the Originator's Bank has been effected. Neither will the Originator be able to force the Beneficiary's Bank to proceed to perform the Credit Transfer, as there is no direct contractual link between the Originator and the Beneficiary's Bank and under Dutch bankruptcy law the Beneficiary's Bank is justified in refraining from further executing the Payment Order.[156] Consequently, the Beneficiary receives no payment. It is rather unlikely that the Beneficiary will file a claim against his Bank to effect the Credit Transfer.

240. As in the situation referred to under (i) above, the Originator has not paid the Beneficiary, the Originator has remained indebted to the Beneficiary, even though his account has been debited. Ultimately, it seems most likely that the Originator bears the risk of the closure of the Originator's Bank, as his claim for performance (or alternatively for reversal of the debit entry made to his account) ranks equally with the claims of the Originator's Bank's other unsecured creditors.

241. The above could be different if the Dutch Central Bank would warrant the settlement between the Originator's and the Beneficiary's Bank. However, this situation will not arise in practice, since the Dutch Central Bank does not provide such blank credits.

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155 Article 6:114 Section 2 BW; compare paragraph 157.

156 Unless it has been granted securities, as referred to in the Introduction.

In connection herewith, we would like to add that there is a Collective Guarantee Scheme in force,[157] under which Scheme the Central Bank has given a guarantee for the non-subordinated claims which individuals, societies (*verenigingen*) and foundations (*stichtingen*) have vis-à-vis registered credit institutions. The maximum amount thus guaranteed is NLG 40,000.

242. Assuming that (ii) the Beneficiary's bank account has been credited, the situation may be different. The payment contemplated by the Credit Transfer has then been effected.[158] The question then arises whether the Beneficiary's Bank can successfully claim back the amount of the Credit Transfer from the Beneficiary, if it has not settled with the Originator's Bank. This is the case, which follows from article 17 of the general banking conditions which provides that the Beneficiary's Bank has reserved the right to unwind Credit Transfers which have not been settled. A bank that relies on article 17 does not *per se* act contrary to its good faith obligations vis-à-vis the client. Comparison could be made with Article 6:46 Section 1 Dutch Civil Code, relating to payments per cheque. Here, it is provided that payment takes place under the presumption of a successful finalisation.

243. Consequently, the bank account of the Beneficiary would be debited for the amount for which the Beneficiary's Bank has not settled with the Originator's Bank. In that case, the Beneficiary would bear the risk of closure of the Originator's Bank. This appears to be an undesirable result, especially where it is uncertain to what extent the Beneficiary's underlying claim vis-à-vis the Originator will come into existence again. It would further be unreasonable against the Beneficiary, particularly if he could not file a claim for payment with the liquidator in the closing of the Originator's Bank. However, in practice,[159] this situation is probably unlikely to arise, as the crediting will not be effected prior to the settlement.

A.23 In what circumstances might a receiver be able to bring a claim based on fraudulent preference or preferential transfer otherwise seek to set aside or claw back any payment?

244. The Bankruptcy Act offers the liquidator two distinct possibilities to cancel payments made by the bankrupt. The relevant provisions are Articles 42 Fw and

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157 Official Gazette 1992, no. 1.

158 Article 6:114 section 2 BW. Compare paragraph 157 above.

159 With the exception of the urgent transfers which are only processed by the *Bankgirocentrale* if sufficient funds are available (compare the Introduction).

47 Fw (jointly referred to in literature as: the *Actio Pauliana*). The WTK does not contain specific provisions regarding the Actio Pauliana.

(i) Article 42 Fw

245. Article 42 Fw provides that the liquidator may nullify, through an extra-judicial statement, any legal act which has been performed by the bankrupt before his bankruptcy and which was not obligatory (which constitutes fraudulent preference). The bankrupt moreover should or could have been aware of the fact that - by this act - he would prejudice the rights of creditors.

Article 42 Fw further states that a legal act performed by the bankrupt before his bankruptcy, can only be nullified on the ground of fraudulent preference, if the persons with whom the bankrupt has been dealing were aware or could have been aware of the fact that prejudice to the rights of creditors would be the consequence.

(ii) Article 47 Fw

246. Article 47 Fw relates to the payment[160] by the bankrupt of a due payable debt. It provides that such payment can be nullified by the liquidator only if it is demonstrated that:

(a) either the person who received payment knew at that time that an application for the bankruptcy of his debtor had already been filed, or

(b) the payment came about after consultation between the debtor and the creditor, which consultation was aimed at putting the creditor in a position preferred to other creditors after payment.[161]

247. Given the particular construction of bankruptcies of banks, as formulated in the WTK, it is unlikely that this will occur in practice. Indeed, under the WTK, after the special provisions[162] have come into force, the bank will be unable to effect payments without the authorisation of the trustees.

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160 A set-off in a current account relationship also is a payment in the sense of article 47 Fw, decided the Supreme Court for a situation where the client went bankrupt. In this case the client and the bank both clearly intended such set-off (HR 8th July 1987, NJ 1988, 104).

161 The burden of proof is with the liquidator, as was demonstrated in HR 22nd March 1991, NJ 1992, 214, a follow-up of the case referred to in the previous footnote.

162 Article 70ff. WTK.

A.24 Can the receiver avail himself of any zero-hour rule in the winding-up to challenge payments which have been made?

248. Although there is no direct reference to a zero-hour rule as such in legislation or case-law, Article 23 Fw provides that a bankruptcy declaration takes effect the day the declaration has been issued and includes that day, thus *de facto* establishing a zero-hour rule. Commencing this day the bankrupt is deprived of his powers to transfer and/or encumber his assets. The WTK[163] contains a similar provision for the moratorium procedure described in paragraphs 228ff above.

249. In case law, this rule has been confirmed.[164] The case mentioned in footnote 164 below involved a Credit Transfer from one giro-account to another giro-account with the same giro institution. The Originator gave the Payment Order five days before he was declared bankrupt, when he was still authorised to do so. However, the Originator's Bank did not effect the actual debit entry to the Originator's account until the day the Originator was declared bankrupt. The Supreme Court held that the day on which the bankruptcy declaration is issued is decisive for determining whether the obligations arising for the Originator's Bank from the payment instructions could be validly performed. Now that the debit entry was made on the day on which the bankruptcy declaration was issued the liquidator could successfully invoke Article 23 Fw against the Beneficiary and nullify the transaction.

250. It seems that the above case, which dealt with the bankruptcy of a corporation, can be applied *mutatis mutandis* to a bank which is declared bankrupt. As of the day of its bankruptcy, a bank may no longer transfer and/or encumber its assets. After the bankruptcy, the liquidator will only execute instructions regarding a Credit Transfer - thereby effecting a payment between the Originator and the Beneficiary - if in doing so he creates benefits for the joint creditors.

Questions relating to Scenario B:

Assume that Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected that banking day:

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163 Article 71 section 8 WTK.

164 Inter alia in HR 31 March 1989 (NJ 1990, 1).

B.8 Is Bank A liable for the net amount or can the receiver disclaim Bank A's obligations and compel Bank B to pay the gross amount of the Credit Transfers issued by it in favour of Bank B?

B.9 Is netting - or any form of set-off - available after Bank A has closed?

251. As the answers to questions B.8 and B.9 are closely linked to each other, we shall jointly discuss the issues raised. In answering Questions B.8 and B.9 we further interpret the given assumption "that all Credit Transfers have been effected" as meaning that settlement has taken place.

252. We emphasise that the WTK contains no provisions relating to this issue. The answers must therefore be found in the Bankruptcy Act, as, in the hypothetical case that there is no formal contract and there are no Club Rules which govern the respective positions of Bank A and Bank B, the statutory rules[165] are applicable. It should further be noted that the set-off rules of the Dutch Civil Code are overruled by the applicable bankruptcy rules.

253. As set out above,[166] Article 23 Fw provides that a bankruptcy declaration is valid from the day it is issued, including that day. In connection with this zero-hour rule, we stress that the settlement, if effected on the day of the bankruptcy, is not valid as the bank may no longer freely exercise its powers to transfer and/or encumber its assets. This means that all Credit Transfers made by Bank A on the day on which the bankruptcy declaration was issued, are invalid and can be nullified by the liquidator. Below we shall investigate to what extent settlement could be achieved anyway by the set-off rule applicable in bankruptcy situations.

254. The applicable set-off rule is found in article 53 of the Bankruptcy Act.[167] This article determines that a party who is both debtor and creditor of a bankrupt is allowed to set off such mutual claims provided:

(a) the claims and the debts to be set off against each other have arisen before the bankruptcy, or

(b) these claims result from transactions entered into by the two parties before the bankruptcy.

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165 Compare our answers to question B.3 in paragraphs 187ff above.
166 Compare our answers to question A.24 in paragraphs 248ff above.
167 Compare our answers to question A.22 in paragraphs 231 ff above.

255. Bank A not being competent to freely transfer and/or encumber its assets, the liquidator may choose to unwind the netting which took place that day, to the extent that it is based on a set-off in violation of article 53 of the Bankruptcy Act. Should this happen, each Credit Transfer must be reviewed individually in order to establish whether and how it may be settled. It goes without saying that the liquidator would do so, if the creditors would benefit therefrom. In reviewing the consequences we shall consider the two possible scenarios:

(a) after settlement Bank A is a net net payer on the banking day concerned;

(b) after settlement Bank A is a net net receiver on the banking day concerned.

Ad (a) Bank A is a net net payer

256. If Bank A is on the receiving end in respect of an individual Credit Transfer to be effected between Bank A and Bank B, such a Credit Transfer may be effected regardless of the bankruptcy, as there is no transfer and/or encumbrance of assets on the part of Bank A. The liquidator will, on behalf of Bank A, claim payment from Bank B. Bank B will invoke that its payment obligation has been fulfilled if not (a) by the set-off in the netting process, then (b) by statutory set-off pursuant to article 53 Fw. Whether Bank B's appeal to set-off is successful depends on the answer to the question when the claims to be set off against each other arose: they should have arisen (from a transaction entered into) prior to the bankruptcy. We would like to stress that the case law consulted gives no indication as to the interpretation to be given of article 53 Fw in the case of set-off between banks respectively and the application of the zero-hour rule in cases of set-off.[168]

257. If Bank A is on the paying end in respect of any individual Credit Transfer to be effected between Bank A and Bank B, such a Credit Transfer cannot be completed, as Bank B has the position of any other unsecured creditor of Bank A. The liquidator will not be inclined to complete any particular Credit Transfer, unless Bank A's creditors would benefit therefrom. Bank B will, therefore, only be in a position to "force" a completion of the Credit Transfer through invoking the set-off referred to in the preceding paragraph: as mentioned above set-off is only possible if the claims to be set off against each other have arisen (from a transaction entered into) prior to the bankruptcy.

168 Compare our answer to question D.6 (c) in paragraphs 282 and 283 below.

258. In addition, on the basis of the zero-hour rule the liquidator may claim that the debit entry made to Bank A's account with the common correspondent is reversed. It is obvious that the common correspondent equally would want to reverse the credit entry made that banking day to the account of Bank B. Whether it is authorised to do so depends, however, entirely on the implicit understanding between itself, Bank A and Bank B and the interpretation of the unjustified enrichment concept.[169]

259. Considering the rule that the bankrupt's estate is not bound by obligations arisen after the bankruptcy with the exception of those obligations arising from transactions by which the estate is benefited,[170] the liquidator might avail himself of the possibility to disclaim Bank A's obligations on this ground in order to effect a reversal of the debit entry made to Bank A's account with the common correspondent.

Ad (b) Bank A is a net net receiver

260. The set-off rules explained above ad (a) equally apply to the situation that Bank A is a net net receiver.

261. The liquidator shall not co-operate in reversing the credit entry made to Bank A's account with the common correspondent. Resultingly, the common correspondent has a claim vis-à-vis the estate[171] in connection with such reversal, which claim ranks equally with the claims of other unsecured creditors of Bank A. Another situation might arise, if the common correspondent would revert the credit entry made to Bank A's account on its own initiative. Then, the liquidator may assert vis-à-vis the common correspondent that this entry should be undone, as it was made without his consent. The common correspondent can invoke the set-off of his claim against the liquidator's claim, provided that the common correspondent can successfully argue that both claims have arisen (from a transaction entered into) prior to the bankruptcy.

262. Summarising the above, in the event that set-off is not allowed, the liquidator can disclaim Bank A's obligations and can compel Bank B to pay its debts. When set-off is allowed Bank A can be in two different positions:

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169 Compare our answers to question A.9 (c) in paragraphs 85ff above.
170 Compare the rules set forth in paragraph 233 above.
171 This claim arises from breach of the implicit (Scenario B) or explicit (Scenario C) contract between Bank A, the common correspondent and Bank B.

(i) Bank A is in a debtor's position; in this case Bank B has a claim against Bank A for the amount due after set-off. Such claim is an unsecured claim which has to be admitted at the meeting of creditors.

(ii) Bank A is in a creditor's position; in that case Bank B has to pay its net debt to the liquidator.

It should be noted that we expect that the liquidator, after having analysed the costs and returns in order to determine his position, shall probably more often than not choose to challenge the settlement.

Questions relating to Scenario C:

Assume Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected that banking day:

C.6 Is the receiver bound by the netting arrangements which exist - or under your country's insolvency law can he unravel them?

263. In answering this question we interpret the given assumption "that all Credit Transfers have been effected" as meaning that settlement has taken place.

264. Article 37 Fw provides that, in the event there is a reciprocal agreement between two parties and one party goes bankrupt prior to the full completion of that agreement, the other party may require the liquidator to declare - within a reasonable period - whether or not he will (continue to) perform under the agreement. If the liquidator does not respond within such period, he loses the right to claim performance of the agreement. Should the liquidator declare that he wishes to perform under the agreement, he must simultaneously grant securities for such performance.

265. Again - as mentioned above - it is important to remember that under Dutch law the bankrupt estate is not liable for any obligation arisen *after* the bankruptcy except for those obligations arising from transactions by which the estate is benefited. Furthermore, also in Scenario C the other rules mentioned above in our answers to questions B.8 and B.9 equally apply.

266. From these rules set forth in paragraph 233ff above, it follows that the liquidator, or the trustees as the case may be, may choose whether or not to perform under the existing netting arrangements. It is important to note that, should the liquidator or the trustees choose for non-performance, the other party can file a claim for damages which claim ranks *pari passu* with the claims of other unsecured creditors of the bankrupt party.

267. The liquidator is therefore entitled - but not required - to unravel the netting arrangements with the consequences mentioned in paragraph 251ff above.

268. In addition, the trustees in the moratorium situation described in paragraphs 228ff above may transfer the obligations of the credit institution.[172] In order to do so the trustees of the bank require prior authorisation of the District Court. Furthermore, in the event that the credit institution is liquidated by the trustees, special measures may be taken at the order of the District Court such as an abbreviation of the term of current agreements. The WTK does not specifically mention the possibility of unravelling agreements, though it is conceivable that such unravelling could be ordered as a special measure.

269. In the practice most often occurring in The Netherlands, it would seem that the issue of the status of the netting arrangement is solved by the standard contract used by the *Bankgirocentrale*. Article 13 of the *Bankgirocentrale* Standard Contract provides that the agreement between the *Bankgirocentrale* and the participating bank is automatically terminated in the event of:

- winding-up,

- bankruptcy, or

- suspension of payments

of the participating bank (or, which is rather unlikely, the *Bankgirocentrale*). We observe that this provision apparently does not take into account the special provisions of the WTK (which expressly state that a bank cannot go into a suspension of payments).

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172 Article 75 WTK gives rules relating to the applicable procedure, for instance, as to the authorisation by the District Court of any amendments to the underlying agreements and the publication of the transfer of the obligations in the Official Gazette (*Staatscourant*) and at least three newspapers to be indicated by the District Court. The transfer will become effective towards third parties the day after publication thereof.

270. Consequently, as they form an integral part of the *Bankgirocentrale,* the *Bankgirocentrale* Settlement Rules will likewise automatically be considered terminated. It is noteworthy that the participating bank is due a resignation fee to the *Bankgirocentrale*.

C.7 What restrictions or conditions (if any) are imposed on the process of contract novation by your country's bankruptcy law?

271. There is no provision in Dutch bankruptcy law or in the Dutch Civil Code referring to novation as such. As explained above, under Dutch law the concept of novation is interpreted as a revocation of all the original rights and claims arising from an agreement accompanied by the simultaneous acceptance to be bound by a new agreement creating new rights and obligations.

272. Consequently, the answer to question C.7 must be found in the general rules applicable in bankruptcies. On the basis of both the zero-hour rule and the other rules set forth in paragraph 233 above,[173] it can be held that, if Bank A and Bank B are bound by an agreement requiring them to settle Credit Transfers through novation, Bank B may require Bank A's liquidator to express himself as to whether or not he will perform thereunder and in the meanwhile to refrain from performing itself. Again, if Bank A's liquidator were to advise that he perform, Bank B may require the liquidator to grant securities for the due payment of any claims arising therefrom.[174] It is difficult, however, to imagine how this rule would operate in practice: it would be logical to assume that Bank B would rather choose to rescind the agreement with Bank A and, if there are damages, claim these from the liquidator.

Questions relating to Scenario D:

Assume Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected that banking day. Bank A is the net debtor of Bank B and the net creditor of Bank C. Taking the two positions together to arrive at a net net position, Bank A is the net debtor.

D.5 Are at the end of day net positions as between the three banks legally binding?

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173 For instance, the rule found in article 24 Fw providing that the bankrupt estate is not liable for any obligation arisen after the bankruptcy, unless the estate would have benefited therefrom.

174 Article 37 section 2 Fw. It should be noted that the same rule applies in the moratorium situation on the basis of article 71 section 3 WTK jo. article 236 section 2 Fw.

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D.3 Are at the end of day net positions as between the three banks legally binding?

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173 For instance, the rule found in article 24 Fw providing that the bankrupt estate is not liable for any obligation arisen after the bankruptcy, unless the estate would have benefited therefrom.

174 Article 37 section 2 Fw. It should be noted that the same rule applies in the moratorium situation on the basis of article 71 section 3 WTK jo. article 236 section 2 Fw.

273. We have discussed the operation of the Dutch set-off rule in bankruptcy situations (article 53 Fw) in paragraphs 254ff above. On the basis hereof we conclude that the net positions between the three banks are legally binding to the extent it can be held that the claims to be set off against each other have arisen (from transactions entered into) prior to the bankruptcy.

D.4 (a) Can the receiver disclaim the Credit Transfers made during the course of that banking day by Bank A, but affirm the Credit Transfers made to it?

274. As regards the net net position at the end of the day, it is important to note that in connection with the zero-hour rule the settlement will not be deemed valid and will be unwound by the liquidator. Consequently, in order to effect the netting regardless of Bank A's bankruptcy, the participating banks will need to fall back on article 37 Fw and request the liquidator to express whether he shall perform under the netting agreement or not. The liquidator will of course only do so, if Bank A's creditors are benefited thereby. It goes without saying that, in the assumptions set forth above, the liquidator would like to refrain from performing: the estate will benefit by Bank A's claim vis-à-vis Bank C whilst Bank B's claims vis-à-vis Bank A must be filed in the bankruptcy as claims ranking *pari passu* with those of other unsecured creditors. The liquidator is entitled to take this action, but prior to his decision he shall generally be inclined to make an investigation into the eventual success of such an action. In doing so the questions as to the set-off of claims arisen in the Credit Transfer process and the effects of the zero-hour rule discussed in this Study shall need to be evaluated by him, as the answers to these questions can as yet not be conclusively determined (compare, for instance, our conclusion in paragraph 283). Again, in the case of non-performance under the netting agreement, the participating banks including the common correspondent may claim their damages from the estate and these claims rank *pari passu* with the claims of other unsecured creditors.

275. We would like to stress that we expect that in the giro payment system serviced by the *Bankgirocentrale* the above mentioned situation shall not arise. It is quite likely that a bank for which special measures need to be taken in the manner set forth in paragraphs 228ff above or which is declared bankrupt, has already for some time been incapable of meeting its obligations under the *Bankgirocentrale* Standard Contract, i.e. did no longer have a positive balance standing to its account with the Dutch Central Bank, was not capable of acquiring additional funds in the

against the liquidator's claim, provided that the common correspondent can successfully argue that both claims have arisen (from a transaction entered into) prior to the bankruptcy.

The position of Bank B

279. Bank B has a claim vis-à-vis the estate and, possibly, vis-à-vis the common correspondent (the validity of this claim depends on the latter's success in the set-off mentioned in the previous paragraph: should the common correspondent end up being in the same condition as it was prior to the settlement the other participating banks may successfully claim that the netting and subsequent settlement is effected again as if the bankrupt bank were not a party to the netting arrangement). Bank B's net claim vis-a-vis Bank A is the result of a set-off: assuming this set-off is valid because the claims to be set off have arisen (from a transaction entered into) prior to the bankruptcy, at the end of the day Bank B has a claim ranking *pari passu* with the claims of Bank A's other unsecured creditors.

The position of Bank C

280. Bank C may, like Bank B, have a claim vis-à-vis the common correspondent (compare the previous paragraph). Bank C's net debt to Bank A is the result of a set-off: assuming this set-off is valid because the claims to be set off have arisen (from a transaction entered into) prior to the bankruptcy, at the end of the day Bank C must pay its net debt to the liquidator.

281. Summarising, it follows from the above that the liquidator can unravel a netting arrangement which results in "cherry picking".

(c) Can the receiver avail himself of any zero-hour rule in the winding-up to challenge payments which have been made?

282. There is no reason to come to a different result under this scenario D than in the situation dealt with under scenario A. Consequently, we refer to our answers to question A.24 in paragraphs 248 to 250 inclusive above.

283. In addition, we would like to note that there is no clear answer to the repeatedly appearing question as to what criteria must be applied in determining whether a claim has arisen (from a transaction entered into) prior to the bankruptcy and

consequently may be set off on the basis of article 53 Fw. Assuming that the Credit Transfers were all processed on the banking day on which Bank A was declared bankrupt, we cannot be sure whether the zero-hour rule applies or whether the words "prior to the bankruptcy" should be interpreted as meaning "prior to the actual declaration of the bankruptcy by the District Court" allowing a set-off of claims arisen from Payment Orders given after "zero hours" but prior to the actual hour of the day at which the bankruptcy declaration was issued. Another important issue which remains to be resolved is whether the courts would hold that there is sufficient connection between the transactions entered into by the participating banks prior to the bankruptcy and the settlement of Credit Transfers resulting therefrom.[176]

D.5 Identify the netting arrangements (bilateral, multilateral, by novation or otherwise) which would be effective in the insolvency of any of the participating banks.

284. In the light of the mandatory application of article 53 Fw, which article exclusively determines how to set off in the case of bankruptcy and in that respect sets aside previously existing contractual set-off arrangements, and in the light of the zero-hour rule our answer to this question is that there is no netting arrangement which would be effective in the insolvency of any of the participating banks.

176 This question has been resolved in other cases with different circumstances (e.g. the decisions of the Supreme Court of 10th January 1975 (NJ 1976, 249) and of 27th January 1989, NJ 1989, 422). The most important rule to be deducted from these cases is that there is no sufficient connection, if someone merely receives a payment from a party on behalf of a principal after the latter's bankruptcy - whether or not such receipt entails the obligation to credit a current account with the bankrupt principal - and wishes to set off the obligation of paying over the received amount against any existing claims vis-à-vis the bankrupt principal.

SECTION II

COMPARISONS WITH UNCITRAL MODEL LAW

To what extent does your existing law reflect, conflict with or remain silent in respect of any of the matters covered by the provisions of the UNCITRAL Model Law on International Credit Transfers?

If the UNCITRAL Model Law were to be brought into force, and were to apply to consumers, do you believe that any of its provisions would afford those consumers better protection than is now available under your own domestic law?

285. The UNCITRAL Model Law ("Model Law") applies to cross border payments only. Therefore we will only list the consequences which the Model Law has in relation to the legal situation in The Netherlands as described in response to the cross-border questions.

286. The articles 1 and 2 of the Model Law contain a lot of similarities to the situation in The Netherlands. Application of these articles would therefore not result in substantial differences.

287. Article 3 of the Model Law deals with conditional instructions. As stated before,[177] banks in The Netherlands are usually not willing to accept such conditional instructions. However, in case a bank has accepted such a conditional instruction and executes it by issuing an unconditional payment order, the Beneficiary may hold the payment received as having been made unconditionally. Therefore, the consequences of article 3 of the Model Law do not lead to a different result as compared to present Dutch law. Insofar as the position of the sender is concerned, Dutch law does not deprive him of his rights against a bank which does not comply with the sender's (conditional) instructions. This, as appears from the wording of article 3, seems to be different, if the Model Law were applicable.

288. Article 4 of the Model Law states that rights and obligations of parties to a Credit Transfer may be varied by their agreement. This is also possible under Dutch law albeit that parties are generally bound by the general banking conditions (if the applicability thereof has not been explicitly excluded).

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177 Compare our answers to question A.3 above in paragraphs 46ff.

289. The provisions of article 5 of the Model Law are similar to Dutch law. However, the Model Law does not contain the possibility (as exists under Dutch law) for the sender to undertake an action against the Beneficiary for undue payment or unjustified enrichment in the case of forgery, fraud or mistake for which the bank cannot be held responsible.

290. With respect to article 6 we would refer to the answers under A.16, which show that payment is effected when the Beneficiary's account has been credited.[178] In view of our answers to this question and previous questions we feel that under Dutch law the transactions entered into in the course of a Credit Transfer would not be qualified as a payment per se between the participating banks. Likewise any obligation to settle Credit Transfers between banks only arises as a result of the receiving bank accepting the Payment Order concerned. As the several transactions of which a Credit Transfer consists are under Dutch law simply qualified as the performance of acts on the basis of instructions, the receiving bank may refuse to act on the basis of these instructions if anything is wrong with the instructions themselves or if it has not (yet) been credited with the amount to be transferred. It should be noted that this difference in qualification does not lead to another situation, especially where the position of the consumer is concerned.

291. As stated in paragraph 72, in response to question A.8 (c), the Intermediary Bank has fulfilled its obligations as soon as it has debited the account held by the Originator's Bank, credited the account held by the Beneficiary's Bank and delivered the Payment Order to the Beneficiary's Bank for the purposes of crediting the Beneficiary's account. Furthermore, the relationship between the Originator's Bank and the Intermediary Bank as well as the relationship between the Intermediary Bank and the Beneficiary's Bank are governed by Dutch contract law, the inter-bank rules and service contracts between the banks. We find that articles 7 and 8 of the Model Law are quite similar to the legal situation under Dutch law. With the exception of Article 8(2) which contains the provision "within the time required by article 11". These requirements do not specifically exist in Dutch law.

292. Articles 9 and 10 of the Model Law contain provisions concerning the obligations of the Beneficiary's Bank as to how the Bank should act in case of acceptance or rejection of a Payment Order. In The Netherlands there are no specific rules in this respect; the general banking conditions provide for the obligation of the banks to exercise due care (article 2) and to guarantee such execution of the Payment Order

178 Article 6.114 Section 2 BW

within a reasonable period of time (article 10). See further our answers to question A.2. Articles 9 and 10 of the Model Law provide for obligations similar to obligations of banks in The Netherlands. We do, however, find that the articles 9 (2, 3) and 10 (2, 3, 4, 5) offer better protection to the consumer since the Model Law specifically describes the exact periods within which a bank should act, where in Dutch law the banks merely have the obligation to act within a reasonable period.

293. Consequently the same holds true for article 11 of the Model Law since article 10 (2, 3, 4, 5) already refers to this article and article 11 contains the time frames within which a bank is required to act. Consumers are better protected under article 11 of the Model Law, especially with regard to article 11 (2), which obliges the receiving bank to "execute for value as of the day of receipt"; such a provision does not exist in Dutch law. Furthermore, the obligations for the receiving bank can also be derived from the general banking conditions as stated above. The Model Law contains more specific obligations in this respect and is therefore more favourable for the bank's customers.

294. Article 12 of the Model Law provides for a right of revocation for the different parties in the Credit Transfer process and deals with the consequences thereof. As explained in our answers to question A.7, in The Netherlands similar rules apply to the revocation of a Payment Order. The main rule under Dutch law is that, once the Beneficiary's Bank has credited the Beneficiary's account for the funds to be transferred pursuant to the Payment Order, the payment has been completed implying that the Payment Order at that point in time has become irrevocable. Prior to the moment of crediting by the Beneficiary's Bank the Payment Order is revocable, although the Originator is not at all times able to invoke the consequences of his revocation (compare paragraphs 46ff above). An effective revocation by the Originator (or the sender as such term is defined in article 2 of the Model Law) entails that the Originator or sender is entitled to a refund from the recipient of the revocation order. In principle, under Dutch law such a refund can only be recovered from one's contractual party: the Originator has a direct claim vis-à-vis the Originator's Bank (however, compare footnote 64 above). Furthermore, in connection with the above-mentioned rule that under Dutch law revocation is no longer possible after completion of the Credit Transfer, it is noteworthy that (a) making a credit entry to the Beneficiary's account entails that the funds are placed at the exclusive disposal of the Beneficiary (and possible co-account holders of the Beneficiary) and, therefore, it is only the Beneficiary who is

able to effect that the credit entry is reversed after that moment, and (b) the consequences of the revocation can only be invoked vis-à-vis the Beneficiary if the Beneficiary - when receiving or transferring the funds - was (or could have been) aware of the revocation. However, we would like to stress that it is disputable whether the Originator will be capable of revocation at that point in time, because under Dutch law a Credit Transfer is a form of payment. Consequently, it can be argued that a debtor having paid his debt (whether such payment is made in cash or by means of Credit Transfer) cannot revoke that payment, but should revert to the actions available on the basis of the underlying rights and obligations, such as a breach of contract, or the general actions available under Dutch law, such as tort or the action in connection with undue payment. Of course the Beneficiary may also agree with the Originator upon a reversal of the Payment Order. (See further our answers under question A.7 (b) and A.16.) Furthermore, we noted that section 11 of article 12 of the Model Law is contrary to Dutch law, which determines that a power of attorney (such as a Payment Order) ends by the death, incapacity (*ondercuratelestelling*) or bankruptcy of the principal, although sometimes the end of the power of attorney cannot be invoked against third parties who were not aware of the (causes for the) end of the power of attorney. We feel that we cannot comment whether the differences between Dutch law and the Model Law constitute a better protection to the customers since it depends whether one looks at it from the Originator's or the Beneficiary's point of view.

295. Article 13 of the Model Law is similar to article 10 of the general banking conditions and can be considered as an enactment of the principle of good faith as applicable in Dutch contract law.

296. The right to refund of article 14 of the Model Law is not specifically dealt with in Dutch law nor in the general banking conditions (we refer to our answers to question A.12 in paragraphs 105ff above). In principle, on the basis of the general banking conditions it can be held that there is no direct obligation to refund for the Originator's Bank, if it is not to blame for the non-completion of the Credit Transfer and such non-completion is not for the risk of the Originator's Bank. If the Originator's Bank does not comply with an obligation to refund, statutory interests may become due. It needs no further comment that the consumers find better protection under the Model Law regarding this issue than under Dutch law and standard conditions.

297. As follows from article 15 of the Model Law, the receiving bank has not fulfilled its contractual obligations when it has executed a payment instruction by underpayment "other than as a result of the deduction of its charges". This is similar to the Dutch legal situation even though a direct obligation to issue a Payment Order for "this difference", does not exist. We find that in this matter the Model Law also offers a better, more specific, protection to consumers.

298. Article 16 of the Model Law refers to restitution of overpayment. In The Netherlands this obligation also exists and follows from the doctrine of undue payment or unjustified enrichment.

299. Liability for interest and exclusivity of remedies, as dealt with in articles 17 and 18 of the Model Law, do not exist as such under Dutch law. Claims for interest must in The Netherlands be based on the general principle that a creditor is entitled to claim statutory interest. In order, however, for such statutory interest to become due certain conditions will have to be complied with and therefore it is clear that the specific rules of the Model Law in this respect offer better protection to the consumer.

300. As mentioned above, in The Netherlands a Credit Transfer is completed when the Beneficiary's account has been credited and is therefore considered to be completed a fraction later than as provided for in article 19 of the Model Law. However, because article 19 also provides for the Beneficiary's Bank to become indebted to the Beneficiary to the extent of the Payment Order accepted by it, the difference is purely academic and would in our view not amount to a significant difference in the position of the consumer.

CONCLUSIONS

Are there any other relevant issues affecting Credit Transfers and their settlement not addressed? Please list them briefly.

301. In our opinion we have discussed, in answering the questions set forth in the Questionnaire, all relevant issues raised in Dutch literature and case law affecting Credit Transfers and their settlement to the fullest extent possible.

Please list briefly what you consider to be the most important issues affecting Credit Transfers and their settlement. In respect of each of these issues, listed in order of importance, please consider whether harmonisation might assist in the development of European payment systems.

Systemic risks

302. In our discussions with individuals dealing with the execution of Credit Transfers on a day-to-day basis, we got the impression that there is some uncertainty as to what should actually happen when a credit institution goes bankrupt. As follows from our answers to the questions on Systemic Risk, in the end it will probably be the Originator of a Credit Transfer who will bear the risk of closure of his bank. In our view, however, it might take considerable time before the parties participating in a specific Credit Transfer have unravelled the matter and perceived that this is the case. This is due to the complexity of the payment system and the limited possibilities a liquidator will have to quickly assess the Credit Transfers in respect of funds received and funds paid by the bankrupt bank's clients. Another uncertainty arises from the circumstance that the bankrupt bank will no longer be in a position to participate in the netting arrangements of the payment system, as a result of which the liquidator must handle each Credit Transfer individually. Considering these problems - which of course have a very practical nature - we feel that the Dutch legislator would be wise to enact rules giving the parties involved very specific guidelines as to what should be done upon a bank's bankruptcy. In doing so the Dutch legislator might consider to award better protection to those who under present law bear the risk of a bank's closure. It goes without saying that likewise harmonisation might assist in the development of European payment systems.

The nature of the bank-client relationship

303. We have set forth that under Dutch law there is no absolute certainty regarding the nature of the relationship between the bank and its client, although the new provisions regarding the instruction agreement are quite helpful to establish the general duties the banks have vis-à-vis their clients. However, notwithstanding this legislation some questions remain unanswered. These questions mainly arise in connection with the specific aspects of effecting payments by means of Credit Transfers through a multilateral clearing system (such as the question until what moment the consequences of a revocation of a Payment Order may be invoked against other parties involved in the Credit Transfer chain). Consequently, the exact duties of the banks still need to be clarified, as the questions that have arisen and been discussed in this report have not yet been conclusively answered in case law either. Therefore, it is our belief that it would be quite helpful if the Dutch legislator were to give a clear, further indication as to the nature of the bank-client relationship especially where Credit Transfers through the existing clearing system are concerned. Again, the same results could be achieved by harmonisation, albeit that we could envisage that a qualification in the law system of one country does not necessarily lead to the same consequences in another law system.

Revocation

304. This issue is quite related to the previous one in that it would automatically be resolved upon knowing the nature of the bank-client relationship. Nevertheless, we would like to specifically mention it, because we have the impression that in practice the possibilities the clients of Dutch banks have to revoke given Payment Orders (according to the most widely supported view that the bank is its client's agent) are in fact limited by the practical - or supposedly practical - impossibility for the bank to execute such a revocation.

The Originator's Bank's responsibility for due completion of the Credit Transfer

305. We feel that the position of the Originator of a Credit Transfer, in case something goes wrong in the Credit Transfer process on account of an error which is not due to him, needs legal clarification in order to achieve that the Originator is better protected. Such protection could be obtained, for instance, by a provision to the effect that the entries made in connection with such an erroneous Credit Transfer may be reversed if such is necessary for the correct completion of the Credit

Transfer. Harmonisation of the rules pertaining to this subject would in our opinion be quite helpful to protect the European consumers' interests.

PORTUGAL

CREDIT TRANSFERS AND THEIR SETTLEMENT:

PORTUGAL

GONÇALVES PEREIRA, VINHAS,
CASTELO BRANCO E ASSOCIADOS
SOCIEDADE DE ADVOGADOS

PREFACE

Until the late 19th Century all banking transactions, including all operational aspects, were freely established by the interested parties, without any regulatory provisions.

Due to the absence of such regulatory provisions banking matters were basically ruled by general commercial law. In fact, according to article 362 of the Commercial Code of June 28, 1888 - still in force - all banking operations are considered commercial acts, and article 363 of the same code provides that such operations are subject to the specific provisions of Portuguese law which apply to the contracts which such operations represent, or which are actually carried out by the parties (i.e. deposit, mandate, etc.).

However, contrary to most other countries, various banking legislation, ruling various aspects of banking activity, was already published in Portugal in the 19th Century.

After a long period during which banking activity was ruled by a large number of separate Decrees and legal provisions, two basic deçrees were published containing the framework and the fundamental legal provisions applying to banking activity: Decree-Law no. 41403 of November 27, 1957 and Decree-Law no. 42641 of November 12, 1959, both of which were frequently subject to partial alterations. In 1992, the Government eventually published Decree-Law no. 298/92, of December 31, 1992, which approves the General Regime of Credit Institutions and Financial Companies (RGICSF), and revokes most of the existing separate decrees and provisions on the subject.

The specific issue of Credit Transfers was not addressed in either of the two basic 1957 and 1959 decrees mentioned above or in subsequent alterations to them or in other separate decrees or in the RGICSF.

In addition to the RGICSF, banking activity is also subject to the regulations issued from time to time by the Bank of Portugal (Bank of Portugal) in its capacity as supervising entity of credit and financial institutions. The Bank of Portugal regulations are normally "circulares" or "avisos", which are respectively circulated to the entities concerned and published in the official gazette.

There are also no BP regulations specifically on credit transfers, though there are some which are relevant to the cases under analysis, such as a regulation on netting.

In conclusion, there being no specific legislation in Portugal regarding credit transfers and their settlement, we shall have to take into account the general commercial and civil rules namely on:

- contractual declarations;
- mandates;
- deposits;
- set-off;
- bankruptcy.

In addition, it should be noted that our answers will also take into account banking practice on various operational aspects.

We will also bear in mind some jurisprudence again not specifically on credit transfers but on other relevant issues, such as the legal nature of bank deposits.

INTRODUCTION

Credit transfers in Portugal are carried out mainly through electronic means, run by an intermediary clearing house company called "SIBS - Sociedade Interbancaria de Serviços, S.A." (SIBS). This company was formed by the majority of the existing banks in Portugal and holds a services agreement with the Bank of Portugal.

SIBS developed and runs the so-called TEI system (Electronic Transfer of Funds) by which Payment Orders are sent electronically by the banks to SIBS.

SIBS is responsible for providing to the Bank of Portugal the net position of each bank in order to process each bank's account with the Central Bank at the end of the day. For this purpose, SIBS entered into an agreement with each of the banks using the system.

Besides the electronic system for Payment Orders described above it is also possible to carry out Payment Orders in the traditional way which involves issuing the Payment Orders and sending them to the Bank of Portugal (and to the Beneficiary's Bank) in order for them to be processed. This system is presently not much used though it is still functioning.

The Bank of Portugal has recently produced a regulation on netting (FOLHA S-0518.I Anexa à Circular, Série A, nº 247, de 93.02.22) which sets out the main rules in this area and revokes the former regulation.

Concluding, one may say that there are no clearing agencies which act independently of the Bank of Portugal. Each bank has an account with the Bank of Portugal and what SIBS does is to run and manage the system so that at the end of the day the Bank of Portugal receives the net position of each bank in order to process the respective account.

Credit Transfers which involve foreign banks are normally carried out through SWIFT messages sent by the foreign banks to the correspondent banks.

In addition, a system whereby Credit Transfers over a certain amount may be carried out on a real-time basis by electronic means is currently being studied. This large Credit Transfers system would change the present situation which is based on end of day settlement.

SECTION I - EXISTING LAW AND PRACTICE

INTER-PARTY RELATIONS 1: EXECUTION OF CREDIT TRANSFERS

General

Questions relating to Scenario A:

A.1 Taking each stage of the transaction, is there any prescribed form which must be used by any of the parties?

1. There is no specific form required by law for the Originator to transmit a Payment Order to his bank. Therefore, the order may be communicated orally (by telephone for example) or by any other means.

2. The general practice in Portugal is to make a Payment Order in a written and signed document, though such documents may be sent by fax. This requirement is specified for operational reasons and also because a written and signed document constitutes a high element of proof.

3. There are a few banks which have implemented a system of codified communications, allowing the instructions to be given by telephone under a certain code.

4. Some banks carry out Payment Orders through oral instructions but normally this practice is only applied to the so-called "good clients". In general the banks require a subsequent confirmation in writing as recommended by the Bank of Portugal.

5. There is also no specific form legally prescribed for the transmission of a Payment Order by the Originator's Bank to the Beneficiary's Bank, though the normal practice is that they are electronically transmitted (see "Introduction").

6. As for the information on the Credit Transfer to be given to the Beneficiary by his bank, there is also no specific form legally prescribed. The practice is for such information (if any) to be given in writing.

A.2 What are the legal provisions (if any) governing the time within which each bank is required to act? Consider in particular:

(i) Is there any definite period prescribed within which the Credit Transfer must be completed if it is not to lapse?

7. There is no time limit within which the Credit Transfer must be completed in order not to lapse. In this respect, it should be noted that there is a protocol establishing the rules (including time limits) for the setting-off of cheques, but there are no such rules concerning inter-banking Credit Transfers.

8. It is anticipated that such a time limit will be established upon the full implementation of the TEIS.

(ii) If there is no definite period, does custom prescribe the time within which the Credit Transfer must be completed?

9. Custom does not prescribe the time within which the Credit Transfer must be completed.

(iii) Is there a duty for each bank to act "within a reasonable time"? If so, is there any case law or principle or anything else giving guidance on what might be considered "reasonable"?

10. There is no duty for each bank to act "within a reasonable time". There is also no case law or principle giving guidance on what might be considered "reasonable".

11. In our opinion, the guiding criteria would be general banking practice which currently indicates a period of two days.

12. It should also be noted that, as general principles of Portuguese law, the banks in their capacity as depositaries should act with due diligence and whilst carrying out the depositor's instructions in their capacity as attorneys, they are also bound to act with the same due diligence.

13. Furthermore, the RGICSF also provides that the Credit Institutions must guarantee to their customers, in all activities which such Institutions carry out, high levels of technical ability and their organisation must have the material and human means required in order to achieve adequate conditions of quality and efficiency.

14. Therefore, an unjustifiable delay in executing Credit Transfer instructions, beyond what is regarded as general practice, implies the potential liability of the bank for any damages resulting therefrom.

A.3 How would your answers to question A.2 differ if the Payment Order was conditional - for example, if the Originator had given his Bank express instructions that the Payment Order should only be executed in certain specific circumstances, such as the receipt of sufficient funds to the Originator's account to cover it?

15. The same principles are applicable though depending on the complexity of the conditions imposed, the bank may take more time to verify them and in that case there should be a case for justified delay (see A.2(iii) above).

A.4 (a) Are there any rules of value-dating - and how would you define value-dating?

16. There are no rules of value-dating for Credit Transfers (as exist for cheques).

17. Value-dating with respect to credits would be defined as the date on which the funds are available for disposal by the Beneficiary. In other words, funds are available to the Beneficiary as of the value-date of the credit.

Value-dating with respect to debits would be defined as the date on which the funds cease to be available for disposal by the Originator.

(b) Assuming value-dating, is there any difference in the treatment of credits and the treatment of debits?

18. Although there are no rules, the general practice is that credits are value-dated after the actual credit is received by the Beneficiary's Bank. With regard to debits, the respective value-dating normally precedes the actual debit of the Originator's account. This means that currently the actual dates of the debits and credits and the respective value-datings do not coincide thus allowing the banks to profit from the amounts involved in between such different dates. To the best of our knowledge the difference is currently 24 hours.

A.5 Are there any rules governing the issue of double charging - for example, where the Originator in giving the instructions to his Bank has specified that he should bear all the costs, but the Beneficiary nevertheless has charges deducted from the amount credited to the account at his Bank?

19. There are no rules governing the issue of double charging. Charges to the customers would be governed by the individual bank's charging arrangements.

20. It should be noted that pursuant to the RGICSF, Credit Institutions must inform their customers of the price of the services rendered and any other charges to be borne by them.

A.6 Consider the methods of authentication which would be used and/or which might be considered appropriate. (Ignore comparisons of paper signatures.)

21. Under Portuguese law, since there is no required form for the Payment Order, any means to prove the authorship of a determined Order would be acceptable. However, the degree of proof varies.

22. A signed written document proves, in principle, that its author intends to be bound by the text he submitted. Therefore, the only way he may challenge such document in Court is by invoking the argument that the document is false or is not his.

23. On the other hand, the validity of unsigned documents is assessed by the Court even when not challenged by the counterparty.

24. Tested telex is used for Payment Orders as are telephone messages where a specific code is transmitted to the bank official, prior to the communication of the instructions.

25. The current methods of authentication are tested telex, specific security codes and terminal identification codes, though it should be noted that this last method is used by just a few banks.

26. Between banks, besides the use of SWIFT and electronic means, tested telexes are used. It is also common to accept only the signature of determined officials of each bank.

Revocation

Questions relating to Scenario A:

A.7 (a) How would you define revocation and in particular how would you distinguish it from other rights e.g. a receiver's entitlement to disclaim on a winding-up?

27. There is no legal definition of revocation, but this has been defined by doctrine as the free destruction of the effects of a legal act by its author or authors. Applying this definition to Credit Transfer orders, we would say that revocation is the act by which the Originator orders the cancellation of the previous Credit Transfer Order and instructs the bank to destroy any effects therefrom, subject to the answer to question (c) hereunder.

28. According to the Portugese Bankruptcy Code there are a number of acts which may be disclaimed for the benefit of the bankrupt estate, namely acts which represent a reduction in the debtor's assets and executed on a gratuitous basis during the two years prior to the declaration of bankruptcy.

29. This is however a completely different situation from revocation. In fact it is termination (resolution) which is defined by doctrine as the destruction of the effects of a legal act, by the intention or in the interests of either party, on the grounds of some objective reason.

30. In addition, it should be pointed out that even if there is a Credit Transfer involved, the act to be disclaimed will not be such transfer, but the independent act or contract which caused such transfer of funds between the Originator and the Beneficiary (for example a donation).

(b) In what circumstances might the Originator be entitled to revoke or countermand the Payment Order?

and

(c) Until what moment can he do so?

31. Pursuant to the general principles on mandates, the instructions given to the Originator's Bank may be freely revoked until the respective execution has started.

32. If such execution has already started but is not completed it is generally accepted by the banks that the revocation is acceptable and consequently any steps which had already occurred would be cancelled.

33. If the order has already caused its effects with regard to third parties (i.e. the Bank of Portugal or the Beneficiary's Bank) then revocation will not be possible on a unilateral basis, i.e. without the consent of third parties.

34. In our opinion, if there is a possibility of cancelling the order with the Bank of Portugal and/or the Beneficiary's Bank, the Originator's Bank is bound to take all necessary measures to achieve such cancellation.

35. Once the transfer is completed, i.e. the Beneficiary's account has been credited, cancellation of the effects is no longer possible by a unilateral revocation by the Originator and would require the acceptance of the Beneficiary to reimburse the funds.

36. In addition, it is anticipated that with the increasing implementation of sophisticated electronic means - namely in respect of large transfers (see Introduction) - the possibility of revocation of Credit Transfers will be more limited.

(d) What steps would he have to take?

37. There is no legal requirement on the form of revocation of Credit Transfers. The considerations made in point A.1 when dealing with the form of the Credit Transfer order are applicable.

38. Therefore, in principle, revocation orders should be submitted to the bank in writing.

39. Where there is a telephoned codified system (already implemented by a few banks in Portugal) the instruction for revocation may be given by telephone using the appropriate code.

40. Also where so-called "good clients" are involved, verbal instructions by telephone are usually accepted by banks, though they normally require a subsequent written confirmation, as recommended by the Bank of Portugal.

(e) Can entries be reversed in the case of mistake?

41. As the question does not specify whose mistake is under analysis, we shall consider both the situation where there is a mistake by the Originator and the situation where there is a mistake by the Originator's Bank.

42. In the first case - i.e. mistake of the Originator - the rules applicable to revocation are relevant. However, contrarily to what happens in a revocation, where there is a mistake in a declaration (i.e. the Credit Transfer order) this may entitle the Originator to request its annulment.

43. If the mistake is by the Originator's Bank and the Beneficiary's account has not yet been credited it is general practice for the Beneficiary's Bank to accept the correction of the order as required by the Originator's Bank.

44. This practice has never, to the best of our knowledge, been challenged before a Court. However, there is the theoretical possibility considering that the Beneficiary's Bank acts as an attorney of the Beneficiary that accordingly, in strict terms, the consent of the principal (i.e. Beneficiary) should also be required to the correction in the case under analysis.

45. Depending on the operational stage, this "correction" may be carried out either by an annulment of the previous transfer or by a new transfer or transfers in order to make the necessary adjustments.

(f) Answer questions (b) and (c) above on the assumption that the Originator's Bank on its own initiative wishes to revoke the Payment Order.

46. If the Originator's Bank on its own initiative wishes to revoke the Payment Order, the same principles and rules above mentioned would apply.

47. Reverting to paragraph 31 above, the Originator's Bank may freely revoke until it has started the execution of the Payment Order. If the execution has already started - i.e. if the Beneficiary's Bank has already been credited - then paragraph 32 above would be applicable.

Upon completion of the Credit Transfer, the situation would be as in paragraph 33.

(g) Can a situation ever arise where the Originator validly revokes, but the Originator's Bank cannot revoke? (Assume that the Originator's Bank has at all times acted correctly.)

48. Bearing in mind the considerations made under (b) and (c) above, it appears that there can be no situation where the Originator validly revokes but the Originator's Bank cannot revoke. In fact, the possibility of the Originator revoking the order is linked to the operational stage of the transfer, i.e. the possibility of the Originator's Bank, as attorney for the Originator, cancelling all the effects produced by such order.

49. As from the moment at which the transfer is credited to the Beneficiary's account, one could not then describe the cancellation of the effects as a revocation but as an annulment.

Responsibility

Questions relating to Scenario A:

A.8 In respect of each of the following:

(i) the Originator's Bank;

(ii) any Intermediary Bank;

(iii) the Beneficiary's Bank.

(i) Originator's Bank

(a) At what moment does the bank accept the Payment Order (i.e. assume any legal commitment to the party giving such Order)?

50. Regarding the Originator's Bank, the general practice is that upon receipt of the Order the Bank verifies its formal prerequisites - for example, clear identification of the Beneficiary's account - and the material prerequisite which is the availability of funds in the account of the Originator.

51. After this verification, the bank concludes either that all the prerequisites are fulfilled or that there is a problem which prevents the execution of the Order.

52. The general practice is that, in the first case, the bank executes the order without any formal acceptance first being communicated to the Originator. The acceptance results from the execution of the Order.

53. On the other hand, in the second case, the general practice is that the bank informs the Originator of the existing problem(s) and the consequential need to remedy the same so that the Order may be accepted and executed.

(b) At what moment does the bank execute the Payment Order?

54. The Originator's Bank starts execution of the Payment Order after verification that all formal and substantial prerequisites of the Order are fulfilled. In practice, this is usually on the same day as or on the day after receipt of the Order, unless otherwise specifically instructed by the Originator (i.e. when the Order indicates a specific value-dating).

(c) At what moment is the bank discharged from its obligation - for example, would it be upon delivery of the instructions to effect the Payment to the next party in the Credit Transfer chain or would it be upon the Beneficiary receiving value?

55. The answer to this question regarding determining when the bank is discharged from its obligation depends on the conceptual definition of Credit Transfers adopted. Basically it is necessary to determine whether a Credit Transfer should be regarded as an obligation to achieve a certain result or an obligation to perform a certain act.

56. There is no such definition as yet. If the first concept is adopted, the bank will be considered discharged from its obligation only upon the Beneficiary receiving the amount concerned. If the second concept is adopted, then the bank will be discharged upon delivery of complete instructions to the next bank in the chain (Intermediary or Beneficiary Bank) and settlement of the corresponding amount.

57. To the best of our knowledge, there is no case-law or doctrine adressing this issue. We believe that, in practice, the banks regard their obligation as an obligation to perform a certain act and not to achieve a result i.e. credit of the Beneficiary's account which, actually, is not under the control of the Originator's Bank and depends on the intervention of independent third parties.

(d) In what circumstances, if any, may the bank refuse to accept or execute the Payment Order?

58. In principle the Originator's Bank may only refuse to accept or execute a Payment Order if any formal prerequisite (see point (a) above) or the material prerequisite (availability of funds) is not fulfilled. In addition, the bank must also refuse the Payment Order if the transfer is from a bank account which is subject to an injunction restraining the disposal of the funds concerned, and such injunction was duly notified to the bank.

(ii) <u>Intermediary Bank</u>

59. For (a), (b) and (c), the same considerations, with the necessary adaptations, are applicable, though it should be pointed out that in Scenario A there should be no intervention of an Intermediary Bank.

(iii) <u>Beneficiary's Bank</u>

(a) At what moment does the bank accept the Payment Order (i.e. assume any legal commitment to the party giving such Order)? and

(b) At what moment does the bank execute the Payment Order?

60. The same considerations are applicable with the necessary adaptations. The acceptance of the Payment Order will, in the case of the Beneficiary's Bank, result from the credit of the amount to the Beneficiary's account, that is, will be manifested by the execution of the Payment Order.

(c) At what moment is the bank discharged from its obligation - for example, would it be upon delivery of the instructions to effect the payment to the next party in the Credit Transfer chain or would it be upon the Beneficiary receiving value?

61. Irrespective of the conceptual definition of a Credit Transfer, the Beneficiary's Bank will be discharged from its obligation when credit of the amount concerned to the Beneficiary's account has been duly effected pursuant to the terms and conditions set out in the instructions received from the Originator's Bank or the Intermediary's Bank, as the case may be.

(d) In what circumstances, if any, may the Bank refuse to accept or execute the Payment Order?

62. In principle, the Beneficiary's Bank may only refuse to execute the Credit Transfer if the Beneficiary instructed the bank to do so or where the instructions received are deficient and/or unclear (i.e. deficient identification of the account to be credited).

A.9 (a) What contractual duties of care, express or implied, are owed by each party to the transaction to each of the other parties?

Originator to Originator's Bank

63. Further to the general duty to act in good faith, the Originator is subject to the legal regime on mandate, and consequently, as principal, it has the obligation to provide the Originator's Bank with the necessary means for the execution of the Credit Transfer, which basically means the obligation to give complete, clear and timely instructions and the obligation to have the required funds available.

Originator's Bank to Originator

64. Further to the general duty to act in good faith, the Originator's Bank, as attorney is also subject to the legal regime on mandates and, as a banking institution is subject to the specific duties imposed on banks, namely regarding the standard of diligence required in banking activity.

65. As to the mandate rules, the Originator's Bank is mainly subject to the following obligations:

- to carry out acts covered by the mandate (i.e. the Credit Transfer) according to the instructions of the principal (the Payment Order);

- to render all the information requested by the principal regarding the execution of the mandate (i.e. of the execution of the Credit Transfer);

- to inform the principal promptly of the execution of the mandate or of the reason why the mandate was not executed.

Originator's Intermediary Bank to Originator

66. There is no contractual relationship between these two parties and, therefore, there are no duties of contractual nature which would bind the Originator's Intermediary Bank towards the Originator.

67. As to the specific rules on banking institutions, we would point out the obligations to carry out Payment Orders as instructed with accuracy, diligence and promptness.

Originator's Bank to Beneficiary's Bank

68. Since there is no contractual relationship between them, there are no contractual duties to be considered.

The same applies to the reverse situation.

Beneficiary's Intermediary Bank to Originator's Intermediary Bank

69. In our opinion there is no contractual relationship between these two entities and, in consequence, there are no contractual duties from the Beneficiary's Intermediary Bank to the Originator's Intermediary Bank.

Beneficiary to Beneficiary's Bank

70. Theoretically, the considerations made above in relation to the contractual duties of the Originator to the Originator's Bank are applicable (i.e. good faith and legal regime on mandate). However, in practice, we believe that they are not relevant bearing in mind the specific contents of the mandate - receive the monies on behalf of the Beneficiary and credit the same of the Beneficiary's account.

Beneficiary's Bank to Beneficiary

71. Please revert to our analysis on the duties of the Originator's Bank to the Originator.

(b) Does a contract between the participating banks in itself create a contractual nexus between the parties?

72. No. A contract between the participating banks does not create a contractual nexus between the Originator and the Beneficiary.

73. It should however be understood that, according to the rules on mandates, the banks act as attorneys and therefore are bound to transfer to the principal the rights acquired in the execution of the mandate. This means that the relationship between the Banks through which a Credit Transfer is enabled, produces legal effects for both the Beneficiary and the Originator, but it does not create a contractual nexus between them.

(c) Other than contract, what other legal relationships (with attendant duties) can arise between the Originator's Bank and the Beneficiary's Bank?

74. As described above, a Credit Transfer involves a number of contracts between the various parties concerned, namely, deposit contracts between the Originator and the Beneficiary and their respective banks along with the existing mandates between each of them and their respective banks. There may or may not be a written contract between the two banks: currently, in Portugal, to the best of our knowledge, there are no such contracts.

75. In addition, there are contracts for the provision of services executed between the banks and the interbank service company ("SIBS") which is, on its part, contractually engaged by the Bank of Portugal to perform services required in connection with the electronic settlement system.

76. It is obvious that the existence of these many contractual relationships involves multiple rights and obligations of the parties concerned, all of which have a contractual nature, and therefore cannot be addressed in detail under the present question, which refers to legal relationships, "other than a contract".

77. In addition to the contractual relationships and inherent duties described above, there are legal provisions - namely the Bank of Portugal's regulations - which establish a number of rules which are binding on the banks, concerning the settlement system. Breach of any of such rules by any bank may cause extra-contractual liability for any damages incurred by a third party, subject to satisfaction of the applicable legal requirements.

78. Finally, with regard to payment systems, the legal provisions on enrichment without cause may also be applicable. An obligation to reimburse on the basis of enrichment without cause can be established where amounts have been unduly received or received on the basis of a cause or effect which, respectively, ceased to exist or failed to occur. In the context of Credit Transfers, this would be the case where a beneficiary is unduly credited for an amount which is not due to him. However, it should be noted that the legal concept of enrichment without cause is a subsidiary procedure to which one may have recourse only in the event that there is no other legal concept applicable.

A.10 (a) In what circumstances (if any) might the Originator be bound by a Credit Transfer which he has not authorised? (Consider mistake, forgery and fraud.)

Mistake

79. An error in the declaration (i.e. the instructions) enables the party to request the annulment of the agreement if the counterparty knew or should have known that the element in which the error was made was essential to the transaction. This is also applicable to errors in the transmission of the declaration.

80. However, a simple "lapsus linguae" which may be detected in the context in which the declaration is given or through the circumstances in which such declaration is produced, only results in the necessary correction of such error.

81. Therefore, unless the error meets all the legal requirements necessary to annul the declaration, the Originator is bound to the Order.

82. Where the Credit Transfer was not authorised by the Originator, we fail to see how this situation could arise from an act of any other party but the Originator's Bank, which would then be exceeding its powers (i.e. in debiting the Originator's account without the necessary instructions/authorisation).

Forgery

83. As to situations of forgery, we have found no jurisprudence specifically referring to Payment Orders.

84. It may however be of interest to analyse the positions which have been adopted in cases of forgery of cheques.

85. There is a decision of the Lisbon Court of Appeal of 1985 where it is considered that the bank deposit is a special type of deposit which follows so far as possible the legal regime on loans. Therefore, it is a contract which transfers to the bank the ownership of the deposited amounts. The bank is contractually liable to the depositor in the event of payment of forged cheques; where such a payment is made, the party which suffers is, in the first place, the bank and such loss is not to be assigned to the holders of the bank accounts, who are alien to the issue of the cheques. The bank may only act against the person who forged the cheques.

86. However, various other decisions - some of these more recent than the one mentioned above - not only from the Appeal Court but also from the Supreme Court have considered, in summary, that notwithstanding the general rule that the banks should bear any loss resulting from the payment of forged cheques, the banks may be released from such liability provided that they prove that they acted without fault and that the negligent conduct of the depositor has contributed to the irregular Payment.

87. In the absence of specific rules and jurisprudence on Payment Orders we believe that a Court deciding on the matter would follow the same principles.

88. In addition, it should be noted that since the bank is the owner of the amount deposited, the risk of a forgery is transferred to the bank as from the date of the deposit, taking into account the rules on deposits and on loans. The banks incur the loss unless there is a valid authorisation from the depositor to effect payment to a third party but a forged Payment Order is not a valid authorisation. Therefore, even in the absence of fault on the part of the bank, according to the rules of allocation of risk, the bank would suffer any loss resulting from the payment unless the bank is able to prove the depositor's fault.

89. It should also be noted that unlike Payment Orders, the issue of cheques normally implies a commitment by the user to act with diligence in using and keeping such cheques. Banks often include clauses limiting their liability in agreements with customers.

Fraud

90. Fraud ("dolo") is legally defined as any suggestion or artifice someone makes in order intentionally to, induce or maintain the author of a legal instrument in error, as well as the concealment by the counterparty or by a third party of the said error.

91. When the "dolo" comes from a third party, i.e. assuming that it does not come from the Originator's Bank, the Payment Order may only be annulled if the bank knew or should have known of the existence of the fraud; moreover, if someone directly acquired a right as a result of the fraud (i.e. the Beneficiary), such right may be annulled if he was the author of the fraud or knew of it or also if he should have known of it.

92. In conclusion, as far as Payment Orders are concerned, fraud (in the sense that we define "dolo") is only relevant in relation to the Originator's Bank, if the bank knew of it or should have known of it.

(b) On whom is the burden of proving that a Transfer has not been authorised?

93. According to general provisions on the burden of proof, the following rules are applicable:

(i) facts which create the right - the burden of proof lies with the party who alleges the right;

(ii) facts which prevent, modify or extinguish the right - the burden of proof lies with the party against whom the right is alleged;

(iii) in case of doubt on the nature of the facts, these should be regarded as creating the right.

94. In view of the above, the burden of proof regarding the non-authorisation of the Payment Order lies with the Originator.

A.11 If the Credit Transfer is not completed (for whatever reason), is the Originator entitled to have the funds returned to him?

95. Where the transfer is not completed, for whatever reason, and assuming that such reason has nothing to do with the Originator himself, he will be entitled to have the funds returned to him and eventually he may also be entitled to claim compensation for incurred damages.

96. The point is against whom should the Originator claim the return of funds.

97. In our opinion the answer to this question depends again on the legal nature of the obligation undertaken by the Originator's Bank: if it is categorised as an obligation to perform an act, the Originator should be entitled to claim return of the monies from the party which holds the amounts debited from its bank account. In the absence of other grounds, there is always the possibility of invoking the enrichment without cause arguement. The Originator may also be entitled to claim compensation for loss incurred from the negligent party (assuming they are not the same).

98. On the other hand, if one considers the obligation of the Originator's Bank to be an obligation to achieve a result (i.e. completion of the Credit Transfer pursuant to the terms of the Payment Order) then it appears that the Originator may claim the return of the funds (and possible compensation) from the Originator's Bank.

A.12 If the Credit Transfer is delayed or is otherwise mishandled, does any party have a claim for damages in respect of direct and/or consequential loss and/or interest? Can you give examples, with particular reference to any published case law?

99. The same considerations as those mentioned above apply. That is to say that any party in the chain could be liable to a party which suffers loss for negligent or illegal conduct. Under Portuguese law, the damaged party can claim compensation only for the damages which he would probably not have incurred if the act concerned had not occurred. Where this "probability requirement" is met, the claim for damages extends to indirect or consequential damages.

100. We have found no case-law published on this matter.

A.13 Is there in operation a "two tier" system so that the Originator or the Beneficiary has the option to pay a higher fee in respect of a Payment Transfer which excludes a "no liability" clause?

101. We are not aware of the existence of any such "two tier" system. Under Portuguese law, it is illegal to agree on clauses which exclude liability; only clauses limiting liability (to the extent that they do not, in practice, represent an exclusion of liability) are permitted.

A.14 With regard to questions A.11-A.13, are wholesale and retail transactions treated differently?

102. The principles and rules applicable are the same for wholesale and retail transactions.

Cross-Border Payments

Questions relating to Scenario A:

A.15 How would your answers to questions A.1-A.14 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

103. If the Originator's Bank was established outside Portugal in a foreign jurisdiction, the Payment in escudos could only be possible with the intervention of a correspondent Portuguese bank acting on behalf of the Originator's Bank.

104. The answers to questions A.1-A.14 were given on the assumption that Portuguese law is applicable. With the involvement of a foreign jurisdiction, chances are that Portuguese law is not applicable to, at least, part of the operation, and therefore the answers would differ under this scenario.

105. Under Portuguese law, if the parties do not choose the governing law, the law of the residence of the party is applicable to unilateral acts and, in contracts, the law of the common residence of the parties is applicable.

106. If there is no common residence, then the law of the place of execution of the contract is applicable.

107. Taking into account the several contractual relationships involved in the scenario, one may conclude that Portuguese law would, most probably, not be applicable to the contractual deposit relationship between the Originator and its bank and to the respective mandate.

108. In addition the relationship between the said foreign bank and its correspondent in Portugal would have to be analysed in order to establish the law applicable to that relationship under Portuguese rules of conflict.

109. All in all, if the Beneficiary's Bank was established in Portugal, the ultimate Credit Transfer would occur between the Portuguese correspondent bank and the Beneficiary's Bank. This means that though there may be phases of the transaction which escape the applicability of Portuguese law, the ultimate transfer of funds between the correspondent bank and the Beneficiary's Bank, both being located in Portugal, is subject to Portuguese law.

110. In addition, it should be borne in mind that public law rules (as opposed to private law rules) may be applicable in the Portuguese territory independently of what the rules on conflict of laws say. The latter refer to private law only and therefore may not interfere with the territorial application of mandatory public rules.

111. In this scenario the transfer of funds between the correspondent Bank and the Beneficiary's Bank would be carried out in the same way as described in A.1-A.14 above, except for the fact that a declaration for statistical purposes would have to be produced by the Beneficiary's Bank and delivered to the Bank of Portugal.

112. Regarding revocation, it is general practice for Portuguese banks to admit this if the bank has not yet processed the instructions from the foreign bank.

113. The banks normally require such revocation to be carried out in the same form as the Payment Order, i.e. through SWIFT or tested telex.

114. Regarding other relationships in the chain, a number of variations on the original analysis may occur. For example, the underlying contract to which the Credit Transfer relates, which exists between the Beneficiary and the Originator may not, in fact, be subject to Portuguese law but to a different law taking into account Portuguese conflict of laws.

(b) the Beneficiary's Bank was established outside your country in a foreign jurisidiction, but the payment was in the currency of your country?

115. In this scenario, since the payment is also in escudos, the actual transfer is carried out between Portuguese banks, namely between the Originator's Bank and the direct or indirect correspondent in Portugal of the Beneficiary's Bank. Therefore what is said above applies accordingly. The actual transfer of funds, since it is done through Portuguese banks is carried out in the same way as a domestic transfer except for the statistical declaration to be delivered to the Bank of Portugal.

116. In this scenario the difference lies in the fact that it is not a foreign bank instructing its correspondent in Portugal to transfer a credit but a Portuguese bank which receives a credit in its capacity as correspondent of a foreign bank.

117. The accounts of foreign banks with Portuguese banks (in the sense of banks established in Portugal) are not dealt with in the same way by the various Portuguese banks.

118. Some banks send through SWIFT on a daily basis a statement of account for transactions conducted on its behalf to the foreign bank. Others do not send it daily and some do not send such statement of account through SWIFT.

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

and

(d) the Beneficiary's Bank was located outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisidiction (say US$)?

119. Regarding these scenarios, since the payment is carried out in a foreign jurisdiction, the actual netting should be carried out outside Portugal through the respective correspondent banks and therefore would escape the applicability of Portuguese law.

120. Portuguese law would only apply to relationships to which Portuguese law is deemed applicable under Portuguese rules on conflict of laws. For instance in (d) the relationship between the Originator and the Originator's Bank would, most probably, be subject to Portuguese law.

121. Regarding the means used for the transfer, it should be noted that in (d) the instructions of the Originator's Bank to the correspondent bank to carry out the transfer would be done through SWIFT or tested telex.

122. In (c), the Beneficiary's Bank established in Portugal would have its account credited by a foreign correspondent bank (though in practice this may happen indirectly with the intervention of several Intermediary Banks).

123. In conclusion, it may be said that in respect to all the scenarios in question A.15 the main issue is to determine the applicable law. It may so happen that Portuguese rules on conflict of laws consider foreign laws to be applicable. It should be noted that the rules on conflict of laws often take into account what foreign rules on conflict of laws apply in a certain situation. These data are important under Portuguese law, as it may be decisive for the definite determination of which law is applicable to know what law in a foreign jurisdiction would apply in a certain situation.

INTER-PARTY RELATIONS 2: SETTLEMENT OF CREDIT TRANSFERS

Finality

Questions relating to Scenario A:

A.16 When is the Credit Transfer considered to have been completed:

(a) as between Originator and Beneficiary?

124. The Credit Transfer between Originator and Beneficiary is completed at the moment when the Beneficiary's account is credited in accordance with the Payment Order.

(b) as between the participating banks (including any Intermediary Banks)?

125. The Credit Transfer itself is only completed as per (a) above. What we may do is to separate different stages of the Credit Transfer and determine the moment when each is accomplished. We assume that this question refers to the accomplishment of the transfer of funds between the Originator's Bank and the Beneficiary's Bank, which occurs at the moment when the account of the former with the Bank of Portugal is debited and the account of the latter with the Bank of Portugal is credited. The same applies to any Intermediary Bank.

A.17 When completed, is the Credit Transfer:

(a) recognised as discharging the underlying obligations as between the Originator and the Beneficiary?

and

(b) treated as legal tender?

126. The answer to question (a) depends on the contractual provisions established between the parties and the conditions under which the underlying obligation is to be fulfilled. It is quite common for a Credit Transfer to a predetermined bank account of the Beneficiary to be agreed by the parties as the means of payment to be followed in a transaction.

127. Should this be the case, naturally the underlying obligation is discharged at the moment when the referred Beneficiary's account is credited pursuant to the terms and conditions contractually agreed (namely as regards the amount to be credited and the value-dating).

128. If some other means of payment has been contractually agreed - i.e. in cash at a certain place and date - payment by Credit Transfer will only discharge the underlying obligation if the Beneficiary accepts it as such.

129. In the absence of a contractual provision on this point, it should be noted that according to civil law, pecuniary obligations should be fulfilled in the domicile of the creditor, and therefore in this case, the law on this point will also apply.

130. In conclusion, it appears that in practice Credit Transfers are accepted by creditors as a proper means of payment even if this has not been contractually agreed but according to law creditors are not bound to accept this as such. Therefore, Credit Transfers are not legal tender unless otherwise expressly or tacitly agreed between the parties.

131. Finally, it should be noted that the agreement between the parties regarding the Credit Transfer may simply result from the indication by the creditor to the debtor of his account number for a particular payment.

Questions relating to Scenario B:

B.1 When is the Credit Transfer completed as between the participating banks?

132. The Credit Transfer between the participating banks is completed when credit of the outstanding amount is made to the Beneficiary's Bank account with the Bank of Portugal.

B.2 When completed, is the Credit Transfer treated as having discharged the two banks from any obligations towards each other?

133. The two banks will be discharged from any obligations towards each other provided that the Credit Transfer has been carried out and completed pursuant to the terms and conditions agreed between them and that no breach of any legal or contractual duty has occurred.

Questions relating to Scenario C:

C.1 When is the Credit Transfer completed as between the participating banks?

and

C.2 When completed is the Credit Transfer treated as having discharged the two Banks from any obligation towards each other?

134. To the best of our knowledge there are not in existence formal contracts nor Club Rules and therefore scenario C cannot be considered. The contracts for the rendering of services between SIBS and the banks and SIBS and the Bank of Portugal relate to technical aspects which in our opinion are not relevant to the question under analysis. As for Bank of Portugal transfers those are subject to its own regulations and not to contractual provisions.

135. It is difficult to comment on the hypothetical situation of Club Rules/formal contract, since obviously that would depend on the contents thereof.

Cross-Border Payments

A.18 How would your answers to Questions A.16 and A.17 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(b) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of your country?

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another jurisdiction (say US$)?

(d) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another jurisdiction (say US$)?

136. First of all it is necessary to determine the law applying to the underlying contract which eventually exists between the Originator and the Beneficiary. Depending on such law, answers to questions A.16(a) and A.17(a)(b) would differ in respect to the scenarios set out in (a), (b), (c) and (d) of A.18.

137. As to question A.16(b) since there are foreign banks involved, chances are that Portuguese law would recognise the application of a foreign law to the situation and, therefore, accept the application of a foreign law's concept of Credit Transfer.

138. But regarding the scenarios set out in A.18(a) and (b), the answer to question A.16(b) would not differ as the actual netting is carried out in Portugal between banks established in Portugal and, therefore, this particular relationship is governed by Portuguese law.

Settlement in general

Questions relating to Scenario A:

A.19 Assuming that the Payment Order is in the currency of your own country, must Settlement be effected in any particular way as between the Originator's Bank and the Beneficiary's Bank? For example:

(a) by a credit entry to an account kept by the Beneficiary's Bank at the Originator's Bank;

(b) by a debit entry to an account kept by the Originator's Bank at the Beneficiary's Bank;

(c) debit and credit entries to the accounts of the two Banks kept at a correspondent commercial bank;

139. As a rule, Credit Transfers are made through SIBS and settled through the banks' accounts with the Bank of Portugal.

140. The methods described in (a), (b) and (c) are possible but they should be regarded as exceptional.

(d) debit and credit entries to accounts kept by the two banks of your country's central bank;

141. As results from the above response, this method is the usual method adopted by the Banks for Credit Transfers.

(e) some other method.

142. There are no other methods.

A.20 Explain what different rights may arise in respect of each method of settlement employed in your country.

143. Basically, the differences between each method of settlement relate to operational aspects (which have consequences for the cost and efficiency of the Credit Transfer). Naturally, the rights of each party in respect of each method of settlement depend on the conditions agreed between the participants, and regarding method (d) the operational rules established by SIBS and the Bank of Portugal have to be taken into account. Ultimately, the material rights of the participants should not be affected as a consequence of the method adopted by them.

Cross-Border Settlement

Questions relating to Scenario A:

A.21 How would your answers to questions A.19 and A.20 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(b) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of your country?

144. In both cases, the ultimate settlement would be done between two Portuguese banks. Therefore, what is said in A.19 above applies accordingly.

145. Since the payment would be in escudos, then the settlement is carried out between a corespondent bank in Portugal of the Originator's Bank (in question A.21(a)) and the Beneficiary's Bank. In question A.21(b) the reverse would happen. In each case the settlement of the currency would be carried out through the accounts of two Portuguese banks with the Bank of Portugal.

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another jurisdiction (say US$)?

(d) the Beneficiary's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another jurisdiction (say US$)?

146. In these scenarios the ultimate settlement should be carried out in the jurisdiction of the respective currency. If effected in US$, it would be through the accounts of each correspondent bank in the U.S. with the Central Bank, except if there is a common correspondent. In this case, settlement would be effected within the accounts of such correspondent.

Netting

Questions relating to Scenario B:

B.3 Does the informal netting arrangement between Bank A and Bank B have any legal effect? Can it be justified by applying any legal concept other than set-off?

147. It appears that in practice there are no netting arrangements between the Banks. All the credits and debits are duly processed, and ultimately settled by the Bank of Portugal.

148. However, considering in theory the existence of any such netting arrangement, the legal concept of set-off would be applicable.

B.4 Assuming that the netting arrangement is legally binding, is it subject to any limitation? For example, must the debts either way be "mutual"? Is it

possible in certain circumstances for other claims between the two Banks to be brought into the netting arrangement?

149. The limitations legally imposed on set-off are that (i) the credits are legally valid, (ii) there is no "exception" which may be invoked against them and (iii) the obligations to set-off relates to fungible assets of the same type and quality. There is no requirement for the debts to be "mutual", assuming that "mutuality" is used in the sense of "connection" between the obligations.

150. The possibility of including other claims in the netting arrangement requires the agreement of all parties to such arrangement. Otherwise, such other claims could only be set off against a claim covered by the netting arrangement under the general legal regime on set-off, where the respective legal requirements, as described above, are met.

151. Apart from any netting arrangements, and within the scope of the Bank of Portugal netting system, banks must comply with the regulations applicable thereto.

B.5 Would your answer be different if the payments made either way were in a currency other than your own - or if the payments from Bank A were in your currency or a foreign currency and the payments from Bank B were in a different foreign currency (say US$)?

152. From a legal point of view, there is no impediment to the execution of a netting arrangement concerning payments in different currencies. Anyway, the set-off would imply the previous exchange of currency at a determined exchange rate in order to allow the respective set-off.

B.6 At what moment are the underlying obligations of the parties (taking the Originator, the Originator's Bank and the Beneficiary's Bank separately) discharged?

153. The considerations outlined above on discharge of the obligations of the parties are applicable. In this respect, please revert to our answers to question A.17(a), regarding the discharge of the underlying obligations of the Originator, to question A.8(i)(c) regarding the discharge of the obligations of the Originator's Bank and to questions A.8(iii)(c) and (ii)(c) on what concerns the Beneficiary's Bank and Intermediary Banks.

B.7 **How would your answers to questions B.3-B.5 differ if Bank B were established outside your country in a foreign jurisdiction?**

154. Once again this is a question of International Private Law since if Bank B is established in a foreign jurisdiction, a foreign law may be applicable, which makes the answers uncertain as they would depend on the applicable law.

155. In any case, the actual netting would always have to be effected through a correspondent bank in Portugal, which is a participant in the domestic clearing system.

C.3 **Having touched upon (briefly) any particular agreement or set of Club Rules which might be applicable, state whether or not they are enforceable as a matter of law - or do they constitute an agreed practice without being binding as a matter of law?**

C.4 **What is the effect of the netting arrangement on any underlying transactions?**

(a) **Is it possible to vary the contract or the Club Rules? If so, how can this be achieved?**

(b) **Does a single obligation to make a net payment replace the bilateral obligations as between the two Banks? If this concept is recognised under your law, is it treated as a novation?**

C.5 **How would your response to question C.2 differ if Bank B were established outside your country in a foreign jurisdiction?**

156. Not applicable.

Questions relating to Scenario D:

D.1 **At the end of the banking day, are the respective net positions enforceable as a matter of law between the participating banks?**

D.2 **(a)** **Is any obligation of Bank A to pay Bank B enforceable?**

(b) If so, is this dependent upon the nature of the specific contractual arrangements which exist between them or any Club Rules or anything else?

(c) Is multilateral netting by novation possible, without the substitution of an intermediary (such as a Central Bank) as counterparty? (See also C.2 above.)

157 All Credit Transfers are communicated to the Bank of Portugal which, at the end of the banking day (3.30pm) informs the banks of the respective net position. The Bank of Portugal does not establish each bank's net position throughout the banking day.

158. This system involves a risk since only at the closing of the banking day, will the bank which is creditor be aware that the bank which is debtor does not have the funds required in order to meet its commitment.

159. In practice, what happens when this situation occurs is that the Bank of Portugal calls the bank which is debtor and requests the bank immediately to provide the necessary funds to be credited to its account with the Bank of Portugal. To the best of our knowledge, this situation sometimes occurs, but as of today there has been no major problem, since the debtor banks concerned have always provided the necessary funds immediately upon the request of the Bank of Portugal.

160. The critics of this "closing of the day" system argue that if a bank which, by the end of the day, has a negative net position, has no funds available in order to remedy the situation as requested by the Bank of Portugal, this may cause a "snowball effect" bearing in mind that at the time the creditor bank becomes aware of the situation it will be impossible to obtain any funds in the market, as this is already closed. Therefore, if the creditor bank has made Credit Transfers counting on the funds concerned, this will cause a chain of negative net positions.

161. It is unclear whether the correct analysis is that Bank A has an obligation to pay Bank B the specific Credit Transfer as instructed by the Originator, or whether such obligation should be considered as "substituted" by the obligation, to the Bank of Portugal, to have the necessary funds in its account in order to cover its negative net position at the "close of the day". As mentioned above, failure by any bank to

comply with the obligation to cover the negative net position at the "close of the day" has never occurred, as this is solved in one of the following ways:

- either the Bank of Portugal will annull one payment operation provided that such annulment will not cause conseqential negative net position (snowball effect); or

- the bank concerned obtains the necessary funds from another bank.

162. Should there be an unremedied situation of a negative net position then article no. 16 of Regulation S-0518.I-1 would be applicable.

163. Under this provision "the lack or insufficiency of funds in the respective account with the Bank of Portugal necessary to settle the account balance which is not remedied within the time limits fixed by the Bank of Portugal will result in review of the netting situation of the defaulting credit institution and the automatic suspension of it from the netting system".

164. In this case "there will be a special netting which will try to exclude all the amounts presented by the defaulting participant and to exclude the amounts which, on the account and under the responsibility of such participant, should have been liquidated through netting. The respective supporting documents are excluded and returned to the credit institutions which have presented such documents".

165. Anyway, the Bank of Portugal only effects the credit to the account of the Beneficiary's Bank if the debtor has the necessary funds in its account.

166. The Bank of Portugal is currently developing a new system which will only be applicable to large Credit Transfers in order to reduce this risk. Under this new system, the netting will be effected throughout the day and the participating banks will be informed on a real time basis.

SYSTEMIC RISK: INSOLVENCY

Questions relating to Scenario A:

Preliminary note:

167. Section VIII of the RGICSF regulates the recovery of credit institutions establishing a number of measures which the Bank of Portugal may adopt "in order to protect the interests of depositors, investors and other creditors and to safeguard the normal conditions of the monetary, financial and exchange markets".

168. According to these rules, where the situation arises whereby a credit institution may fail to fulfill its obligations or it is anticipated that there is a risk that this situation will occur, the board of directors or the supervising board must immediately notify such fact to the Bank of Portugal. It should be noted that if the board of directors or the supervising board does not make this notification, any member of such boards individually has the obligation to do so.

169. The notification mentioned above should include a report on the existing situation and a list of the main creditors with an indication of their respective places of residence.

170. Amongst the various measures which may be adopted, the Bank of Portugal may appoint one or more directors namely when there is a risk that the credit institution might cease payments. A supervising committee may also be appointed by the Bank of Portugal.

171. Together with the appointment of the directors, the Bank of Portugal may determine that the credit institution will temporarily cease to fulfill existing obligations. This "suspension" may be determined for a maximum period of one year, renewable once.

172. The liquidation procedure will only be initiated if it is not possible to reactivate the credit institution with the measures adopted by the Bank of Portugal. This liquidation procedure is regulated by a separate decree, specifically applicable to credit institutions.

A.22 Who bears the risk of closure of the Originator's Bank - the Originator, the Beneficiary's Bank, or the Beneficiary? (Assume that the payment is made in the currency of your own country.)

173. From a practical point of view, it should be noted that, given the procedure mentioned above, it is unlikely that a bank is "closed" pending making Payment Orders.

174. Anyway, should this situation occur before Settlement has been effected between the Originator's Bank and the Beneficiary's Bank, it appears that the risk of closure will be borne by the Originator who will have a claim against his Bank (creditor's claim against the bankruptcy estate).

175. In addition, and since the Originator will only be discharged upon credit of the Beneficiary's account (i.e. upon completion of the Credit Transfer), the Beneficiary will still have a claim against the Originator on the basis of unfulfillment of the underlying obligation.

A.23 In what circumstances might a receiver be able to bring a claim based on fraudulent preference or preferential transfer otherwise seek to set aside or claw back any payment?

176. The liquidation committee is entitled to cause the annulment or judicial termination of acts which cause damage to the bankruptcy estate (in this respect, see our comments in point A.7(a) above).

177. Also all acts which would be subject, under civil law, to the institute of "impugnaçào pauliana" may be annulled or judicially terminated. The circumstances in which such possibility occurs under civil law, are the following:

(a) where the credit existed before the act to be annulled or, if it is subsequent, where the act was carried out with the intention of preventing the satisfaction of the rights of future creditors;

(b) where the impossibility of the creditor obtaining satisfaction of his credit results from the act.

178. It should be noted that under the Bankruptcy Code there is a presumption of bad faith, or payment or set-off of a debt whether or not due during the year preceding the announcement of the bankruptcy procedure with assets which usually would not be used for that purpose.

179. The specific case of Credit Transfers is not legally addressed. But it may be challenged as any other "act" if any of the legal situations described above apply.

A.24 Can the receiver avail himself of any zero hour rule in the winding-up to challenge payments which have been made?

180. There is no zero hour rule in the winding-up to challenge payments which have been made. Naturally, no payments can be made after the decree which determines the liquidation.

Questions relating to Scenario B:

Assume that Bank A is closed and a receiver is appointed, by a Court or other competent authority, to wind up it affairs after all Credit Transfers have been effected between it and Bank B that banking day:

B.8 Is Bank A liable for the net amount or can the receiver disclaim Bank A's obligations and compel Bank B to pay the gross amount of the Credit Transfers issued by it in favour of Bank B?

181. After the liquidation of the bank has been ordered (which will occur if and when the bank is unable to re-establish its normal condition) a liquidation committee will be appointed.

182. As indicated above, there are some specific situations where the liquidation committee may cause the annullment or judicial termination of acts which cause damage to the bankruptcy estate. It appears, however, that the situation as described would not be affected by this possibility.

B.9 Is netting - or any form of set-off - available after Bank A has closed?

183. According to the legal regime on bankruptcy of banking institutions, any set-off which would have occurred before the suspension of payments, pursuant to the

applicable provisions of the Civil Code, will be taken into account in the verification of credits, after the declaration of bankruptcy.

184. Where there are reciprocal credits which may not be set off as previously discussed above, the debtor must pay to the bankruptcy estate its total debt and, there being no priority of preference, it will receive as payment of its credit only the percentage to which it is entitled.

185 In addition, it should be noted that any debtor to the bankruptcy estate who wants to operate a set-off has the burden of proof of showing that its crediits already existed at the date of suspension of payment by the bank.

186. The suspension of payments by a bank has to be ordered by the public authorities. It may so happen that the suspension is ordered for the future and that it does not affect transfers already ordered and subject to subsequent netting. These past transfers would have to be challenged as described above.

187. Where suspension is ordered and effective before an actual netting is carried out with the Bank of Portugal, then the Beneficiaries of such Transfers will remain creditors of the bankruptcy estate.

188. In this respect article 16 of Regulation S-0518.I-1 described above in D.2 should be taken into account. This provision relates to the suspension of credit institutions from the netting system.

Questions relating to Scenario C:

Assume Bank A is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after all Credit Transfers have been effected that banking day:-

C.6 Is the receiver bound by the netting arrangements which exist - or under your country's insolvency law can he unravel them?

C.7 What restrictions or conditions (if any) are imposed on the process of contract novation by your country's bankruptcy law?

189. Not applicable.

Questions relating to Scenario D:

D.3 Are the end-of-day-net positions as between the three banks legally binding?

D.4 (a) Can the receiver disclaim the Credit Transfers made during the course of that banking day by Bank A, but affirm the Credit Transfers made to it?

(b) Can the receiver unravel the netting arrangement by "cherry picking"?

(c) Can the receiver avail himself of any zero-hour rule in the winding-up to challenge payments which have been made?

190. A multilateral scenario does not affect the principles and legal rules described in answers to questions A.22-B.9 which will be applicable where one of the banks involved is declared bankrupt.

191. In particular, any payments made could only be challenged by the liquidation committee according to the terms already explained above.

192. Regarding the specific question set out in D.5 it should be pointed out that the net positions of the banks have legal effects since such positions are relevant in respect to the application of article 16 of Regulation S-0518.I-1 of the Bank of Portugal. The liquidation committee has no power to decide/effect payments until the decision, verification and ranking of credits is rendered.

Therefore, our answer to question D.6(b) would be negative.

D.5 Identify the netting arrangements (bilateral, multilateral, by novation or otherwise) which would be effective in the insolvency of any of the participating banks.

193. As from the bankruptcy declaration a bank may no longer participate in a netting arrangement, as all payments will be subsequent to the decision on the ranking of credits mentioned above. The liquidation committee has the powers to negotiate and agree with the debtors to the bankrupt institution on the means and form of payment of the debts.

SECTION II

COMPARISONS WITH UNCITRAL MODEL LAW

To what extent does your existing law reflect, conflict with or remain silent in respect of any of the matters covered by the provisions of the UNCITRAL Model Law on International Credit Transfers?

If the UNCITRAL Model Law were to be brought into force, and were to apply to consumers, how would the protection which it would offer to consumers differ from the protection already available under existing laws?

Taking the Model Law article by article:

Article 1

194. There is no Portuguese law or decree specifically addressing the sphere of application.

Article 2

195. The concepts defined in this article are not the subject of a legal definition under the Portuguese law. The definitions proposed do not, in our view, contradict the current practice.

Article 3

196. Under Portuguese law, conditional instructions are not subject to any specific legal provisions.

However, on the basis of general civil law, we would define a conditional instruction as an instruction which is subject to a suspensive condition. This means that, until the condition concerned is verified, the instruction cannot produce any effects. In this line, in the situation foreseen in Article 3, what would occur would be that the sender should not be affected by the fact that the bank executed an unconditional payment order.

Article 4

197. It is in accordance with the general principle of Portuguese Civil Law of contractual freedom of the parties, without prejudice to the mandatory rules applicable.

Article 5

198. Basically it is in line with the solutions which would result from the application of general civil rules, though the UNCITRAL provision covers a highly detailed situation for which there is no jurisprudence. The notion of "commercially reasonable" would substitute the notion currently adopted which is the due diligence of a "bonus pater familiae".

Finally, it should be noted that under Portuguese law the sender could claim the reimbursement of the amount concerned from the Beneficiary on the basis of enrichment without cause.

Article 6

199. Currently, payment to the receiving bank occurs in the situation described in point b) (iii), and exceptionally in the one described in point b) (iv)(b).

Article 7

200. This provision elaborates on the obligations of an Intermediary Bank which are not specifically addressed by the Portuguese law, namely on what concerns time-limits and required proceedings. However, in our opinion the proposed regime is consistent with the current practice and general principles and rules applicable.

Articles 8 and 9

201. The same comments as above mentioned in relation to Article 7.

Articles 10 and 11

202. The obligations provided in these articles are in line with the current obligations which result from the general duty of diligence imposed by the bank. According to general rules on mandate the payment order should be executed with promptness.

Article 12

203. It is in line with current practice in Portugal, with the difference that the right of revocation is accepted until the moment when the Beneficiary's account is credited.

Article 13

204. This provision would not contradict Portuguese law and practice.

Article 14

205. If the Credit Transfer is not completed, the Originator is entitled to reimbursement. To what extent the Originator may claim these reimbursement from any of the banks involved is a controversial issue which is related to the concept of Credit Transfers as involving an obligation of means or an obligation of result.

Article 15

206. Though the issue is not specifically addressed by Portuguese law, this provision is consistent with general principles and practice.

Article 16

207. It is in accordance with Portuguese law.

Article 17 and 18

208. Under Portuguese law, the Beneficiary would be entitled to a compensation for the damages caused - and which we would have to prove - by the delay in the execution of the transfer. This compensation would be due by the party responsible for such delay.

Furthermore, it should be noted that though it is possible to contractually establish a limitation of responsibility, such limitation must not represent, in practice, an exclusion of responsibility , that is, a situation where the compensation provided is clearly unproportionate to the damages concerned.

Article 19

209. This provision establishing the moment when the Credit transfer is completed is not in compliance with the generally accepted understanding that completion occurs upon the crediting of the Beneficiary's account.

CONCLUSIONS

Are there any other relevant issues affecting Credit Transfers and their settlement not addressed? Please list them briefly.

Please list briefly what you consider to be the most important issues affecting Credit Transfers and their settlement. In respect of each of these issues, listed in order of importance, please consider whether harmonisation might assist in the development of European payment systems.

210. In our opinion, all relevant issues which affect Credit Transfers and their settlement have been addressed.

211. As indicated, there is no specific legal regime, jurisprudence nor relevant doctrine on this area.

212. At a time when Credit Transfers have became a common means of payment involving sophisticated mechanisms aimed at achieving the highest efficiency, it appears to us that there should be major concern about the consumer's protection, i.e. the customer's - Originator and Beneficiary - protection.

213. In fact, it is clear that in the absence of specific laws, the "rules" tend to be established by the banks themselves, thus creating a "banking practice" against which the customer is powerless. It also seems clear that such "banking practice" goes along with the banks' interests and the protection of the customers' interests has to be based on general principles and rules - namely contractual and extra-contractual liability, obligations of the attorney pursuant to the legal regime on mandate, etc. - which, given the particular nature and very specific characteristics of the transactions concerned, may sometimes be very difficult to adapt.

214. In conclusion, in our opinion there should be major concern over the definition of rules clearly setting out certain aspects which should not be left to "banking practice", such as the definition of delays in effecting the Credit Transfer (as there are already for the credit of cheques), and the rights of the customers (and corresponding liabilities of the banks) where such rules are not fulfilled by the banks.

215. All in all, it seems that at this stage, the priority should be the definition of rules to be followed by the banks in the day-to-day operational aspects, and more so than the definition of rules to apply in specific situations, which will rarely occur - such as bankruptcy - and in which it will be easier to apply, with the necessary adaptations, the existing laws and regulations (and not "banking practice").

SPAIN

CREDIT TRANSFERS AND THEIR SETTLEMENT:

SPAIN

ESTUDIO LEGAL

INTRODUCTION

1. PREAMBLE

This report analyses the situation of Spanish legislation on bank transfers, in reply to the questions raised by the Commission of the European Economic Community.

It should be noted "that Spanish banking laws have been subject to an increasingly clear intervention by the Administration in banking activity, which has resulted in a number of provisions forming a complete banking discipline, which has changed from being voluntary, at first, to being binding on private banks" (Judgement of the Supreme Court of May 1st, 1982).

"The new guidelines on bank contracting and liberalisation of the banking market, which have increased the rights of bank customers in respect, among other things, of the value dates in transfer operations, are set out in the Order issued by the Ministry of Economy and Finance on December 12, 1989, deriving from Act 26/1988 of July 29 and the Bank of Spain Circular no. 9/1990 of September 7, all of which contain clear interpretative elements that may be assumed in pursuance of Article 3.1 of the Civil Code" (Judgement of the Provincial Court of Bilbao of November 29th, 1991).

2. BANK CLEARING: GENERAL ASPECTS

Bank clearing as normally understood is multilateral, that is, performed by all credit institutions among themselves. At present, bank clearing is performed in two different ways: firstly, at the clearing houses, by means of a physical exchange of documents or magnetic tapes containing the details of documents; and secondly, in the National Electronic Clearing System by exchanging the details of documents to be cleared through computer connections.

In order to be able to cancel debts and credits through clearing using the physical exchange of documents or magnetic tapes, the credit institutions join a clearing house. The accession agreement establishes that clearing will be performed in the clearing house, which operates as an intermediary between all the member credit institutions, being subrogated in the credit and debit positions of each such institution in respect of the others. For each credit institution, a distinction is made between the amount of the documents presented for clearing and the amount of

those received in other credit institutions for clearing. This produces a balance, of which the clearing house informs the Bank of Spain in the town in which it is located, for recording in the ad hoc current account, called inter-bank settlement accounts. Most of the credit institutions co-operating in the catchment area of a clearing house are members of that clearing house. Bills of exchange, promissory notes, cheques and debits for bank domiciliations, among others, are presented for clearing, in the form of physical documents or on magnetic tapes containing the relevant details of the documents subject to clearing.

Clearing by means of the exchange of details of the relevant documents through computer connections is performed through the National Electronic Clearing System. In this system, the details of the documents presented for clearing are transferred directly, with no intermediaries, between the computers of member banks. Just as in the other forms of clearing, the balances of the exchanges are settled through the inter-bank settlement accounts held by the credit institutions with the Bank of Spain. Bills of exchange, promissory notes, cheques, transfers, payment orders, debits for domiciliations, bills, payments made by means of cards, withdrawals of cash through computer equipment, reimbursements of inter-bank refunds and specific use cheques may all be cleared through the National Electronic Clearing System. There is no centralised clearing house in the National Electronic Clearing System, but rather each member bank transfers directly to the other banks, through electronic channels, the details corresponding to the documents that they have for exchange. The physical circulation of the documents is truncated in this system. In order to protect the legal actions incorporated in each document, the member banks have agreed that the other member banks are their attorneys, whereby the admittance of a given document by any one of them produces the same effects as if that document had been presented physically at the drawee bank.

a. Clearing through the physical exchange of documents at clearing houses

The existence of clearing houses makes it possible to avoid or reduce the payments made between the different credit institutions, by means of bank clearing. Houses are regulated in the Royal Order of February 10, 1923, establishing the bases for their creation; the Resolution adopted by the Higher Bank Board on March 16, 1923 and the Order of February 2, 1949 on the up-dating of provisions on bank clearing.

Clearing houses are set up by the Higher Bank Board (Base 2 of the Royal Order of February 10, 1923). They have the legal form of Associations (Article 5 of the Order of February 2, 1949) and, therefore, have legal personality. Each clearing house has a specific catchment area, which may be a single town or city, several villages or towns or all villages and towns in a given province. At present, there are clearing houses in all the provincial capitals and Ceuta. The internal regulations of clearing houses must be based on those approved by the Higher Bank Board on December 21, 1987.

At present, any credit institution may be a member of the clearing houses. The use of clearing houses by member credit institutions for the clearing of their reciprocal obligations is not voluntary, but "is preferential and excludes any others" (Article 2 of the Order of February 2, 1949). The reciprocal obligations subject to clearing are those "checked and recognised" between the credit institutions, acting on their own behalf or for their branches, agencies and customers, or on behalf of other credit institutions (Article 6 of the Order of February 2, 1949). The different stages of bank clearing are described in the same article and provision and may be broken down into the following time sequences:

(a) Activity initiated by the credit institution presenting documents for clearing:

1. Concentration of own documents, those of its branches, agencies and customers and those of credit institutions represented.

2. Classification of documents by paying entities.

3. Presentation of the documents, duly classified in listings, at the clearing houses.

(b) Activity induced in other credit institutions:

4. Admission for clearing of the documents presented at the clearing house by the other credit institutions.

5. Determination of the balance resulting from clearing with other credit institutions.

As a result of the exchange of documents, each credit institution will have credit or debit balances with the other institutions. Each credit institution will compile these balances into a single credit or debit balance with the clearing house, which "personifies the clearing entity" (Base 3 of the Royal Order of February 10, 1923). The latter balance will be settled through the accounts that the clearing house and credit institutions have at the Bank of Spain. Every day, after all the settlements have been made, the current account that the clearing house has open at the Bank of Spain will be balanced. For this purpose, the clearing house is authorised by each credit institution, when the latter signs its accession agreement, whereby it may order the Bank of Spain to debit or credit the inter-bank settlement account that each member credit institution has at the latter, to cancel its credit or debit positions in respect of the clearing house. Bank clearing as such is produced when "the clearing houses assume the role of creditors of all final amounts receivable and debtors of all final amounts payable" of the clearing credit institutions (Article 6 of the Order of February 2, 1949). Legally, the clearing is not considered concluded until the Bank of Spain has approved all the payment and collection orders received. Until that time, the clearing house will, to all legal effects, be the sole proprietor of the documents submitted for settlement and the members holding them will be mere depositories of such documents.

The credit institutions participating in a clearing house must assume "unconditionally and without reservation, all obligations and liabilities deriving from all operations in which they participate, in their own name or as representatives" (Article 4.8, Resolution of the Higher Bank Board of March 16, 1923.)

The credit institutions that have joined by means of an agreement participate in the operating system of the Inter-bank Co-operation Centre. The clearing process is performed in two phases. In the first, the entity holding the documents subject to clearing transcribes the details of such documents onto magnetic tapes. From then on, the circulation of the documents subject to clearing is interrupted and they are deposited at the offices of the holder. This interruption of circulation is called truncation. The magnetic tapes containing the details of the documents subject to clearing are exchanged among the entities participating in one of the three Data-Processing Centres of the Inter-bank Co-operation Centre, situated in Madrid, Barcelona and Bilbao. In the second phase, the results of the exchanges made at the data-processing centres are incorporated on other magnetic tapes, which are

presented at the clearing houses of Madrid, Barcelona and Bilbao, like any other physical document.

b. National Electronic Clearing System

Royal Decree 1369/1987 of September 18 created a state service at the Bank of Spain, called the National Electronic Clearing System, whereby documents, means of payment and transfers of funds presented in the system are cleared electronically. The National Electronic Clearing System, as a service of the Bank of Spain, has no independent legal personality; the administration and management of the service corresponds to the Bank of Spain. In order to be able to participate in the National Electronic Clearing System, entities must join by means of a contract signed with the Bank of Spain. All credit institutions may opt to join the National Electronic Clearing System. In the accession agreement, the credit institution acknowledges, accepts and submits itself to the rules of the National Electronic Clearing System, assumes responsibility for participating in the System and accepts the system of penalisation and arbitration for the resolution of irregularities. Every time a credit institution joins or leaves the National Electronic Clearing System the relevant notice is published in the Official State Gazette (Article 3.2 of Royal Decree 1369/1987).

The National Electronic Clearing System operates throughout Spain, hence a credit institution may, wherever it is installed in Spain, present any document included in the system for clearing, irrespective of where it has been issued or taken. Consequently, any member credit institution may remit through electronic channels all the information that it presents to the other credit institutions, and receive through the channels all information remitted to it by the other credit institutions. The National Electronic Clearing System is a clearing house which, due to its electronic nature, does not need to occupy a given physical space. The balances of each member entity in respect of the other members are established at the Bank of Spain.

The Electronic Clearing System is designed to be generalised, clearing all kinds of documents that may be classified as means of payment. In particular, the documents, means of payment and transfers of funds admissible for clearing in the National Electronic Clearing System include bills of exchange, promissory notes, cheques, transfers, payment orders, debits for domiciliations, bills acting as drafts, etc. (Article 1 of Royal Decree 1369/1987; Article 1 of the Order of February 29,

1988.) The Bank of Spain may, when it considers this necessary in view of the evolution of the economic-financial environment, propose extending or modifying the documents, means of payment and transfers of funds admissible for clearing through the National Electronic Clearing System.

The Regulations of the National Electronic Clearing System were approved in Bank of Spain Circular no. 8/1988 of June 14. The System is defined as "the general framework within which, according to the operational and functional outline set forth in the Regulations, credit and savings institutions carry out the clearing of means of payment in Spain, through electronic systems and procedures".

"The operational and functional outline" is "the set of automatic processes and the means of transmission that connect any two of such processes required to achieve the full processing of an inter-bank operation, from when it is introduced into the System by the member presenting it until, after the receiving member has been notified, individually or together with others of the same nature, it is settled and converted into a balance that the Bank of Spain shall, where appropriate, record in the account of the two entities".

The National Electronic Clearing System comprises the National Exchange System and the National Settlement System. The National Exchange System is the set of automatic processes that the member credit institutions carry out within the National System in order to communicate operations between them. These processes are, in turn, grouped into exchange sub-systems.

An exchange sub-system is a set of automatic processes specialised in the full processing of only one kind of inter-bank operation, which may be bills of exchange, cheques, transfers, etc. The exchange sub-systems may be general or specific. The internal operation of a general is regulated by the rules of the National Electronic Clearing System and there may not be more than one such sub-system for the processing of any particular kind of operation. The internal operation of a specific sub-system is based on rules agreed by the entities participating in it; however, these sub-systems settle their accounts through the National Settlement System, remitting the resulting operational totals to the settlement services. Despite its specific nature, a sub-system of this kind may cover all kinds of geographical areas within the country.

The sub-systems may have two forms of exchange: bilateral and multilateral. With bilateral exchange, the exchanges of operations of a sub-system are made directly between the data-processing centres of the members, without going through a common centre. With multilateral exchange, the operations are exchanged through a common centre, to which the members of the sub-system remit the operations presented against the remaining entities, and the centre forwards such operations to the respective receiving entities.

The National Electronic Clearing System operates all year round, 24-hours a day, except on Saturdays, Sundays and national holidays, hence it is potentially available for any or several of its components to be working at any time whatsoever. However, each exchange sub-system, within its rules of operation, establishes a schedule and hours for activities.

The Bank of Spain has provided the National Electronic Clearing System with different internal standards for operation, which are binding on member credit institutions. The standard for transfers is SNCE-003 (Bank of Spain Circular number 5/1991 of July 26).

The National Settlement System is the set of automatic processes performed by the data-processing centre of the Bank of Spain to settle the totals produced in each exchange sub-system and obtain the relevant balances. The rules of operation establish the schedule and hours for operation, such that within the aforesaid hours, each exchange sub-system is assigned a period of time within which it must make settlement and, in particular, when the operation totals must be transferred to the Settlement Service of the Bank of Spain.

The exchange of data among member entities produces a balance between each two entities, of which the Settlement Services of the Bank of Spain are informed. After the totals have been received and any disputes have been resolved, the Settlement Service establishes a balance for each sub-system and entity; the Bank of Spain enters the balance in the inter-bank settlement account that each entity has opened with it, provided that there are sufficient funds in said account.

SECTION I- EXISTING LAW AND PRACTICE

INTER-PARTY RELATIONS 1: EXECUTION OF CREDIT TRANSFERS

General

Questions relating to Scenario A:

A.1 Taking each stage of the transaction, is there any prescribed form which must be used by any of the parties?

1. No legal provisions stipulate any given form to be used by the parties to the Credit Transfer.

2. The Originator is not, from a strictly legal point of view, obliged to use any given form when ordering his bank to make the transfer: he may do so by letter, fax, telephone, telex or any electronic system; however, banks usually have, at the disposal of their customers, a standardised form drawn up according to the "Club Rules" of the Higher Bank Board.

3. The Originator's Bank must send its instructions in accordance with the operating instructions:

   (i) Clearing house: by means of a physical exchange of documents: in respect of Credit Transfers made through the exchange of documents, Article 7 of the Internal Regulations of clearing houses stipulates that the members of the latter "shall, for all (clearing operations), use exclusively the prescribed forms", the format, number of copies and paper specifications of which are regulated.

   The Originator's Bank commences its action with the delivery of a bill of presentation.

   The Higher Bank Board has also created some standard forms, constituting "Club Rules", for both the bank's relationship with its customer and the bank's relationship with the clearing house, and the Originator's Bank with the Beneficiary's Bank. Thus:

- For ordinary and telephonic-telegraphic bank transfers, see Banking Rules and Procedures, no. 4 of March 1974, modified in no. 26 of August 1977 and no. 27 of February 1978.

- For indirect transfers, see Banking Rules and Procedures no. 7 of May 1974, modified in no. 26 of August 1977 and no. 27 of February 1978.

- For internal transfers, see Banking Rules and Procedures no. 8 of May 1974, modified in no. 26 of August 1977 and no. 27 of February 1978.

- In respect of the internal operation of clearing houses in the exchange of documents, there are Internal Regulations and General Operating Rules, mentioned above.

(ii) For the National Electronic Clearing System: according to Rule Eight of the Bank of Spain Circular number 1/1990 of February 2, at the end of normal working hours, the bank must deliver to the Settlement Service a report on operating totals, indicating the type of communication, date of exchange, date of settlement, notifying bank, reserved test-key, participating entities, operating totals and operating balance.

4. The receiving bank must use the same documents for the clearing house using the physical exchange of documents and the National Electronic Clearing System, save that clearing houses operating through the physical exchange of documents do not have to deliver a bill of presentation.

5. The Beneficiary does not need to participate in any phase of the Credit Transfer, since his acceptance of the transfer is tacit. Should the Beneficiary wish to reject the Credit Transfer in his favour, he may express this wish by any means admitted in law (letter, fax, telephone, telex or any electronic system).

A.2 What are the legal provisions (if any) governing the time within which each bank is required to act?

Consider in particular:

(i) Is there any definite period prescribed within which the Credit Transfer must be completed if it is not to lapse?

6. Spanish laws contain no specific legislation on the term after which a Payment Order is deemed to lapse.

7. Article 290 of the Commercial Code stipulates the following for the commercial mandate:

"The powers of attorney obtained by an agent shall be deemed to remain in force until expressly revoked, notwithstanding the death of the principal or the person from whom he may have duly received such powers."

8. However, for the civil mandate, Article 1732 of the Civil Code stipulates that it will end, among other reasons:

"... as a result of the death, bankruptcy or insolvency of the principal (Originator) or the agent (Originator's Bank)".

9. However, it should be specified that any actions performed by the agent unaware of the death of the principal or any of the other causes terminating the mandate are valid and effective in respect of third persons that have contracted in good faith (Article 1738 of the Civil Code).

(ii) If there is not a definite period, does custom prescribe the time within which the Credit Transfer must be completed?

10. The payment order must be performed within the period agreed or, as the case may be, with the utmost diligence, the bank complying with its principal obligation, which, moreover, justifies the reduction in the available balance produced as a result of the debit made in the account of the customer issuing the order.

11. The Judgement of the Supreme Court of February 14, 1950 considers that once the Credit Transfer has been ordered (between different accounts of the same Originator), such transfer must be considered made even if the bank has not made the relevant entries in the two accounts; this is based on the principle that transfers

are deemed made "irrespective of the bookkeeping thereof, which is an internal activity of the bank and may not affect its customers, because otherwise the reality of the operation would be left to the exclusive discretion of the bank".

(iii) Is there a duty for each bank to act "within a reasonable time"? If so, is there any case law or principle or anything else giving guidance on what might be considered "reasonable"?

12. This is not applicable, since there is no reference in legislation or case law to the expression "within a reasonable time". However, the Payment Order must in all cases be performed with the utmost diligence.

13. The obligation to act with the utmost diligence is contemplated in specific legislation on banking (rule 4 of the Bank of Spain Circular 8/1990 of September 7) and in general legislation (Article 1903 of the Civil Code, which mentions the obligations to act with "the diligence of a good head of a family"; and Article 255 of the Commercial Code, which mentions "acting cautiously", "according to commercial practice" and "care of the business as his own".

14. There is, therefore, a triple criteria, according to the Commercial Code: one objective (commercial practice); one subjective (diligence in own affairs, which must be considered more demanding than the general diligence of an "orderly trader", but always within that of the specific professional sector to which it belongs, i.e. banking); and one mixed (caution).

A.3. How would your answers to question A.2 differ if the Payment Order was conditional - for example, if the Originator had given his bank express instructions that the Payment Order should only be executed in certain specific circumstances, such as the receipt of sufficient funds in the Originator's account to cover it?

15. Conditional Payment Orders do not exist in Spanish banking practice. In any case, there are no legal impediments to making them, such as the existence of sufficient funds in the Originator's account to cover the Credit Transfer.

A.4 (a) Are there any rules on value-dating and how would you define value-dating?

16. Spanish law contains no definition of the concept of value-dating.

This concept may be defined as the date as of which the bank is authorised by mandate of the Bank of Spain Circular 8/1990 of September 7, in respect of the entry of a given sum in a bank account, to charge its customer delay interest or pay him interest, irrespective of whether the entry is a debit or credit, respectively, in the account.

17. The Order issued by the Ministry of Economy and Finance on December 12, 1989 does not regulate the concept of value-dating; Article 4 establishes merely that:

"Credit institutions shall determine the value dates of the credits and debits in their active and passive accounts, within such limits as may be established by the Bank of Spain."

18. Annex IV to the Bank of Spain Circular 8/1990 of September 7, in pursuance of the mandate issued in the aforesaid Ministerial Order (Final Provision 1.c) and d)), regulates the time limits for giving value for the purpose of accrual of interest of credits and debits in bank accounts. These terms indirectly constitute the period within which the banks are obliged to make the debit or credit in the bank account. The aforesaid Annex mentions deadlines (as set out in the answer to question A.4 (b)) "for the purpose of interest accrual" specific but does not give a deadlines for purposes other than interest payments, however it but may perfectly well be applied to the dates on which the banks must make the relevant debit entry for the Originator and the credit entry for the Beneficiary.

(b) Assuming value-dating, is there any difference in the treatment of credits and debits?

19. Annexes IV and V to the Bank of Spain Circular 8/1990 of September 7 stipulate that:

The value date for debit entries made by the Beneficiary's Bank in its customer's account shall be deemed to be the same day as the date of the payment order; when sent by post, the date of the payment order shall be deemed to be the date of receipt by the bank (Annex IV).

20. The value date for credit entries is the same day as the date of the payment order if the remitting branch is a branch of the same bank, and two business days after such date if the remitting branch belongs to another bank. The remitting branch shall be included in the information remitted to the Beneficiary in respect of the Credit Transfer (Annex V).

A.5 **Are there any rules governing the issue of double charging, for example, where the Originator, in giving the instructions to his bank, has specified that he should bear all the costs, but the Beneficiary nevertheless has charges deducted from the amount credited to the account at his bank?**

21. There are no rules regulating limitations on applying charges and costs to both the Originator and the Beneficiary for the same Credit Transfer. Such operation, that of the double charge, i.e. charging one party for remitting the funds and the other for receiving them, is perfectly legal.

22. There is nothing preventing the Originator from contractually assuming all bank charges and costs until the end of the transfer.

23. However, problems are encountered when trying to put such an agreement into practice. Clause Five of the Order of the Ministry of Economics and Finance issued on December 12, 1989 stipulates that:

"... credit institutions shall establish and publish, after recording them at the Bank of Spain, their rates of charges and costs that may be passed on, indicating the events and, where appropriate, frequency with which they shall be applicable; they may not charge rates or amounts in excess of those contained in such rates or for items not contemplated therein".

Moreover, Clause 7.c) stipulates that the Originator may request a copy of the agreement that is to regulate the Credit Transfer, which must indicate:

"... the applicable charges and costs that may be passed on, with specific indication of the concept, amount, dates of accrual and settlement and, in general, any other detail that may be necessary to calculate the absolute amount of such items".

Thus, the Originator may know before ordering the transfer what charges or costs are produced on the operation, and can therefore ensure that the amount received by the Beneficiary is free from such charges or costs.

The practical problems in avoiding double charges are that the Originator or Originator's Bank must be informed by the Beneficiary's Bank or Bank of Spain of the fees to be charged to the Beneficiary.

24. However, in practice it is more difficult for the Originator to ensure that the Beneficiary receives the amount of the transfer without its bank deducting any charges or costs. In order to avoid this, the Originator or the Originator's Bank should request the rates charged by the Beneficiary's Bank; once the amount of such rates has been stated, in accordance with the rates announced publicly, the Beneficiary's Bank may not pass on any other charge or cost.

A.6 Consider the methods of authentication which would be used and/or which might be considered appropriate. (Ignore comparisons of paper signatures.)

25. There is no general method established in law for assessing the authenticity of the instructions issued to the bank by its customers.

26. In respect of the instructions sent by the Originator's Bank to the Beneficiary's Bank, the following should be indicated:

- clearing houses using physical exchange of documents: the only stipulation is found in Article 16 of the internal regulations of clearing houses, which indicates that:

  "All documents submitted to the clearing house must be identified with the seal or computerised recording on the document approved by the House."

- National Electronic Clearing System: The Bank of Spain Circular 4/1988 of June 14 establishes, in Rule 24.5, that:

  "... each entity participating in the settlement of a sub-system shall enclose with the report of its totals an "authentication code", obtained in accordance with the corresponding SNCE Standard, which guarantees to

the Settlement Service beyond all doubt that said entity effectively approves the information contained in the aforesaid report".

Revocation

Questions relating to Scenario A:

A.7 (a) How would you define revocation and, in particular, how would you distinguish it from other rights, e.g. a receiver's entitlement to disclaim on a winding-up?

27. Revocation may be defined as an act rendering a legal relationship an element preventing the completion of a Credit Transfer, either by application of the law or according to the particular covenants of a given agreement.

28. There is no specific regulation in banking laws on the revocation of Payment Orders.

In the event of revocation in respect of Credit Transfers, all actions prior to the revocation are, in principle legally valid, whereas, for example, the backdating to a given date of the effects of bankruptcy declared by the judge means that any transfer made within the period of retroaction is null and void and, therefore, has no legal effects.

Thus revocation may be defined as the act initiated by the Originator, the Originator's Bank or the Beneficiary's Bank, whereby the conclusion or completion of the transfer is avoided.

29. For clearing houses using the physical exchange of documents, only Article 22 of the Internal Regulations contemplates the possibility of the Beneficiary's Bank returning the document requesting the Credit Transfer if it is incomplete:

"Invalid documents shall be deemed drawn on the entity that submitted them and shall be returned to said entity, indicating the reason for rejection on the back, which reason may also be indicated in the bill of return."

30. Article 290 of the Commercial Code regulates, as a means of termination of the commercial mandate, revocation of the power of attorney granted (see question A.2.i).

31. In general legislation, Article 1732 of the Civil Code stipulates that the mandate ends upon termination. The principal may freely revoke the mandate, requiring the agent to return the document evidencing such mandate.

32. Such revocation may be deemed produced by legal order, e.g. (Article 1735 of the Civil Code):

"The appointment of a new agent for the same business produces the revocation of the previous mandate as of the date on which the previous agent is informed, ..."

33. The effects of the revocation vis-à-vis third persons are also limited by legal order, Article 1734 of the Civil Code, which stipulates that:

"When the mandate has been granted to contract with certain persons, the revocation may not cause any loss or prejudice to the latter if they are not informed."

(b) In what circumstances might the Originator be entitled to revoke or countermand the Payment Order?

34. Neither specific nor general legislation prohibits revocation of the payment, provided that the funds of the transfer have not reached the Beneficiary's sphere of ownership.

35. According to the applicable legal principles, revocation is possible, leaving aside the legal business that gave rise to the payment by transfer, provided that no legal provisions are contravened in doing so.

(c) Until what time can he do so?

36. The Originator can no longer revoke the Credit Transfer once its bank has made the relevant debit and credit entries.

(d) What steps would have to be taken?

37. There is no legislation whatsoever on this point, hence the procedure would be determined by commercial practice, e.g., remit notice to the Originator's Bank, with reference to the identification details of the Payment Order and, obviously, requesting revocation of such order.

38. The Originator's Bank will not require its customer to justify the revocation.

(e) Can entries be reversed in the event of error?

39. The margin of error is defined in Spanish law in Article 1266 of the Civil Code, as follows:

"In order for the error to render the consent invalid, it must affect the substance of the object of the contract or the principal conditions of such object on which the signing of the contract was based. An error in respect of the person shall render the contract invalid solely when the consideration of the person was the principal ground for signing the contract. A simple error in the account details shall give rise merely to correction."

40. The error affects the person Originator, Originator's Bank, Intermediary Banks, Beneficiary's Bank and Beneficiary, but exclusively the natural or juristic person with whom there is a banking contract relationship; such relationship does not exist between the Originator and Beneficiary, who are bound in a legal relationship, save for the underlying business.

41. In the event of error in respect of the person, that is, if the Credit Transfer is ordered in favour of a person other than that indicated by the Originator, since the Originator's Bank does not have any legal relation with that person, it has no right to touch the amounts paid into the Beneficiary's account. Obviously, this is also valid if the transfer is made in favour of the correct person but for a greater amount than that indicated by the Originator.

42. If the error in respect of the person or amount is committed by the Beneficiary's Bank, it will be necessary to act in accordance with the contract signed with its customer. However, the current account relation does not allow the bank to withdraw money from the account except that its customer issues a specific order (domiciled bills, payment of cheques, etc.).

43. For errors committed in Credit Transfers made through the National Electronic Clearing System, the Bank of Spain Circular number 1/1990 of February 2 stipulates that:

"... when establishing the operational balances of the sub-system discrepancies are detected that have not been resolved within the period indicated therefor and, consequently, must be eliminated according to the provisions of the aforesaid rule. In these cases, when the affected entities discover where the error has been committed, they shall inform the Settlement Service, ..."

The procedure for resolving disputes must be commenced within the above-mentioned period, during which the settlement service shall try to solve the problem. If this is unsuccessful, the latter service may, as an exception, extend the settlement period, open a new settlement session or eliminate the transaction giving rise to the problem.

44. As regards the person who has received a Credit Transfer when he is not the Beneficiary indicated by the Originator or, if he is such Beneficiary, if he receives a larger sum than that indicated by the Originator, Article 1895 of the Civil Code indicates that:

"When a person receives something to which he is not entitled and which has been unduly delivered to him by error, that person is obliged to return it."

(f) Answer questions (b) and (c) above assuming that the Originator's Bank wishes to revoke the Payment Order on its own initiative.

45. The Originator's Bank must refuse to make the Credit Transfer and is obliged to point out to the Originator the consequences to which the latter is subject if the transfer is made, for example, if the Originator's Bank discovers that the Beneficiary has been declared bankrupt or in suspension of payments. In these cases, the Originator's Bank must, in pursuance of Article 255.2 of the Commercial Code, suspend fulfilment of the order received, informing the Originator through the most rapid means available of the reasons for such suspension.

46. In any case in which the Originator's Bank wishes to revoke the Payment Order other than to avoid a greater loss to the Originator than that incurred by not making payment to the Beneficiary, the Originator's Bank requires authorisation to do so.

47. The period during which the Originator's Bank may revoke a Credit Transfer is the same as that applicable to the Originator.

(g) Can a situation ever arise where the Originator validly revokes, but the Originator's Bank cannot revoke? (Assume that the Originator's Bank has at all times acted correctly.)

48. The Originator and its bank may revoke the transfer up to the same time. No situation may arise in which the Originator may not make the Payment Order but the Originator's bank may, or vice versa. The periods and reasons for revocation are the same for these parties.

Responsibility

Questions relating to Scenario A:

A.8 In respect of each of the following:

(i) the Originator's Bank;

(ii) the Intermediary Bank;

(iii) the Beneficiary's Bank.

(a) At what time does the Bank accept the Payment Order (i.e. assume any legal commitment to the party giving such Order)?

49. The consent given to an offer to enter into a (transfer) agreement is deemed accepted when the object and ground of the agreement coincide.

50. The Originator's Bank accepts the Payment Order as of when it delivers to its customer a duly stamped copy of the transfer request form.

51. The Intermediary Bank accepts the order as of when it receives the instructions from the Originator's Bank and performs any action that may prove a tacit acceptance of the order received.

52. The Beneficiary's Bank accepts the order as of when it includes the operation deriving from the Payment Order in favour of its customer on the clearing system settlement sheet.

(b) At what time does the bank execute the Payment Order?

53. For both the Originator's Bank and the Intermediary Bank:

(i) Clearing house using physical exchange of documents: at the end of each session (Article 30 of the Internal Regulations):

"The balances resulting for each member after the clearing operations shall be settled through the current account that each such member keeps at the Bank of Spain."

(ii) National Electronic Clearing System: at the end of each session and (rule 21.3 of the Bank of Spain Circular no. 8/1988 of June 14):

"After the totals have been received and any discrepancies resolved, the Settlement Service shall proceed to make settlement and establish the operating balances; such balances, one for each sub-system and entity participating in the settlement, shall be recorded in the accounts held at the Bank of Spain, as contemplated in the Sub-system Operating Rules, provided that the participating entity has made an adequate provision of funds to cover the day-to-day clearing of operations ordered thereon."

Thus at the end of each session and between 10.30 and 11.00 a.m., the banks shall proceed to execute the Payment Orders resulting from all the balances through the accounts held at the Bank of Spain.

If an Intermediary Bank intervenes, that is, if the Originator's Bank is not associated with any of the settlement systems (see the comments on foreign banks in Prior Aspects of Cross-Border Payments), the Originator's Bank shall execute the Payment Order on the conditions freely established with the Intermediary Bank (see reply to question B.3 paragraph 2).

54. The Beneficiary's Bank shall make payment as of when so requested by its customer, having the amount of the sum received available as of the date indicated as the maximum value date.

(c) **At what time is the bank discharged from its obligation - for example, would it be upon delivery of the instructions to effect the payment to the next party in the Credit Transfer chain or would it be upon the Beneficiary receiving value?**

55. The Originator's Bank will have completed its intervention in the Credit Transfer in respect of its customer as of when it sends the Payment Order to the Beneficiary's Bank.

56. The Beneficiary's Bank will have completed its action in respect of its customer as of when the Beneficiary receives the amount of the transfer. Rule 7.5 of the Bank of Spain Circular no. 5/1991 of July 26 stipulates that the entity receiving the transfer shall be liable:

"For correctly paying each Credit Transfer to the Beneficiary, in accordance with the information received in the transfer."

57. For the relation between the banks, the obligation assumed by the Originator's Bank in respect of the Beneficiary's Bank ends with the approval by the banks participating of the "settlement documents" (those indicated in the annexes to the Bank of Spain Circular 1/1990 of February 2) of the settlement documents and, therefore, prior to the receipt of payments. Insufficient funds in the account of the Originator's Bank will not however affect the validity of the transfer or the obligation of the Beneficiary's Bank to pay the amount of the Credit Transfer to its customer.

The position of the Intermediary Bank may be assumed to be the same as that of the originator's bank, such that the former is released of its obligations when it sends the appropriate instructions to the Beneficiary's Bank.

The following provisions are established for each system of clearing:

(i) Clearing house using physical exchange of documents: Article 31 of the Internal Regulations of the clearing house considers that the liability of

the Originator's Bank in respect of the Beneficiary's Bank ends when the documents have been exchanged:

"The clearing operations shall be deemed concluded when the Bank of Spain has approved all the operations received."

(ii) National Electronic Clearing System: this may be deduced from the foregoing regarding the liability of the beneficiary's bank to its customer, since the bank must pay the transfer "according to the information received" (there is no mention of the amount actually received) and it is not included as an obligation of the submitting entity (Rule 7.5.A of the Bank of Spain Circular no. 5/1991 of July 26).

(d) In what circumstances, if any, may the Bank refuse to accept or execute the Payment Order?

58. See reply to question A.7 (f).

For the Originator's Bank and the Intermediary Bank, the reply given to questions A.7 (f), paragraphs 45 and 46 are valid.

The Originator's Bank may refuse to make the transfer, even though this may constitute a default of the mandate agreement and current account agreement, as the case may be, signed with the Originator. For the Intermediary Bank, the instructions received from the Originator's Bank suffice.

The Beneficiary's Bank may refuse to accept the payment order only if the order remitted by the Beneficiary's bank or the Intermediary Bank does not contain sufficient information for the Beneficiary's Bank to be able to execute it adequately. Otherwise, if, at the end of the settlement day, the Beneficiary's Bank has approved the settlement sheet, including the details supplied by the bank requesting acceptance of payment, it may not refuse to execute it.

A.9 (a) What express or implied contractual duties of care does each party to the transaction have in respect of each of the other parties?

59. The Originator in respect of the Originator's Bank: It is logically understood that the instructions that the Originator gives to its bank must contain all the necessary information in order to be able to correctly order the transfer.

60. Originator's in respect of the Beneficiary's Bank: assumes the same duty of diligence as in respect of the Originator's bank.

61. The Originator's Bank in respect of the Originator: The bank assumes the duty of caution and supervision whereby it is obliged to check and verify the authenticity of the Payment Order, although in practice its obligation should not go beyond a superficial control. In short, it must check with the greatest care possible in the reasonable exercise of its activity (Articles 1258 and 1719 of the Civil Code and 255 of the Commercial Code).

62. The Originator's Bank in respect of the Beneficiary's Bank: Have sufficient funds in an account opened at the Bank of Spain for the Beneficiary's Bank to be able to collect the amount of the transfer for its customer.

63. The Originator's Intermediary Bank in respect of the Originator: The relationship between them has the same nature as any relationship that may exist between the Originator and the Beneficiary's Bank.

64. The Originator's Intermediary Bank in respect of the Originator's Bank: The relationship is the same nature as any may exist between the Originator's Bank and the Beneficiary's Bank.

65. The Beneficiary's Bank in respect of the Originator's Bank/the Beneficiary's Intermediary Bank in respect of the Originator's Intermediary Bank: The relationship between the two first two and the second two is identical for the purposes of the contractual obligation of the diligence between them. This obligation of diligence consists of the need to have sufficient funds, whether at the time of sending the Payment Order (if the Payment Order between banks is made through a current account) or remitting sufficient funds to cover the overdraft (if the payment between banks is made through a credit account). Obviously, there will always be an obligation to supply sufficient information to be able to remit the funds to the following entity in the chain of payment).

66. The Beneficiary's Bank in respect of the Beneficiary: The Beneficiary's Bank must make the amount of the Credit Transfer available to its customer on the value date established by the bank, or in any case within the maximum term established by the Bank of Spain, and provide said customer with information on the Originator of the transfer and amount thereof.

67. The Beneficiary in respect of the Beneficiary's Bank: By virtue of the nature of the transfer, it assumes no obligations in respect of the remaining parties.

(b) Does a contract between the participating banks in itself create a contractual nexus between the parties?

68. The possibility that the Payment Order may create a legal relationship between the Originator and the Beneficiary's Bank is remote, because the Originator has nothing to do with the consequences that may derive from the relations between the banks and the possible liability contracted by the Beneficiary's Bank to the Beneficiary if, for example, it refuses, without good reason, to perform the order issued.

69. The legal relationship created between the Originator and the Beneficiary's Bank is similar to the substitution mandate, whereby the agent (Originator's Bank) would perform the order by placing another subject in its place (Articles 261 and 262 of the Commercial Code; Articles 1721 and 1722 of the Civil Code). This would be a necessary substitution mandate with designation by the Originator of the substitute, whereby the Originator's Bank would not be liable for the actions of the substitute and the Originator would also have right to direct action against the latter, in the event that the Originator's Bank has not been authorised, or if the Intermediary Bank has been selected, the Originator may go against the Originator's Bank.

The substitute thus acts in its own name and right, but on behalf of the Beneficiary's Bank and, finally, the Beneficiary.

(c) Other than contract, what other legal relationships (with attendant duties) can arise between the Originator's Bank and the Beneficiary's Bank?

70. The legal relation, that is, apart from the commercial relation, created by the contract signed as members of the clearing houses, is that of a substitution mandate as mentioned in question A.9 (b).

A.10 (a) **In what circumstances (if any) might the Originator be bound by a Credit Transfer which he has not authorised (consider error, forgery and fraud)?**

71. (i) Non-existence or forgery of instructions: If the Originator's Bank has not received any order from the Originator, or the order is the result of an error (e.g. error in the name of the Originator), a forgery or fraud, then the bank will undoubtedly have to refund the amount unduly debited in the account of the Originator.

For example, if the Originator's Bank believes that the instructions to make the Credit Transfer were received from the customer A when they were actually received from customer B.

It may thus be concluded the Originator will not be liable in the event of forgery or fraud, save that it is to a greater or lesser degree responsible for such event.

72. (ii) Deviation of instructions received: If the Originator's Bank received a Payment Order but for a lesser sum than that actually transferred by error, it will have to refund the excess in the account of the Originator and reduce the amount paid to the Beneficiary, making the corresponding entries in both accounts.

73. (iii) Finally, if the Originator's Bank seconds a Payment Order believing, erroneously, that there are sufficient funds in the account (and assuming that no credit is opened), the Beneficiary can obviously not be expected to pay the consequences of the bank's negligence. The Originator's Bank will therefore be obliged to pay the Beneficiary, irrespective of its action vis-à-vis the Originator, from whom it may claim the entire sum or the difference, if the balance of the account is insufficient to cover the order.

This possibility is established in the mechanism of the mandate, according to which the agent may require its principal to reimburse it for any payment made to a third person (Beneficiary), pursuant to the second paragraph of Article 1728 of the Civil Code and Article 278 of the Commercial Code.

The Originator's account may therefore be deemed active when the Bank's error is considered to be error in the motive and not error in respect of the substance of the object. In such case, the Bank may not revoke the credit but may exercise merely its rights in respect of the Originator of the Credit Transfer. When the error is made by the principal (wishing to transfer to A, but giving order to transfer to B), it has been determined that the Bank could not cancel the credit, although the principal could take action against the Beneficiary for unfair enrichment.

(b) On whom is the burden of proving that a transfer has not been authorised?

74. Rule 6.2 of the Bank of Spain Circular no. 8/1990 of September 7 specifies that:

"The entity shall retain and keep a copy signed by the customer of the contract; ... It shall also keep the receipt of the customer of the copy of the document delivered to him."

75. In general, Article 1214 of the Civil Code establishes, with regard to the proof of obligations, that:

"The party claiming fulfilment is obliged to prove the obligations, while the opposing party must prove their discharge."

76. Thus, it must be understood that the burden of proof would correspond to the Originator's Bank, if it needs to prove that the transfer that it made was effectively ordered by its customer, the Originator, and that, therefore, it has fulfilled its obligation to its customer.

A.11 If the Credit Transfer is not completed (for whatever reason), is the Originator entitled to have the funds returned to him?

77. There are no specific provisions in banking laws on this matter.

78. Article 1720 of the Civil Code stipulates, with regard to the mandate, that:

"All agents are obliged to inform the principal on their operations and to pay to the latter any sums that they may have received by virtue of the mandate, ..."

79. In practice, if the transfer is not completed, the Originator is entitled to recover the funds debited in his bank account, either from its own bank or from the Beneficiary's Bank or any of the Intermediary Banks.

A.12 If the Credit Transfer is delayed or is otherwise mishandled, does any party have a claim for damages in respect of direct and/or consequential loss and/or interest? Can you give examples, with particular reference to any published case law?

80. There is no case law on the obligation to pay compensation for damages.

81. The Originator: His bank will be liable for any damages produced as a result of his actions.

He may request compensation from the Beneficiary's Bank, in his capacity as substitute of the principal (Originator's Bank) and in pursuance of Articles 296 of the Commercial Code and 1722 of the Civil Code if the Originator's Bank had no powers to appoint a substitute (mercantile and civil rule) or, having such power, if the person designated as substitute, i.e. the Beneficiary's Bank, were clearly incapable or insolvent (civil rule). It may thus be concluded that the Originator always has direct action against or is entitled to claim from the Beneficiary's Bank for the damages caused by said bank (Article 1902 of the Civil Code).

In respect of the Beneficiary, since he assumes no obligation to the Originator in the transfer, he may cause no damages to the latter.

82. The Originator's Bank: In respect of its customer, it seems unlikely that the bank may incur loss as a result of the actions of its customer, but Article 1729 of the Civil Code nevertheless indicates that the principal must:

"... compensate the agent for all damages that the latter may have incurred as a result of fulfilling the mandate, provided that the agent may not be accused of negligence or wilful misconduct."

The Originator's Bank may take action against the Beneficiary's Bank in respect of any damages caused to the Originator as a result of negligence by the latter bank.

83. The Beneficiary's Bank: This bank may request compensation for damages incurred solely as substitute of the Originator's Bank and in pursuance of Article 1290 of the Civil Code.

84. The Beneficiary: He may claim damages from the Originator, but only on the basis of the legal business, if any, giving rise to the contract, never on the grounds of the Credit Transfer contract.

The Beneficiary may never claim damages from the Originator's Bank; in the event that such bank has acted incorrectly, only the Originator may claim such compensation.

85. In respect of the commercial mandate, in pursuance of Article 297 of the Commercial Code, the agent (the bank) will be liable:

"... for any loss or damage caused to its interest as a result of having performed its duties with malice, negligence or breach of the orders or instructions received."

86. In respect of the mandate, Article 1726 of the Civil Code establishes that:

"The agent is liable not only for wilful misconduct, but also for negligence, which the courts must consider greater or lesser, according to whether any consideration has been paid for the mandate".

Thus, any of the parties is liable when its actions may be considered wilful misconduct (when the other party may be deemed to have been induced, with words or underhand machinations by one of the parties, to enter into a contract when it would otherwise not have done so - Article 1269 of the Civil Code), or negligence (the omission of the diligence required by the nature of the obligation and corresponding to the circumstances of the persons, time and place - Article 1104 of the Civil Code), the action being more gross if remunerated.

87. The compensation will be for damages, which are deemed to include not only the loss suffered (consequential damages), but also the earnings not obtained (loss of profit) - Article 1106 of the Civil Code.

88. It may thus be concluded that claims against any of the parties may be made for any damages caused by that party to any of the other parties. Such damages may be, among others, those produced as a result of negligence or default of the instructions of the principal, consequently including delay in performing orders given by the previous entity in the transfer chain.

A.13 Is there a two-tier system in operation whereby the Originator or the Beneficiary has the option to pay a higher fee in respect of a payment transfer which excludes a "no liability" clause?

89. There are no provisions regulating a two-tier system, nor is this normal practice.

A.14 With regard to questions A.11 - A.13, are wholesale and retail transactions treated differently?

90. There is no difference in the treatment of wholesale and retail transactions in respect of questions A.11 - A.13.

Cross-Border Payments

Questions relating to Scenario A:

A.15 How would your answers to questions A.1 - A.14 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(b) the Beneficiary's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

(d) the Beneficiary's Bank was located outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

Prior aspects:

Applicable law: According to Article 10.5 of the Civil Code regarding the legislation applicable to legal relations in which there is a foreign element:

"The law to which the parties have expressly submitted shall be applied to the contractual obligations, provided that it has some connection with the relevant business; otherwise, the national law common to the parties; or, failing this, that of common normal residence; or, in the last resort, the law of the country in which the agreement is signed."

Moreover, it should be specified that the reference made in Spanish law to a foreign law must be deemed to be to its material, rather than to its formal law, as provided in Article 12.2 of the Civil Code:

"The reference to Spanish law shall be deemed made to its material law, ignoring any reference that its rules of conflict may make to any law other than Spanish law."

Foreign banks and the clearing house using the physical exchange of documents: Pursuant to Article 44 of the Internal Regulations of Bank clearing houses, foreign banks may participate as entities represented by an associate:

"only the associated members of the House may participate on their own account in clearing or settlement transactions.

Any entities not registered with the House may obtain the advantages of the clearing through the services of one of the associated members.

For this purpose, the Register of the House shall indicate, in addition to the associate members, all those establishments of which they are agents for the purpose of clearing."

Article 45 goes on to say that:

"Any entity wishing to be represented shall so request of the Board of Government, through the associated member that is to represent it to the clearing house, in a document signed by both parties whereby they undertake to accept the provisions of the General Internal Regulations and any adopted by the Board of Government. Both representative and represented shall be obliged at all times to inform the House of the conditions in force in its contract of representation."

Foreign bank and the National Electronic Clearing System: Just as in the previous clearing system, foreign banks may participate as represented entities, that is, indirectly. This is stipulated in Clause Twelve, which defines a represented entity as being:

"... Any entity participating indirectly in the exchange phase of a sub-system through another member entity that represents it and which, irrespective of the nature of the representation, puts at its disposal the necessary technical infrastructure to enable such participation."

The use of foreign currency: Spaniards and foreigners resident in Spain may hold bank accounts in foreign currency and, consequently, order and receive transfers in foreign currency. These transactions may be made free of all limitations, save the exchange control regulations, and on the same conditions as those applicable to transactions made in pesetas.

The use of foreign currency in clearing systems is a different matter. Since the resulting balances are credited or debited in accounts open with the Bank of Spain, they must necessarily be made in pesetas and, consequently, payment in foreign currency is not acceptable.

Assumption: We do not know what law is applicable to the bank established in a foreign currency. We assume that the Originator's and Beneficiary's Bank will, due to its position of strength when negotiating the transfer contract with its customer, have stipulated that the said contract will be regulated by the laws of the country in which it has its registered office and, therefore, not by Spanish law. Otherwise, if the contract were subject to Spanish law, the replies to questions A.1 to A.14 would remain exactly the same.

Otherwise, the provisions of private international law would be applicable; as a result, the situation could arise where the relations between some parties are

subject to one legal system, while the relations between other parties are subject to the laws of another state. For example, the relationship between the Originator and its bank may be subject to the laws of State A and between the Beneficiary and its bank to the laws of State B.

Exchange Control: All payments made between residents and non-residents through registered banks must be declared on a form used by each bank. For each collection, payment or transfer, the resident must give its name or trade name, address and fiscal identification number, while the non-resident remitter or beneficiary of the collection, payment or transfer must indicate its name or trade name and address. It is also necessary to inform on the amount, currency, country or origin or destination and concept in respect or which the transaction is made, save for transactions made for more than 100.000 pesetas, in which case it is not necessary to mention the concept.

91. The Originator's Bank will not be bound by Spanish law, save in respect of regulations on clearing, insofar as it uses the clearing systems provided by Spanish entities.

92. If the Beneficiary's Bank is established in Spain, it is bound by Spanish law, and the fact that the transfer comes from abroad does not affect the replies to the above questions in any way whatsoever.

93. (A.7 (g)) The grounds for revocation that the Originator may allege are the same (limited by agreement) as those existing between the Originator's Bank and the Intermediary Bank, which are very specific.

94. (A.8 (a).4) Acceptance by the Beneficiary's Bank shall be deemed made when any action is performed with the Beneficiary whereby the latter receives the amount of the transfer in its account.

INTER-PARTY RELATIONS 2: SETTLEMENT OF CREDIT TRANSFERS

Finality

Questions relating to Scenario A:

A.16 When is the Credit Transfer considered to have been completed:

(a) as between Originator and Beneficiary?

95. In principle, and as regards banking practice, the Credit Transfer is deemed completed when the funds remitted are credited in the Beneficiary's account.

(b) as between the participating banks (including any Intermediary Banks)?

96. For the National Electronic Clearing System, Article 5.1 of Royal Decree 1369/1987 establishes that "all documents, means of payment or transfer of funds subject to clearing in the National System shall be deemed presented in such system as of the time when the holding entity or principal (Originator's Bank) thereof sends notice through electronic means to the drawee, remittee or domiciling bank (receiving bank) in the form and containing the details stipulated in the applicable provisions, requesting the credit or debit thereof through clearing".

The vagueness of the legal text allows us only to deduce, although not state categorically, that if we understand "presented" to mean "cleared", the clearing is produced when the document is presented.

A.17 When completed, is the Credit Transfer:

(a) recognised as discharging the underlying obligations as between the Originator and the Beneficiary?

97. For the purpose of the underlying legal relation between the parties, which gave rise to the Credit Transfer, the credit entry does not assume acceptance of the transfer by the Beneficiary and, consequently, the conclusion of the Credit Transfer. Thus, the legal figure of tacit acceptance comes into play.

In its judgement of April 27, 1945, the Supreme Court established that:

"... payment into a current account fulfils the requisite stipulated in Article 1162 of the Civil Code and constitutes one of the many forms of payment that may be used in order to discharge the obligation, provided that the creditor does not reject it with good reason on the grounds that it does not fulfil the legal payment conditions in respect of the object, place and time of the monetary payment, as per Articles 1162, 1169, 1170 and 1171 of the Civil Code, deeming that save for express rejection, silence, as its effects are defined in the judgement of November 24, 1943, may mean a tacit acceptance of the payment in account as an effective form of payment".

Likewise, in its judgements of November 26, 1948 and June 18, 1948, the Supreme Court considered that:

"the opening of the account and its public manifestation by the account holder in its letterhead or a note on its business forms or notices, are deemed a clear invitation to anyone contracting with him to use such facility in their commercial relations, while they induce others to consider, with good reason, that the establishments mentioned are authorised to receive such amounts as may be deposited in favour of such current account holder".

(b) treated as legal tender?

98. Under Spanish law, the debtor must pay and the creditor is entitled to the payment, but is not obliged, as it may refuse to receive the payment. This has been so declared in case law (judgement of December 2, 1954), which is not obliged, but rather entitled, to receive (the payment), nor is it forced to help to discharge the debtor, since the latter may, using the appropriate legal measures, exempt itself from the obligation contracted". In view of this right of the Beneficiary, a situation may arise in which, by virtue of whatever circumstances, it is not interested at any particular time, or it is even damaging for it to receive the payment; in such cases, if it were obliged to receive it, it would be necessary to assume disinterest or bear any damages that the Beneficiary may incur in having to receive the payment.

99. In any case, it should be noted that the payment must be made, according to Article 1170 of the Civil Code, "in the currency ... of legal tender in Spain".

The transfer releases the Originator from the obligation to pay in the currency of legal tender, since the transfer substitutes said currency.

Questions relating to Scenario B:

B.1 When is the Credit Transfer completed as between the participating banks?

100. Clearing houses using physical exchange of documents: since the entire operation of these houses is governed by "Club Rules" and contracts signed by the associates with the house, there is no specific legislation on the matter.

The general legislation applicable would be the Civil Code, Article 1156 of which stipulates that the obligation produced between the parties must be deemed completed and discharged at the time of payment:

"Obligations are discharged: by payment or fulfilment".

101. National Electronic Clearing System: the reply to question A.16 is valid here, since the system, pursuant to Rule Three of the Bank of Spain Circular 8/1988 of June 14, is not based on "Club Rules", but on law, which is, moreover, compulsory and which is applicable to the exchange of operations produced directly between two entities, i.e.:

"... where the exchanges of operations in a sub-system are produced directly between the processing centres of the participating entities, without passing through a common centre."

B.2 When completed, is the Credit Transfer treated as having discharged the two banks from any obligations towards each other?

102. When a Credit Transfer is made using the services of clearing houses, the banks are discharged from their obligations to the other bank when the transfer is completed, hence the reply to question B.1 is applicable.

103. The reply to question A.8 (c) is valid for the National Electronic Clearing System.

Questions relating to Scenario C:

C.1 When is the Credit Transfer completed as between the participating banks?

104. Unilateral clearing is not possible in settlement through clearing houses, hence the possibility of direct clearing between two banks is excluded.

105. In the case of the National Electronic Clearing System, the reply to question B.1 is valid.

C.2 When completed, is the Credit Transfer treated as having discharged the two banks from any obligation towards each other?

106. See reply to question B.2.

Cross-Border Payments

A.18 How would your answers to Questions A.16 and A.17 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction but the payment was in the currency of your country?

107. In the case of question A.16 (a), the reply would be the same.

108. For question A.16 (b), the transfer will be deemed completed between the banks upon receipt of the funds from the preceding bank in the chain of the Credit Transfer.

109. For question A.17 (a), if Spanish law is applied to the legal business giving rise to the Credit Transfer, the reply remains unchanged. If any law other than that corresponding to the domicile of the Beneficiary is applied, the effect of the Credit Transfer will depend on the legal provisions of said law.

110. Reference is made to the comments in the preceding paragraph and in the reply to question A.17 (a).

111. For the questions concerning Scenario B and in the event that Spanish law is applicable, general legislation considers the Credit Transfer completed and the banks discharged of their obligations to one another upon receipt of the money in the Beneficiary's Bank.

112. The reply for Scenario B is also applicable to Scenario C.

(b) the Beneficiary's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

113. For questions A.16 and A.17, assuming that Spanish law will be applied up to the conclusion of the Credit Transfer, the replies given in A.18 (a) would be valid.

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

114. Just as in the preceding question, the replies to question A.18 (a) are valid here, especially in respect of the fact that the payment made in foreign currency has no repercussion for practical effects and outside the intervention of the clearing systems, but only if the parties have submitted the contractual relation to Spanish law (see Cross-Border Payments, Prior Aspects - Assumption).

(d) the Beneficiary's Bank was located outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

115. See reply to the previous question and A.18 (b).

Settlement in general

Questions relating to Scenario A:

A.19 Assuming that the Payment Order is in the currency of your country, must settlement be effected in any particular way between the Originator's Bank and the Beneficiary's Bank, for example:

(a) by a credit to an account kept by the Beneficiary's Bank at the Originator's Bank;

(b) by a credit to an account kept by the Originator's Bank at the Beneficiary's Bank;

(c) debit and credit entries to the accounts of the two banks kept at a correspondent commercial bank;

(d) debit and credit entries to accounts kept by the two banks of your country's central banks;

(e) some other method.

116. Settlement is made by means of the system described in letter (d), with the peculiarities indicated herein below. The above notwithstanding, and although such practice may be the most common, in fact any of the above-listed methods may be used.

117. Settlement through clearing houses using the physical exchange of documents: the balances resulting for each bank after the clearing operations will be settled through the current account that each bank keeps at the Bank of Spain, pursuant to Article 30 of the Internal Regulations of clearing houses.

Settlement is made through the following operations (Article 32 of said Regulations):

"The clearing house shall keep a special current account at the Bank of Spain, in which all orders received by the House in payment of the debit balances resulting from clearing against its associates will be credited, and in which all orders that the clearing house, in turn, issues to pay the credit balances in favour of other associates as a result of clearing will be debited, such that the debit and credit sides of such account shall be perfectly balanced every day.

The aforementioned orders, which shall be dated the day they are issued, shall be delivered by the Manager of the clearing house, promptly upon conclusion of the settlement session, to be executed by the Bank of Spain on the first business day on which the offices of the latter Institution are open, thereby giving margin for any associates who so require to be able to make a provision of funds in their respective accounts at the Bank of Spain."

118. Settlement through the National Electronic Clearing System: this commences with each bank associated to the settlement system transmitting its operating totals produced in the exchange phase to the Settlement Service and ends with the

establishment by said Service of the operating balances of the sub-system (Rule 25.6 of the Bank of Spain Circular number 8/1988 of June 14).

The Bank of Spain Circular goes on to indicate, in paragraphs 7 and 8 of the aforesaid Rule, in respect of the establishment of balances and account entries:

"Establishment of balances. Procedure of algebraic adding together of the previously assessed operating totals of a sub-system carried out by the Settlement Service to determine the final operating balance corresponding to each bank participating in the settlement of the sub-system. The operating balances established are then transferred to the Current Account Services of the Bank of Spain for recording in the relevant accounts.

Account entry. By means of the appropriate account entries, the Current Account Services of the Bank of Spain proceeds, in accordance with the particular settlement rules of each sub-system and according to the value date corresponding in each case, to convert the net amounts, funds or cash of the operating balances established in such sub-system."

A.20 Explain what different rights may arise in respect of each method of settlement employed in your country.

119. For clearing houses using the physical exchange of documents, the associated banks have the following rights:

i. Margin of one banking day to make the necessary provision of funds, if the current account kept at the Bank of Spain contains insufficient funds to pay the settlement (Article 32).

ii. Request payment of delay interest from any bank that does not pay the credit order within the specified period, as of the date following the day on which payment should have been made (Article 33).

iii. Request the mediation of the Chairman of the clearing house, in the absence of the Manager, in the event of dispute between associated banks of the clearing house and that he adopt the necessary measures to ensure the successful conclusion of the clearing (Article 43).

120. For the National Electronic Clearing System, the only right contemplated in law for the banks is the right to request the mediation of the Bank of Spain and, in particular, its dispute-settling bodies, namely: for issues between banks (DIRIBANK), between savings banks (INTERCAJAS), between banks and savings banks (SERDI), and between banks, savings banks and rural banks (SERDIRRUR).

121. The rights of the banks, if other settlement systems are used, are the normal rights existing in any privity of contract, with the specific nature of a current account and transfer agreement, through the current account open at the Originator's Bank, Beneficiary's Bank or at a third bank.

Cross-Border Settlement

Questions relating to Scenario A:

A.21 How would your answers to questions A.19 and A.20 differ if:

(a) the Originator's Bank was established outside your country in a foreign jurisdiction but the payment was in the currency of your country?

(b) the Beneficiary's Bank was established outside your country in a foreign jurisdiction, but the payment was in the currency of your country?

(c) the Originator's Bank was established outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

(d) the Beneficiary's Bank was located outside your country in one foreign jurisdiction, but the payment was in the currency of another foreign jurisdiction (say US$)?

122. The replies in cases (a) and (b) remain unchanged, provided that the bank, whether the Originator's Bank or the Beneficiary's Bank, established in a foreign country is represented in the settlement system as a member represented by an associated member (see issues prior to the questions identified as A.15).

123. Questions A.19 and A.20 are not applicable if the foreign banks do not use the settlement systems established in Spain. See clearing houses using physical exchange of documents and the National Electronic Clearing System.

124. The questions of fact raised in A.19 and A.20 are not possible if the payments are made in a foreign currency, such as US$.

125. See the reply to the question A.20.

Netting

Questions relating to Scenario B:

B.3 Does the informal netting arrangement between Bank A and Bank B have any legal effect? Can it be justified by applying any legal concept other than set-off?

126. The case of Scenario B is apparently rare in day-to-day banking practice, since it is not common for payments between banks to be cleared other than in the clearing houses through the physical exchange of documents, or through the National Electronic Clearing System.

127. However, such transaction may be enclosed in legal figures other than clearing, for example, if the two banks have reciprocal account relations, in which case the Credit Transfer order is made from bank to bank. These account relations may be formalised by means of a commercial current account relation or a banking current account relation, deriving from the opening of a credit line or a deposit of funds. When the provision of funds to make the Payment Order is not the result of one of the above-mentioned legal relations, the first bank will have to send funds to the second bank, either in cash or in the form of a cheque.

B.4 Assuming that the netting arrangement is legally binding, is it subject to any limitation? For example, must the debts either way be "mutual"? Is it possible in certain circumstances for other claims between the two banks to be brought into the netting arrangement?

128. There is no limitation on the netting arrangement, nor is it necessary for one bank to have balances in its favour and balances against it in order to settle accounts

with another bank that also has credit and debit balances in respect of the first bank.

129. Only those balances deriving from banking transactions that have been intervened by the clearing system may be admitted as balances to be incorporated in the total balance subject to set-off.

B.5 Would your answer be different if the payment made either way were in a currency other than your own - or if the payments from Bank A were in your currency or a foreign currency and the payment from Bank B were in a different foreign currency (say US$)?

130. See replies for "Cross-Border Payments" (A.15 and A.18) and "Cross-Border Settlement" (A.21).

131. An official exchange rate is fixed by the Bank of Spain for all business days and for any currency, and this shall be the rate applied by the banks whenever they receive a payment in foreign currency if the Originator or Beneficiary has no bank account open in said currency.

B.6 At what time are the underlying obligations of the parties (taking the Originator, Originator's Bank and Beneficiary's Bank separately) discharged?

132. The parties are released from the underlying obligation upon completion of the transfer, that is, upon the tacit or express acceptance by the beneficiary, i.e. as explained in the reply to question A.17.

133. In respect of the Originator, the reply to question A.17 (a) is valid.

134. In respect of the Originator's Bank, the replies to questions A.8 (c) regarding its relation with the Originator and B.2 regarding its relation with the Beneficiary's Bank should be taken as a starting point.

Apart from the comments therein, which refer strictly to the provisions in specific banking law, general legislation and, in particular, the Civil Code stipulates that obligations are discharged through payment (Article 1156).

Thus, the Credit Transfer may be completed but the Originator's Bank may have insufficient funds in its account at the Bank of Spain to pay the Beneficiary's Bank. In this case, pursuant to Article 1158 of the Civil Code:

"Anyone paying on behalf of another may claim what it has paid from the debtor, ..."

135. As regards the Beneficiary's Bank, the reply given to question B.2 is valid.

136. All things considered, we may conclude that the physical movement of the money and, consequently, the payment obligation between the parties is one thing, and the conclusion of the transfer is another. Hence, on the one hand the beneficiary may have received the money, therefore making the transfer complete, while on the other hand the Originator's Bank may have defaulted its payment obligation in respect of the Intermediary Bank or the Beneficiary's Bank, in which case the Originator's Bank is not discharged of its obligations in respect of the banks following after in the chain.

B.7 How would your answers to questions B.3 - B.5 differ if Bank B were established outside your country in a foreign jurisdiction?

137. There would be no changes, provided that Spanish law is applicable to the relations between the parties.

138. However, it is clearly most common for the relationship existing between the Beneficiary's Bank and the Beneficiary to be governed by the laws of the foreign state, while Spanish law may be applicable for the relationship between the Originator's Bank and the Beneficiary, although in this case if the banks have not stipulated which law is applicable, there may be a conflict of laws.

139. The laws of the foreign state will be applicable if the parties have so agreed, in which case there would be no conflict of laws with Spanish law.

Questions relating to Scenario C:

C.3 Having touched (briefly) upon any particular agreement or set of Club Rules that might be applicable, state whether or not they are enforceable as a matter

of law - or do they constitute an agreed practice without being binding as a matter of law?

140. The Club Rules regulating the clearing houses using the physical exchange of documents do not constitute a law and, therefore, are not enforceable as such. If one of the parties affected by such rules wishes to enforce them, for example in respect of a defaulting bank, it may demand fulfilment at the courts and tribunals, but only as though it were a contract, an agreement between two or more parties, regulating their rights and obligations.

C.4 What is the effect of the netting arrangement on any underlying transactions?

141. See the reply to question A.17 (a).

(a) Is it possible to vary the contract or the Club Rules? If so, how can this be achieved?

142. In respect of clearing houses using the physical exchange of documents, the Higher Bank Board is competent for this.

143. As regards the National Electronic Clearing System the competence for modifying the rules regulating the system corresponds to the Bank of Spain. However, such rules cannot be considered "Club Rules" and, in general, they have force of law.

(b) Does a single obligation to make a net payment replace the bilateral obligations between the two banks? If this concept is recognised under your law, is it treated as a novation?

144. Rather than a novation, the concept raised in the question may be considered to contain the classical elements of a delegation of debt, that is, the institution through which the Originator, who usually takes the initiative, proposes another debtor, the Originator's Bank, to the Beneficiary, which the latter accepts. This figure is recognised in the Spanish Civil Code under the name of novation by substitution of debtor. Moreover, the expression "delegate the debt" appears in Article 1206 of the Civil Code. An essential requisite for the delegation of debt is the consent of the creditor to substitute the person of the debtor. Thus, Article 1205 of the Civil Code states that the novation, which consists of substituting a new debtor in the place of the original debtor, may be done without the consent of the

original debtor, but not without the consent of the creditor. The problem of whether this novation is purely a modification, with subsistence of the former debtor, although with a different debtor, or whether it is an extinctive, "Roman" novation, must be resolved in the sense that the creditor, by accepting the Credit Transfer, agrees to the extinguishment of the former obligation, which is not revived even in the event of insolvency of the new debtor, save that such insolvency existed prior to the delegation of the debt, or if it were public or known to the debtor when he delegated his debt (Article 1206 of the Civil Code). This means that the presumption here is in favour of a "Roman" novation (in delegatio semper inest novatio). No express declaration from the creditor is required, indicating that he considers his original credit extinguished, for the simple reason that the two debts are incompatible (Article 1203 of the Civil Code): once the Credit Transfer has been made, a new credit is created (and, therefore, a new debt), the terms and conditions of which are different to those of the former credit. Indeed, the latter was a credit deriving from a casual contract (loan, purchase and sale, mandate, company, etc.) existing between the Originator and the Beneficiary of the transfer. But when the transfer is made, the Beneficiary's credit against the bank can no longer be deemed to derive from such contract, but merely from the entry in a bank account deriving from the opening of credit in a deposit. In this sense, the Credit Transfer gives rise to a debt that no longer derives from the contract that gave rise to it, but from the legal relation previously existing between the bank and the Beneficiary of the Credit Transfer.

145. The "animus novandi" is clear in the Beneficiary of the Credit Transfer. The Beneficiary wants the bank, rather than the former debtor, to assume liability for payment, because if the obligor is a bank, he considers such payment secure, as secure as though the money were in his safe. In this respect, he is not bothered about the loss of guarantees and secondary obligations resulting from the novation (Article 1207 of the Civil Code), since for the Beneficiary, the fact that his debtor is a bank provides a greater guarantee. The bank transfer is admitted by the creditors for the same reason that, in the event of an international sale of goods, the sellers prefer a bank to add its liability to that of the buyer. The Beneficiary also wishes to consider the contract giving rise to the debt to be fulfilled by his debtor, admitting the Payment Order as fulfilment of the obligation, in other words, considering such Payment Order to be equivalent to effective payment, although it is not really so. Finally, the Beneficiary does not wish to be exposed to any pleas that his debtor may put up in objection, based on the contract existing between the debtor and the Beneficiary, which lapse when the original debt is extinguished and

the new one created. This "animus novandi" is discovered in the principal of the Credit Transfer, who wishes to obtain acknowledgement by the creditor that the Credit Transfer extinguishes the original debt and produces another one, for which the original debtor is not liable and, therefore, is held harmless from the claims of the creditor and from falling into arrears.

146. In respect of the relation among the banks, at the end of each session these settle the balances (initial payment and collection rights/obligations) by adding together the debit balances on the one hand and the credit balances on the other, such that each and all of the individual obligations are converted for the sum and difference between them into a single obligation or right, which could be called final. Under Spanish law, this figure is neither a novation nor a delegation of debt, but a set-off (Article 1195 of the Civil Code), that is, when two persons are, in their own right, reciprocally creditors and debtors in respect or the other. The debts are set off against each other and cancelled in the relevant amounts through clearing (Article 1202 of the Civil Code).

C.5 How would your reply to question C.2 differ if Bank B were established outside your country in a foreign jurisdiction?

147. The reply would remain unchanged if Bank B is established in a foreign country and Spanish law is applicable to the parties.

Questions relating to Scenario D:

D.1 At the end of the banking day, are the respective positions enforceable as a matter of law between the participating banks?

148. No, for the reasons set out in the reply to question B.6.

D.2 (a) Is any obligation of Bank A to pay Bank B enforceable?

149. For this question, see the reference made in the reply to question B.6 to Article 1158 of the Civil Code.

(b) If so, is this dependent upon the nature of the specific contractual arrangements existing between them or any Club Rules or anything else?

150. None of the rules regulating the clearing systems, whether the clearing houses using the physical exchange of documents or the National Electronic Clearing System, regulate the enforceability by one bank against another of the balances resulting from clearing; reference to general law is therefore necessary, namely to Article 1258 of the Civil Code.

(c) Is multilateral netting by novation possible without the substitution of an intermediary (such as a Central Bank) as counterparty? (See also C.2 above.)

151. See the replies given to question A.19 and C.4 (b).

SYSTEMIC RISK : INSOLVENCY

Questions relating to Scenario A:

Spanish law regulates insolvency of the debtor, or bankruptcy proceedings, under two different institutions, distinguishing between absolute insolvency or relative insolvency.

The first situation, which is more serious, involves an imbalance between the values of assets and liabilities, reflecting the inability of the net worth to settle all of the debts contracted.

The other situation is less serious, because since the value of assets is higher than the value of liabilities, there is merely insufficient liquidity of net worth and the consequent inability to fulfil payment obligations will be temporary.

The typical proceedings of provisional, or relative, insolvency is suspension of payments, regulated in the Suspension of Payments Act of July 26, 1922, which deals basically with the processing of proceedings, during which the actions of the entrepreneur are supervised but his freedom is not limited, with the intention of seeking an agreement between the entrepreneur and creditors that will allow the former to re-establish normal payments.

The proceedings regulating definitive insolvency is bankruptcy, aimed at liquidating and distributing the assets of the entrepreneur among his creditors.

Assume that the Originator's Bank is closed and a receiver is appointed, by a court or other competent authority, to wind up its affairs after the Payment Order has been received by the Beneficiary's Bank, but before settlement has been effected between the Originator's Bank and the Beneficiary's Bank.

A.22 Who bears the risk of closure of the Originator's Bank - the Originator, the Beneficiary's Bank or the Beneficiary? (Assume that the payment is made in the currency of your country.)

152. The reply is valid for both insolvency proceedings. The obligation assumed by the Originator's Bank ends with the approval of the settlement documents, as explained in point A.8.

The shortage of funds at the Originator's Bank does not affect the validity of the Credit Transfer, which is already complete and, therefore, the Beneficiary's Bank is obliged to make the amount of the transfer available to its customer.

153. Therefore, the risk must be borne by the Beneficiary's Bank. This is deduced from the following provisions for each of the clearing systems:

i. Clearing house using physical exchange of documents: Clearing operations will be deemed complete when the Bank of Spain has approved the operations received.

ii. National Electronic Clearing System: It is established that the bank must pay "according to the information received", and not in accordance with the funds received.

A.23 In what circumstances might a receiver be able to bring a claim based on fraudulent preference or preferential transfer, or otherwise seek to set aside or claw back any payment?

154. In the case of suspension of payments, the Act of July 26, 1922 does not contemplate the possibility of voiding acts performed in the event of creditors' fraud.

155. In the case of bankruptcy, Spanish law distinguishes two events in this respect:

i. Acts deemed ineffective on the exclusive ground of the period during which they were performed.

ii. Acts deemed voidable upon evidence of fraud.

Acts deemed ineffective on the exclusive ground of the period during which they were performed: for certain acts performed during periods very shortly before the adjudication of bankruptcy, the law establishes the presumption of fraud and declares such acts ineffective, as a result of which they may be contested by the receiver on behalf of the creditors.

Article 879 of the Commercial Code establishes that:

"the amounts paid by the bankrupt in cash, bills or securities within the fifteen days preceding the adjudication of bankruptcy, in respect of debts and direct obligations with a maturity subsequent to the date of such declaration, shall be returned by whomsoever may have received them to the assets of the bankruptcy".

On the same line, Article 1292 of the Civil Code stipulates that:

"... payments made in a situation of insolvency against obligations that the debtor could not have been compelled to fulfil at the time of making such payments may also be annulled".

The presumption does not admit evidence in contrary, as confirmed in case law (judgement of November 15, 1928) and releases the receivers from having to file declaratory proceedings; injunction formalities are sufficient, as per Article 1375 of the Code of Civil Procedure.

Acts deemed voidable upon evidence of fraud: Spanish positive law authorises the receivers to claw back a fraudulent transfer, at the request of the creditors.

Article 882 of the Commercial Code stipulates:

"... at the request of the creditors, all donations or contracts made in the two years prior to the bankruptcy may be revoked if any kind of surmise or pretence made in fraud of the creditors is proved".

A.24 Can the receiver avail himself of any zero-hour rule in the winding-up to challenge payments which have been made?

156. In the case of suspension of payments, the bank is not subject to any restrictions during the suspension proceedings and retains the administration of its assets and the management and direction of its activities, with the limits inherent in the actions of the receivers and any that may be established by the court (Article 6 of the Suspension of Payments Act).

Therefore, in order to analyse whether or not the payments are valid, it would be necessary to take into account what is ordered by the court.

157. According to the legislation on bankruptcy, the judge may cancel the transfer order irrespective of whether or not payment has been settled, provided that it is covered within the retroactive period of the bankruptcy.

Questions relating to Scenario B:

Assume that Bank A is closed and a receiver is appointed by a court or other competent authority to wind up its affairs after all Credit Transfers have been effected between it and B that banking day:

B.8 Is Bank A liable for the net amount or can the receiver disclaim Bank A's obligations and compel Bank B to pay the gross amount of the Credit Transfers issued by it in favour of Bank B?

158. In the case of suspension of payments, apart from the supervision of such suspension of payments by the receivers, it is necessary to take into account anything that the court may expressly order.

159. If the declaration of insolvency for bankruptcy is made after all the Credit Transfers of the day have been presented for clearing, the transfers are valid and Bank A is liable for the amount of such transfer.

The judge hearing the bankruptcy proceedings may consider the payment made by Bank A to be fraudulent or made prior to maturity, as a result of which such payment is subject to the retroaction of the bankruptcy and Bank B is obliged to return the money received from Bank A.

In all other cases the money paid to Bank B cannot be reclaimed.

B.9 Is netting - or any form of set-off - available after Bank A has closed?

160. Apart from the points made in the previous reply, it should be added that in that case of bankruptcy, once the situation of insolvency has been declared, Bank A may not have recourse to the clearing house or electronic clearing. Any action in this respect will be null and void.

161. Debts may be offset provided that they refer to payments for transactions not cancelled by the retroactive effect of the bankruptcy and, therefore, not annulled by

the judge. There are doubts as to the extensiveness of such set-off, as there is no clear position in case law. The most widely-accepted theory is that credits and debts deriving from a single legal relationship (ex eadem causa) may be offset, but if the credit and the debt derive from different relationships (ex dispari causa) the opposite is generally upheld. The limitation on the right to offset debts in bankruptcies is upheld on the basis of the need to maintain the principle of non-disposability of the assets of the bankrupt, whereby no payments may be made to the detriment of the bankrupt's estate and the respect for the postulate of the "par conditio creditorum", which does not allow any part of the bankruptcy assets to be removed to the benefit of some creditors and the detriment of the others (judgement issued by the Supreme Court on March 17, 1977).

Questions relating to Scenario C:

Assume that Bank A is closed and a receiver is appointed by a court or other competent authority to wind up its affairs after all Credit Transfers have been effected that banking day:

C.6 Is the receiver bound by existing netting arrangements - or under your country's insolvency law can he unravel them?

162. In the event of suspension of payments, the trustees of the suspension of payments are bound by any agreements reached by the company declared in suspension of payments and, therefore, to make or receive the corresponding payments, provided that they are not fraudulent. If the trustees wish to contest the agreement, they must do so in writing and before the Judge, but only if they have doubts founded on the authenticity of the credit or accuracy of the amount thereof (Article 11 of the Suspension of Payments Act). The purpose of the foregoing is to avoid any fraudulent action designed at obtaining majorities in the voting of the agreement.

The decision of whether the payment agreement is fraudulent or otherwise corresponds to the judge hearing the suspension of payments proceedings and will be issued eight days prior to the date of the creditors' meeting.

163. In the event of bankruptcy, the receivers and trustees are also bound by the agreements giving rise to the payments or payment agreements giving rise to the payments or payment agreements reached by the bankrupt, proved that such

payments do not have to be made from the bankruptcy assets and for the reasons indicated in the reply to question A.23, paragraph 2.

C.7 What restrictions or conditions (if any) are imposed on the process of contract novation by your country's bankruptcy law?

164. The bank in suspension of payments is subject to no restrictions in respect of the making and signing of agreements and it retains the administration and management of its assets. It is necessary to bear in mind only:

i. Any limitations on such freedom that may be imposed by the court.

ii. Limitations inherent in the temporary receivership, whereby the bank will require confirmation from the receivers in order to perform any operations or enter into any agreement (Article 6 of the Suspension of Payments Act).

165. As regards the bankrupt, it is stipulated that as of when the adjudication of bankruptcy is made, the bankrupt is disqualified from performing any commercial acts or actions. Article 878 of the Commercial Code stipulates that "once bankruptcy has been adjudicated, the bankrupt is disqualified from administering its assets".

Therefore, the bankrupt may not enter into new agreements.

However, the liquidation of the assets of the bankruptcy requires a number of operations to be performed in order to convert the assets comprised therein into money.

Spanish positive law entrusts the disposal of the debtor's assets to the receivers. Therefore, the receivers are authorised to promote the disposal, although always subject to a number of requisites:

- Intervention of the commissioner

- Appraisal of the assets

- Established procedure for disposal.

Questions relating to Scenario D:

Assume that Bank A is closed and a receiver is appointed by a court or other competent authority to wind up its affairs after all Credit Transfers have been effected that banking day. Bank A is the net debtor of Bank B and the net creditor of Bank C. Taking the two positions together to arrive at a net position, Bank A is the net debtor.

D.3 Are the end-of-day net positions between the three banks legally binding?

166. According to the regulation of suspensions of payments, any Credit Transfers and transactions performed by the bank are valid, provided that the court so declares and that the necessary confirmation has been obtained from the receivers.

167. In the case of bankruptcies, if the adjudication of bankruptcy is made after the transfers have been taken to the clearing house, all those received and issued the bank will be legally binding.

If the adjudication is made before they are forwarded to the clearing house, even though they have been ordered by the issuer, they may be annulled because they are not yet legally binding.

D.4 (a) Can the receiver disclaim the Credit Transfer made during the course of that banking day by Bank A, but affirm the Credit Transfers made to it?

168. See the reply to question C.6.

(b) Can the receiver unravel the netting arrangement by "cherry picking"?

169. See the reply to question A.23.

(c) Can the receiver avail himself of any zero-hour rule in the winding-up to challenge payments which have been made?

170. See the reply to question A.22 and A.24.

D.5 Identify the netting arrangements (bilateral, multilateral, by novation or otherwise) which would be effective in the insolvency of any of the participating banks.

171. In the case of suspension of payments, in view of the few limitations imposed by law on the suspended company, the latter may settle its debts or credits as it wishes (bilaterally, by set-off, multiterally, etc.), since the only obstacle that it has is the subsequent supervision of its actions by the trustees.

172. In the case of bankruptcy it is more complex and the possibility of settling payments depends on the results of the agreement reached with the creditors.

The payment obligations existing prior to the declaration of payment will be valid irrespective of the system through which they were fulfilled (novation, set-off, unilateral, multilateral, etc.) and in the event of invalidity, this will be determined not by the systems in which they were made, but by the agreement giving rise to them or whether the legal relationship from which they derive is covered by the retroactive effect of the bankruptcy.

There are no legal restrictions on the method of making payments in respect of obligations created subsequent to the declaration of bankruptcy or contracted during said period, hence any system is valid, the only obstacle being that the payment must be supervised by the body controlling the bankruptcy.

SECTION II

COMPARISONS WITH UNCITRAL MODEL LAW

To what extent does your existing law reflect, conflict or remain silent in respect of any of the matters covered by the provisions of the UNCITRAL Model Law on International Credit Transfers?

The UNCITRAL Model Law is only applicable when the Credit Transfer is international.

The similarities and differences between Spanish law on this matter and the Model Law are analysed article by article.

CHAPTER I

GENERAL PROVISIONS

Article 1 - Scope of application

1. Article 1.1 stipulates that the law will be applicable to Credit Transfers when the issuing bank and receiver are situated in different States.

   In this respect, Article 1.5 of the Civil Code establishes that "the legal provisions contained in international treaties shall not be directly applicable in Spain, unless they have come to form part of the domestic laws by being published in full in the Official State Gazette". Therefore, in order for the Model Law to be subject to direct application in Spain, it should previously have been published in the Official State Gazette.

   Article 10.1 of the Civil Code establishes that "the law to which the parties have expressly submitted shall be applicable to the contractual obligations, provided that said law has some connection with the relevant business". Therefore, the parties may freely agree to submit to the Model Law in respect of international Credit Transfers. In this respect, it should be noted merely that if any provision exists establishing any particular form or solemnity in order for acts and contracts to be valid, it should be applied, even if executed abroad (Article 11.2 of the Civil Code).

2. In respect of Article 1.2, banks and other entities which, in the normal course of their business, execute Payment Orders should be considered to be those defined in Article 1 of Legislative Royal Decree 12989/1986 of June 28.

3. With regard to Article 1.3, Article 259 of the Regulations of the Mercantile Registry establishes the concept of branch as follows: "branch shall be deemed to mean all secondary establishments having permanent representation and certain autonomy of management, through which all or part of the activities of the company are performed". This, therefore, contradicts the provisions of the Model Law, where they are considered different banks.

Article 2 - Definitions

1. There is no single provision in Spanish law which systematically defines the different concepts to which this article refers.

2. We have found some definitions in different laws and provisions, but not in banking or even commercial law and, therefore, relating to other areas of law, such as tax law for the concept of "Beneficiary"; see the Order issued by the Ministry of Finance on February 3, 1968 for provisions regarding smuggling; Administrative Law for the concept of "issuer"; and Decree no. 788 issued by the Presidency of the Government on April 3, 1975 for a definition of telegrams sent by telephone.

3. Moreover, it should be noted that any clauses included in the general conditions of the contract exempting any of the parties from liability must be classified as voidable, since they are contrary to the fair balance of the considerations owing by the consumer. This is stipulated in Article 10.1(c).7 of the General Consumer and User Defence Act.

   The only acceptable form of limiting the liability of the banks is to include the clause "under usual reserves".

4. Credit Transfers

   Article 299 of the Bank of Spain Regulations of 1958, reproduced in the 1976 Regulations, mentions "transfer mandates".

Article 10 of the Statutes of the Bank of Spain establishes that orders of delivery and transfer of all kinds will be admissible against cash current accounts.

5. Interest

"Interest" must be understood according to the concept regulated in Act 24/1984 of June 29 of the Head of State, regulating the legal interest rate of money. This is defined as the rate determined by applying the base rate of the Bank of Spain in force on the first day of the interest period, save otherwise as stipulated in the General State Budget Act.

Article 3 - Conditional Instructions

1. Spanish Law agrees with Article 3.1, but what must be taken into account is the fact that the Originator is empowered to claim from the Originator's Bank for the damages caused in breach of its instructions (the conditional payment order).

2. Regarding Article 3.2, conditional payment orders are not governed by Spanish Law.

Article 4 - Modification by agreement

In Spanish law, the conditions of an agreement may be freely modified at the will of the parties. This is stipulated in Article 1255 of the Civil Code, according to which: "contracting parties may establish such covenants, clauses and conditions as they may deem fit, provided that they are not contrary to law, morals or public order".

CHAPTER II

OBLIGATIONS OF THE PARTIES

Article 5 - Obligations of the issuer

1. The general rule established in paragraph 1 - the issuer is obliged by a Payment Order provided that the latter has been issued by said issuer or a person authorised to oblige it - is fully effective in Spanish law.

2. There are no provisions in Spanish law referring to the liability contracted by the issuer in respect of the use of a commercially reasonable method of authentication. The bank is obliged to second all orders of its customer, who is not obliged to observe any particular form; the means normally used is a letter or printed form issued by the bank, but the order may also be given by telephone if the bank employee knows the voice of the customer (who would be obliged in this case to ratify the telephone order by letter).

3. Paragraph 5 establishes that the issuer will be obliged in accordance with the terms of the order received by the receiving bank; this coincides with the provisions of Article 1719 of the Civil Code: "In executing the mandate, the agent shall act in accordance with the instructions issued by the principal".

4. No procedures are established in Spanish law for detecting errors.

Article 6 - Payment to the receiving bank

There is no detailed, specific regularisation of when the obligation is deemed performed by the receiving bank. In this respect, Article 149 of the Commercial Code establishes that "The order shall be deemed accepted whenever the agent performs any action in performance of the job commissioned to it by the principal". This basically coincides with the regulation of the Model Law.

Article 7 - Acceptance or rejection of a Payment Order by a receiving bank other than the Beneficiary's Bank

1. The terms regulating the acceptance in general coincide with those established in Spanish law. In this respect, Article 249 of the Commercial Code establishes that it: "shall be deemed accepted whenever the agent performs any action in performance of the job commissioned".

2. With regard to paragraph 3, no specific period of time is indicated for the duty to serve notice in case of non-acceptance; it is understood that such notice should be served as soon as possible. This obligation is included within the general duty to inform on the movements produced in the current account of the issuer.

3. The Model Law seems to state that it is possible to refuse to execute the Payment Order without giving any grounds for this decision; this is not acceptable under

Spanish law, where, under the current account contract the bank is obliged to pay provided that there are sufficient funds. This is also deduced from Article 252: "Any agent who defaults without legal grounds for doing so shall be liable for all damages produced as a result ..."

The bank is obliged to second the Payment Order; however, it must draw its customer's attention to the consequences that fulfilment of the order may have for the latter, for example, in cases of bankruptcy and suspension of payments (Article 255 of the Commercial Code).

4. There is no reference in Spanish law to the existence of a prescription period in the event that the order is neither accepted nor rejected within a given period of time.

Article 8 - Obligations of a Receiving Bank other than the Beneficiary's Bank

1. Spanish law also contemplates a given period in which the order must be accepted and the bank is obliged to issue a Payment Order in accordance therewith.

Rule 4.4 of the Bank of Spain Circular no. 8/1990 of September 7 stipulates that the bank is obliged to execute the order no later than the business day following the date of receipt.

2. In respect of paragraph 3, there are no express provisions and nor is the event of incoherence or inadequacy specifically regulated; this could, therefore, be assumed by domestic law.

3. Paragraph 6 of Article 8 stipulates that the separate branches and offices of a bank, even when situated within the same state, shall be considered separate entities. This does not reflect the Spanish situation, where, as mentioned above, all branches and offices of one bank are considered one and the same juristic person (Article 259 of the Regulations of the Mercantile Registry).

Article 9 - Acceptance or rejection of a Payment Order by the Beneficiary's Bank

Spanish law does not contain such a detailed regulation of when the Payment Order is deemed accepted.

Neither is there any express provision establishing a specific prescription period for the Payment Order, as mentioned in Article 7.

Article 10 - Obligations of the Beneficiary's Bank

1. Spanish law coincides with the provisions set out in paragraph 1. The bank acts according to the obligations inherent in the cash service, whereby it is obliged to accept any payments made into its customer's current account, as part of a general mandate for collections. The credit in the current account substitutes the direct payment of money to its principal, according to the banking relation of current account (Article 1720 of the Civil Code).

2. No provisions are made regarding the events of insufficiency or contradiction (paragraph 2, 3 and 4), hence they could be adopted by domestic law.

3. Paragraph 5 establishes the duty of the Beneficiary's Bank to notify when the Beneficiary has no account open in its books. Spanish law does not accept the event where the Beneficiary of the Payment Order has no current account open, as established in Article 299 of the Bank of Spain Regulations and the Regulations of March 1, 1973.

Article 11 - Period available to the receiving bank for executing the Payment Order and serving the appropriate notices

1. Under Spanish law, the receiving bank is obliged to execute the Payment Order no later than the business day following its receipt.

   This is stipulated in Rule 4.4 of the Bank of Spain Circular 8/1990 of September 7.

Article 12 - Revocation

The general rule coincides with the provisions of Spanish law.

The possibility that the issuer and bank agree that orders are to be irrevocable is not allowed in Spanish law either.

We can find no express provisions regarding the authenticity of the order of revocation.

With regard to the contents of paragraph 11, there is a clear contradiction with the provisions of Spanish law: the occurrence of circumstances modifying the personal situation of the Originator may render the order null and void. In particular, death, ex post facto incompetence and the loss of disposal of assets will render execution of the order null and void, unless the credit has already been made in the Beneficiary's account (Articles 1732 and 280 of the Commercial Code).

As mentioned above, under Spanish law the separate branches and offices of a bank situated within the same state are considered a single juristic person.

CHAPTER III.

CONSEQUENCES OF FAILED, ERRONEOUS OR LATE CREDIT TRANSFERS

Article 13 - Attendance

The duty to attend is not specifically contemplated in Spanish law, but there is no problem in having it assumed in domestic law.

Article 14 - Reimbursement

There is no specific legislation on this matter. Only general legislation, namely Article 1720 of the Civil Code, stipulates that: "All agents shall be obliged to inform the principal of its operations and pay to the latter any sums that they may have received under the mandate, ..."

Apart from this, there is no problem in assuming the text of Article 14 of the Model Law in domestic law.

Article 15 - Rectification of insufficient payment

There is no problem in adopting these provisions in Spanish domestic law.

Article 16 - Recovery of excess payment

There is no problem in adopting these provisions in Spanish domestic law.

Article 17 - Liability for interest

1. Spanish Law agrees with Article 17.1. There are no provisions in banking law regarding this matter but general legislation, namely Article 263 of the Mercantile Code, states that the commission agent has to pay to the principal the legal interest (delay interest) in the case of delay.

   The obligation to pay interest is referred to the period of delay in which the commission agent fulfils his obligations.

2. In respect of Article 17.2, Articles 1.101 and 1.106 of the Civil Code state that damages caused by delay have to be indemnified. Such a indemnity would include the damages caused and the profit that has not been earned.

3. As regards Article 17.3, the Originator can recover interest paid for any delay caused to the Beneficiary when the bank that has caused such delay has paid the delay interest. The above rule is applicable to any bank that pays the delay interest (when such bank has not caused the delay) because the interest should be paid by the defaulter bank. The bank that has paid, has then a right to recover the money paid on behalf of a third party (the defaulter bank) as stated in Article 1.158 of the Civil Code.

4. The notices regulated in Articles 17.4 and 17.5 are not issued in international credit transfers in Spain. Notwithstanding this, under Spanish Law, delay interest would be payable because there is a retention of title. However in the case of Article 17.5 the delay interest seems to be more a penalty.

5. In respect of Article 17.7, Article 10.1.c 6° of the General Law of Defence of Consumers and Users, Law 26/1984, 19th July, does not accept any absolute limitation of the liability before the consumer or user. Of course the concept of "absolute limitation" and reduction of liability are not the same. Spanish Law accepts the restrictions to the limitation of liability clauses.

Article 18 - Excluding Actions

There is no problem in adopting these provisions in Spanish domestic law.

CHAPTER IV

CONCLUSION OF THE CREDIT TRANSFER

Article 19 - Conclusion of the Credit Transfer

According to the Model Law, acceptance of the Payment Order by the Beneficiary's Bank makes the said bank liable to the Beneficiary for the amount accepted and, moreover, it takes on the effect of meeting the obligation pre-existing between the Originator and the Beneficiary, insofar as such obligation would be fulfilled by the payment of the aforesaid amount in cash.

There is a difference here in respect of Spanish law. In Spanish law, in order for the Credit Transfer to become effective in respect of the pre-existing obligation, the creditor's express or tacit consent is required.

Case law has confirmed that the silence of the creditor, in the case of the bank transfer, is equivalent to tacit acceptance of the deposit as a form of payment and that such transfer will, therefore, be effective in respect of the pre-existing obligation. Therefore, the simple fact of the transfer produces effects in respect of the pre-existing obligation between the issuer and the Beneficiary.

Point 2 establishes that even if the amount of the Payment Order accepted by the Beneficiary's Bank is smaller than the sum indicated by the Originator, the Credit Transfer is completed. In this case, however, the Credit Transfer would not extinguish the underlying obligation.

CONCLUSIONS

Are there any other relevant issues affecting Credit Transfers and their settlement?

No.

Please list briefly what you consider to be the most important issues affecting Credit Transfers and their settlement. In respect of each of these issues, listed in order of importance, please consider whether harmonisation might assist in the development of European payment systems.

It should be mentioned that the current clearing systems offer good operation and do not reveal any noteworthy deficiencies or problems.

This list is drawn up in order of importance, according to the criteria of the authors of this report, but it is admitted that the different interests involved in the matter, such as consumers, commercial banks and the Bank of Spain, may make the order of importance different for each of such parties.

i. Regulate, in accordance with case law and existing banking practice, the obligations of the banks to their customers in matters that are not regulated (Bank of Spain Circular 8/1990 of September 7 on transparency of operations and protection of the clientele).

ii. Guarantee, through specific banking legislation, that banks have sufficient funds in their accounts at the Bank of Spain to make the settlements resulting from each clearing system.

iii. Create a Data Processing Centre to centralise orders between banks; a multilateral data processing system, thereby gradually eliminating the bilateral transmission of banking operations.

iv. Limit the creation of clearing systems other than those already in existence.

v. Regulate the limitations on revoking Payment Orders.

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