THE CONCEPT OF PAYMENT: WIRE TRANSFER ORDERS, THE COMMON LAW AND ARTICLE 4A

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ABSTRACT

The immense size of the wire transfer orders that occur in the Eurocurrency market are integral to the operation of the international monetary system. Private international law should ensure the smooth facilitation of such transactions—yet both the common law and statutory provisions enacted in some jurisdictions do not definitively determine nor allocate liability in certain claim-conflict situations. The specific focus of this article is the determination of the point at which a wire transfer order is completed, resulting in the discharge of an underlying debt obligation between a payor and payee.

Determining the point at which a payment order is complete is not within the purview of the payor or payee; rather, the internal processes of a beneficiary’s bank dictate the time at which a wire transfer order is complete. This requires the payor to rely upon the payee's bank to complete payment and discharge an underlying debt obligation. This article will outline the common law decisions applicable to such transactions, and the statutory provisions of Article 4A of the Uniform Commercial Code that attempted to further refine liability. The conclusion of the article is that there is no predictable legal method to determine the point of completion of payment, resulting in payors making wire transfer orders at their own risk.

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I. INTRODUCTION

Technological advances in international financial relations have altered the method by which debts are paid, accounts are settled and obligations are discharged. However, technology has often moved faster than the common law courts and legislative bodies, leaving numerous questions unanswered. One example of such a development is the use of wire transfer orders that facilitate economic exchange. A wire transfer, or electronic funds transfer, is a communication method by which a payor initiates a payment process ultimately discharging that payor’s obligation to a payee. They consist of “instructions that funds be transferred from one person to another implemented through electronic means.”\(^1\) The basic conundrum with regard to wire transfers is the determination of the completion of payment. This may be because payment orders sent by the payor via a wire transfer are legally different from the actual discharge of the underlying debt obligation, or payment.

The common law does not delineate a specific set of rules applicable to wire transfer orders. Accordingly, this article will outline the common law determination of the agency relationship between an originator’s bank and its customer, and a beneficiary’s bank and its customer. Both decision and posting theories of credit will be discussed with reference to the banker-customer relationship. Numerous legislative provisions have attempted to clarify the common law; one example is the Uniform Commercial Code.\(^2\) The second half of this article discusses Article 4A of the Uniform Commercial Code which deals with the determination of completion of payment and the discharging of debt obligations. Although strictly American law, the Uniform Commercial Code governs a significant proportion of customers and banks involved in electronic funds transfers and can be used as a model law in other jurisdictions. As such, this article begins with an examination of one such jurisdiction – eurobanking transactions where wire transfers are the most frequently used.

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II. ANALYSIS

Eurobanking transactions specifically deal with transactions over $1 million USD in currencies not held by the banks facilitating the transaction. A eurocurrency transaction utilizes the services of banks outside the country of the originator of the transfer, and the transaction consists of the use of book entries, intermediary banks and correspondent accounts. Eurocurrency banking is a "specialized facet of the offshore banking market and involves the exclusive phenomenon of wholesale transactions in foreign currency," differing from offshore banking in that eurocurrency transactions are exclusively in the form of book entries. The reliance on book entries is integral to the execution of an electronic funds transfer in the eurobank market because the currency of issue will not be the currency of one of the parties to the transaction and that party’s bank will not have physical access to the denominated funds. As a result of the voluminous transactions that constitute a wire transfer, there is a notional or legal transfer of funds between the banks involved rather than a physical exchange of assets.

The eurocurrency funds transfer process is designed to discharge a debt obligation owing between a payor and payee, termed an originator and beneficiary during the transfer. An electronic funds transfer consists of an order sent by the originator’s bank to an intermediary bank, in which the originating bank and the beneficiary’s bank may have correspondent accounts. An in-house transfer occurs in this situation because the bank that holds both correspondent accounts can simply make an internal notation of the credit and debit transactions. However, in situations when there is no single bank with accounts of both the beneficiary’s bank and the originator’s bank, two intermediary banks with correspondent accounts are required to effect the transfer order. These intermediary banks have either correspondent accounts at each other’s bank or both have accounts in a third bank that facilitates the transfer.

4 Ibid. at 5.
5 Ibid. at 5.
6 Ibid. at 52.
7 Ibid. at 27.
The legal characterization of the relationship between a eurobank and its customer has given rise to a number of difficulties, primarily in the determination of each party’s liability during the execution of a wire transfer transaction. The general common law banker-customer relationship is that of contract, and by analogy this applies to a eurobank and its customer. However, there is no body of common law rules that arises between the customer and the eurobank once the customer attempts to transfer funds. The common law appears to indicate that a bank becomes the agent of the customer once the bank initiates a payment order via a wire transfer on behalf of the customer. In this agency role, the bank is required to execute the payment order with reasonable care and skill, but this does not impose a duty to discharge the underlying debt obligation.

A fundamental issue is whether or not the beneficiary’s bank is the agent of the beneficiary when receiving the order. The common law seems contradictory, and the answer appears to be dependent upon whether the wire transfer order can be considered a cash payment discharging the debt, or simply a request of the beneficiary’s bank to transfer funds into the beneficiary’s account. If the wire transfer order is made in the latter context, the internal mechanisms of the bank’s operating system will effect completion of payment. The standard banker-customer relationship governs the crediting of the beneficiary’s account, and the bank is considered to be a debtor to the credit of the customer, rather than an agent accepting a cash payment on behalf of the customer. If the order is in the former category, the wire transfer retains a monetary value and is considered good payment for the underlying debt obligation. The bank is then characterized as an agent of the beneficiary, accepting funds on the beneficiary’s behalf. Completion of the wire transfer order and the discharging of the underlying debt obligation occurs when the bank accepts the order.

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8 Ibid. at 39.
9 Ibid. at 40.
III. RELATIONSHIPS OF AGENCY

1. Sending Banks

A request to transfer funds between a customer’s account and the account of another party by a wire transfer is an ordinary banking request that does not give rise to a separate contract.\(^{10}\) Rather, the legal obligations between banker and customer stem from the original relationship as opposed to than from the payment order to transfer funds. In *Royal Products Ltd v. Midland Bank Ltd.*,\(^{11}\) it was held that the customer’s bank owes the customer a duty to “use reasonable care and skill in carrying out its part of the transfer.”\(^{12}\) The originator’s bank acts on behalf of the customer, and “the instruction which a customer gives to its bank to effect a transfer of funds is nothing more than an authorization from the customer (the principal) to the bank (the agent) to make payment.”\(^{13}\)

In effecting the payment order, the bank is required to use a reliable intermediary bank. According to *Equitable Trust Co. of New York v. Dawson & Partners*,\(^{14}\) in the absence of a contractual disclaimer, the originating bank is held to be vicariously liable for the negligence or default of its correspondents. The mandate of the wire transfer given by the customer must be clear and unambiguous, but when effecting this mandate the originating bank is not bound by strict compliance to the order. A bank cannot be held liable “provided it acts in accordance with general banking standards in carrying out the mandate of its principal.”\(^{15}\) The duty of the correspondent bank is to “act in accordance with the mandate that is given to it by its principal, the transmitting (originating) bank, and to use such skill and care as would be expected of a comparable bank in such a situation.”\(^{16}\) According to *Royal Products*, there is no superadded condition inherent to the wire transfer order

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\(^{11}\) [1981] 2 Lloyd’s Rep. 194 (Q.B.) [hereinafter *Royal Products*].

\(^{12}\) “Performance”, supra note 10 at 115; *Offshore Banking*, supra note 3 at 41.

\(^{13}\) *Offshore Banking*, supra note 3 at 54.

\(^{14}\) [1926], 27 Lloyd’s Rep. 49 (H.L.).

\(^{15}\) *Offshore Banking*, supra note 3 at 41.

\(^{16}\) *Ibid.* at 42.
beyond standards of regular banking practice that directly imposes liability on the originating bank for the completion of the transfer of funds. The bank is not the agent of its customer in terms of the debt obligation owed, but rather facilitates the payment of the debt. As such, a fiduciary duty does not arise between the customer and the bank in regards to the transaction request beyond the duty already imposed by the customer-banker relationship.

2. Beneficiary Banks

At the receiving end of the wire transfer payment order, the beneficiary’s bank is given the telex requesting a funds transfer and its correspondent account with an intermediary bank may have been credited with the funds indicated in the order. However, this does not necessarily mean the beneficiary’s bank acted as an agent on behalf of the beneficiary when receiving the wire transfer order. In Midland Bank Ltd. v. Conway Corporation17 the Court determined that “although a bank received rent on behalf of its customer who was a landlord, it did not do so as an agent for the customer.”18 The wire transfer order did not discharge the underlying debt when the beneficiary’s bank accepted the order, as the bank did not act as an agent of the customer. The Court found that it was not a “proper inference that there was a special relationship between the bank and its customer which constituted the bank an agent to receive the rent.”19

The determination by the Court in Midland, not contradicted by the judgement in Royal Products, differentiates between the liability of the payee’s bank to implement the wire transfer order versus characterization of the order as the actual payment of funds to the payee. When discharging the payment order the originating bank is considered an agent of the originating customer: when accepting funds, the beneficiary bank may or may not be deemed to hold the status of agent on behalf of the beneficiary for the purposes of discharging the underlying debt obligation. The common law delineation between the obligations associated with a payment order and the actual payment of a debt is compli-

17 [1965] 1 W.L.R. 1165 (Q.B.) [hereinafter Midland].
18 Offshore Banking, supra note 3 at 46.
cated by the decision in *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corporation of Liberia, The Laconia*[^20] which post-dates *Midland* and is not directly overturned by *Royal Products*.

The precedent articulated in *The Laconia* maintains the distinction between the receipt of a payment by a beneficiary’s bank and “acceptance of that payment as fulfilling an obligation owed by the transferor to the bank’s customer.”[^21] The Court of Appeal’s decision, which was subsequently overturned by the House of Lords, assumed that the bank was the agent of the owners. Denning L.J. utilized a cash-based analogy to confirm that “if the payment order was accepted without objection, then it was the equivalent of the customer accepting cash [for payment] without objection.”[^22] The House of Lords decision in *The Laconia* did not question this assumption and, accordingly, the “opinion of the court of appeal on the completion of payment was left unscathed.”[^23] In this sense *The Laconia* supports the judgement of *Midland*, despite the House of Lords’ lack of clear determination on the status of the bank — whether or not it acted as an agent when accepting payment.

Instead, the House of Lords articulated various conceptualizations of what acts could constitute the completion of payment. The beneficiary’s bank could be given explicit authority by the beneficiary to accept payment and discharge the particular debt, but only if done so punctually, as “the bank [does] not have authority to make commercial decisions on the owners’ behalf.”[^24] The making of a book entry on the books of the beneficiary’s bank might also constitute an unequivocal act of acceptance on behalf of the owners, thus waiving the owner’s rights.[^25] However, in *The Laconia* the House of Lords also stated four reasons as to why the acceptance by the bank of the payment order could not discharge the payor’s obligations:

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[^21]: “Receiving Bank’s Role” *supra* note 19 at 372.
[^22]: *Offshore Banking, supra* note 3 at 61.
[^24]: “Receiving Bank’s Role” *supra* note 19 at 371.
agent only to receive the payment and not to waive the owners’ rights – the function in receiving payment was merely ministerial – and consequently a reasonable time had to be allowed for the bank to obtain instructions on the rejection of the payment; and fourthly, that the marking of the payment order did not constitute a final act of acceptance by the bank upon which the charterers could rely.\textsuperscript{26}

The House of Lords determined none of the four enumerated acts had occurred.\textsuperscript{27} All of the possible acts that would not constitute the discharging of the debt were based on the internal policies of the beneficiary’s bank. It was this issue – which the payee’s bank would dictate the terms of completion of payment based on internal banking policies – which Lord Denning attempted to circumvent in his Court of Appeal level decision in \textit{The Laconia}.\textsuperscript{28}

Between \textit{Royal Products, Midland} and \textit{The Laconia}, the common law does not provide guidance regarding the relationship between the eurobank and its customers when receiving payments. The difficulties faced by the House of Lords in \textit{The Laconia} arise from the complexities of defining when an electronic funds transfer order has been sufficiently completed to discharge the underlying debt obligation associated with the transfer. In a wire transfer order there are two arrangements of relationships in which obligations must be discharged – the first involves the completion of payment to the payee, while the second involves the reconciliation of liability between and among banks party to the wire transfer process by the delivery of funds. Accordingly, the next step of this article is to assess the banker-customer relationship.

\section*{IV. THE BANKER – CUSTOMER RELATIONSHIP}

The reconciliation of a bank’s obligations can affect the point in time at which the bank will complete the order and discharge the underlying debt obligation. The “mere transmission of the payment message by the sending or originating bank, upon a demand by the payer-customer,
cannot constitute payment," because the settling of liabilities may or may not have occurred. Financial claims and legal obligations are transferred between banks to enact payment, yet the common law continues to use the analogy of the bailor-bailee relationship when analyzing the relationship of the eurobank and its customer. A contract exists between the customer and the bank, the terms of which are agreed upon between the two parties at the outset of the relationship. Absent any additional arrangement between these two parties, the deposit of the customer is on loan to the bank and becomes the bank’s property. 30 Well established in case law, the 1848 decision of the House of Lords in Folely v. Hill defined the common position of a banker as a debtor to the customer. 32 The position asserted is that a debtor holds no fiduciary duty over the customer’s money and that the banker’s capacity is neither agent nor factor to the customer. This characterization of the relationship between a bank and its customer was confirmed in N. Joachimson v. Swiss Bank Corp., in which the court determined that the owner of funds deposited with a bank must make a demand for payment before an action could be commenced. 34 The decision in Joachimson reinforces the decision-making power a bank has over funds deposited.

Based on the characterization of the eurobank-customer relationship as a bailor-bailee, a wire transfer order results in funds credited to the benefit of the payee’s bank—not necessarily to the benefit of the payee specifically. A transfer of legal claims effects completion of the order. 35 However, the substitution of the beneficiary’s bank in the place of the original payor is not an assignment of the debt. If the debt was assigned from the originator’s bank to the beneficiary’s bank, the mandate of the funds order could not be revoked once made, and this could be contrary to the expectations of the parties. 36 When the “receiving bank becomes

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30 Offshore Banking, supra note 3 at 40.
31 (1848), 2 H.L. Cas. 28, 9 E.R. 1002.
32 “Performance”, supra note 10 at 120.
33 [1921] 3 K.B. 110 (C.A.) [hereinafter Joachimson].
34 “Performance”, supra note 10 at 123.
35 “Eurocurrency Deposits”, supra note 29 at 328.
36 Offshore Banking, supra note 3 at 54.
the debtor or obligor of the payee-customer in place of the payer-debtor, in respect of the amount due," legal ownership of the funds has passed to the beneficiary’s bank but the bank has not assumed to discharge the underlying debt obligation. Payment of the debt occurs when the beneficiary’s bank becomes the bailor of the funds and chooses to replace the payor as the payee’s debtor. The manifestation of such a transition is determined by the internal policies of the payee’s bank and its operationalization can represent different theories of credit.

1. Decision and Posting Theories of Credit

The case law draws an unclear line between the decision to credit a payee’s account and the posting of credit to a payee’s account when determining the completion of the wire transfer order and the discharge of underlying debt obligations. The decision to credit a customer’s account is understood as an internal decision on behalf of the bank to accept the liability of the amount credited. The decision theory of credit is exemplified by the determination in Tenax Steamship Co. Ltd. V. Renante Transoceania Navegacion (The Brimnes). In The Brimnes, the Court of first instance stated that the payment was complete when the payee or creditor retained an unconditional right to the use of the funds. This principle was supported by the Court of Appeal, which held that payment was made when the bank of the payee made the decision to credit the account of the payee and then acted upon that decision. However, in A/S Awilco v. Fulvia S.p.A Di Navigazioni (The Chikuma), the House of Lords narrowed the decision of The Brimnes by defining “unconditional right” to mean “unfettered and unrestricted right” of the payee to the use of the funds. The decision by a bank to credit the account of a customer completes payment by giving the payee-customer a right to claim against the bank the amount in the customer’s account. The bank’s assumption of liability of the monetary amount indicated in the wire transfer order occurs when this decision is made. In exercising its’ discretion the beneficiary’s bank has the right to

37 “Eurocurrency Deposits”, supra note 29 at 329.
38 Offshore Banking, supra note 3 at 56.
40 Offshore Banking, supra note 3 at 59.
42 Offshore Banking, supra note 3 at 57.
choose when to assume the risk of the transfer order. However, until the bank exercises this discretion, the wire transfer order cannot be considered complete.

Analogous to the posting of credit in paper-based credit transfers, which is dependent upon the instrument being honoured, the mere posting of credit on the customer’s account would not place the customer’s bank in the place of debtor. The posting is not an assumption of liability by the payee’s bank per se but rather a representation that funds have yet to arrive from the originating bank. If the instrument is not honoured and the funds do not arrive at the payee’s bank, the obligation of the original payor to the payee has not been discharged. Applied to wire transfer orders, the Court in The Chikuma determined that if the bank decides to credit the customer’s account to discharge the obligation of the payor, giving the payee an unrestricted right to the funds, the payee has recourse against the bank for the amount of the payment. A disadvantage of the decision theory is that there must be a de facto manifestation of the bank’s decision to credit. In the marketplace, this demonstration is normally apparent by the posting of credit on the customer’s account or direct notice to the customer that the funds are available for access.

In Momm v. Barclays Bank Int’l Ltd., the Court relied on the decision in Eyles v. Ellis for the proposition that the payment to the payee was completed when the account was credited – not necessarily when the payee had an unfettered and unrestricted right to the funds. Although the decision in Momm that supports the posting of credit theory pre-dates The Chikuma, the latter does not directly overturn the former because the court makes no distinction in The Chikuma as to the bounds of what act constitutes the decision to credit. The confusion in the common law regarding the completion of payment is exemplified by the Court’s use of The Brimnes decision in the Momm case. The Brimnes is understood to stand for the decision theory of credit where the right of the customer to use the funds unconditionally completes payment, yet the Court in Momm cited The Brimnes as standing for the posting of credit theory. Beyond this reinterpretation of judicial decisions, rely-

43 “Eurocurrency Deposits”, supra note 29 at 332.
45 (1827) 4 Bing. 112, 130 E.R. 710 [hereinafter Eyles].
46 Offshore Banking, supra note 3 at 59.
ing on the principles articulated in The Brimnes and The Chikuma allows the payee’s bank to dictate the procedures by which it decides to grant credit, affecting the completion of payment. This allows “banks to manipulate their practices so as to make the time when a decision is made to credit an account suit their own objectives,” subjecting those not employed by the payee’s bank and no knowledge of the bank’s internal procedures to a significant degree of uncertainty in their contractual relations.

The overall lack of clarity in the common law allocating liability among parties to a wire transfer payment is a result of the nature of historical relationships between bankers at the international level. There have been few cases before the courts for judicial consideration although banks have been using telegraph transfers since 1918. This is because “until recently disputes over bank wire transfers were largely resolved by a gentlemen’s agreement among the members of the small club of domestic and international bankers involved in these transactions.” It is arguable that if the courts had been faced with a significant amount of litigation arising from wire transfer transactions, the common law would have refined legal principles regulating wire transfer payments through the course of judicial decision-making. This has not been the case and the courts have not articulated a cohesive body of law applicable to electronic funds transfers. As a result, statutory provisions have been enacted in some jurisdictions in an attempt to delineate and define the responsibilities and liabilities of parties to a wire transfer payment.

V. ARTICLE 4A OF THE UNIFORM COMMERCIAL CODE

Originally promulgated in 1951 by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, the Uniform Commercial Code is a “set of suggested laws relating to commercial transactions...adopted, at least partially, by all the states to further uniformity and fair dealing in business and commercial transac-

47 Ibid. at 60.
48 “Uniform New Payments” supra note 1 at 1678.
49 Ibid. at 1678.
tions." Article 4A, which was the result of a desire to assign responsibility and define limits on liability, covers the transfer of funds between parties by payment systems and is intended to address the issues that arise with the use of new technologies for handling money. The rights, duties, obligations and liabilities of parties are exhaustive in Article 4A, and as such the "resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article." Even with the specific rules detailed in Article 4A, the drafters made allowances for a beneficiary’s bank to choose to accept or reject a wire transfer order, as indicated by the bank’s choice of whether or not to credit the beneficiary’s account. Despite the drafters’ intent, it appears that Article 4A maintains the common law dominance of the beneficiary’s bank to determine the time at which the bank becomes legally indebted to its customer.


The statutory provisions of Article 4A of the Uniform Commercial Code apply to a funds transfer, defined in section 4A-104 as "the series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order." For the purposes of the Article, a payment order is defined in section 4A-103 as "an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary." Article 4A of the Uniform Commercial Code does potentially apply to eurocurrency transactions because the transfer of funds in a eurocurrency transaction falls within the definition of section 4A-104. However, Article 4A is only applicable to the wire transaction if the parties are within the jurisdiction of U.S. states that have enacted the Uniform Commercial Code.

In order for a payor to discharge an obligation owing to a payee, the payor must comply with the terms negotiated between the two parties. If the parties are governed by the provisions of Article 4A, there are two...
separate sections of the Article which determine the completion of the wire transfer order and the discharge of the underlying debt obligation: the former is constituted by the acceptance of the wire transfer order as defined in section 4A-209, the latter being governed by section 4A-406.

(i) Acceptance of a Wire Transfer Order

Central to the process of transferring funds under Article 4A, the acceptance of a wire transfer order “triggers the various obligations and rights of the parties to a funds transfer order.”52 However, “[u]nder Article 4A, a bank, in the absence of an agreement, is under no duty to accept a payment order and, unless it accepts a payment order, does not incur any liability with regard to any payment order.”53 The request made of the beneficiary’s bank to accept the funds transfer order may be rejected, “unless the receiving bank has entered into agreements to the contrary.”54 If the beneficiary’s bank has failed to accept a wire transfer order, it is “obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this Article.”55 A receiving bank accepts a wire transfer order by execution of that order.56

Section 4A-209(b) defines two general areas that constitute acceptance of a wire transfer order: the first relates to the acts of the beneficiary’s bank57 and the second to the acts of the sender and intermediary banks.58 Firstly, acceptance of a payment order by a beneficiary’s bank may be made when the bank pays the beneficiary.59 This payment is made provisional to section 4A-405(a), which is applicable only if the beneficiary’s bank credits an account of the beneficiary of a payment order. The crediting of a beneficiary’s account occurs “when and to the extent ... the beneficiary is notified of the right to withdraw the credit [and] ... the bank lawfully applies the credit to the

52 Offshore Banking, supra note 3 at 84.
53 Ibid. at 84.
55 Supra note 2 at Section 4A-212.
56 Supra note 2 at Section 4A-209(a).
57 Supra note 2 at Section 4A-209(b)(1).
58 Supra note 2 at Section 4A-209(b)(2) and (3).
59 Supra note 2 at Section 4A-209(b)(1)(i).
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debt of the beneficiary, or...funds with respect to the order are otherwise
made available to the beneficiary by the bank.”60 The obligation of the
beneficiary’s bank to make payment once credited is governed by
section 4A-404(a), referred to in 4A-405(a), but this repayment provi-
sion only arises if the beneficiary’s bank accepts a payment order by
crediting the account of the beneficiary. If a beneficiary’s bank decides
not to credit the account of the beneficiary, section 4A-405(b) governs,
according to the definition of acceptance in section 4A-209(b)(i). Sec-
tion 4A-405(b) states that “if the beneficiary’s bank does not credit an
account of the beneficiary of a payment order, the time when payment of
the bank’s obligation under Section 4A-404(a) occurs is governed by
principles of law that determine when an obligation is satisfied.” How-
ever, the bank’s obligations under section 4A-404(a) do not arise until
the bank accepts the payment order – which is governed by the defini-
tion of section 4A-209. No provision is made for the beneficiary’s bank
to actually incur the liability of the payment under section 4A-405(b) if
the bank does not credit an account of the beneficiary. Even if one
attempts to assert that a beneficiary’s bank acquires liability for a
payment order though the bank chooses not to credit the beneficiary’s
account, section 4A-405(b) still requires the common law to determine
the point at which the bank’s obligations arise and are discharged.

Secondly, acceptance by the beneficiary’s bank may also occur
when the beneficiary’s bank “notifies the beneficiary of receipt of the
order or that the account of the beneficiary has been credited with
respect to the order.”61 This act of the bank is governed by section 4A-
209(b)(1)(ii), which allows for the bank to reject the order in the notice
sent to the beneficiary or inform the beneficiary the posting of credit is
simply provisional and the funds “may not be withdrawn or used until
receipt of payment from the sender of the order.”62 Section 4A-209(3)
indicates that a beneficiary’s bank may also accept a payment order
when “the amount of the sender’s order is fully covered by a withdraw-
able credit balance in an authorized account of the sender or the bank has
otherwise received full payment from the sender,”63 on the opening of

60 Supra note 2 at Section 4A-405(a).
61 Supra note 2 at Section 4A-209(b)(1)(ii).
62 Supra note 2 at Section 4A-209(b)(1)(ii).
63 Supra note 2 at Section 4A-209(b)(3).
the next funds-transfer business day of the bank following the payment date of the order. This provision allows the beneficiary’s bank to ensure that the funds deposited or received are clear of other liabilities and are thus sufficient to fulfil the payment order. At this time the beneficiary’s bank can be assured that the funds have been delivered and cannot be withdrawn.

Although section 4A-209(3) imposes acceptance upon a beneficiary’s bank, it incorporates a time lag that gives the bank’s internal decision-making processes significant leeway to reject the order according to the provisions of section 4A-210. The only general section of Article 4A that imposes liability is that of 4A-212, which governs the liability and duty of receiving banks regarding unaccepted payment orders. Although there are two separate definitions for a beneficiary’s bank and a receiving bank under section 4A-103(a)(3) and (4) respectively, in practice a beneficiary’s bank also receives instructions from a sender, most often an intermediary bank. According to 4A-212, unless a bank is obliged to accept a payment by a separate agreement, a bank does not “have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in [Article 4A].”64 4A-212 refers liability back to the terms of 4A-209, which maintains the dominance of the beneficiary’s bank.

(ii) Discharging Underlying Obligations

The underlying transaction driving the completion of a wire transfer order is the original contract between the payor and the payee. The use of a wire transfer to discharge a monetary debt owing to a payee is governed by section 4A-406. According to this section, the originator pays the beneficiary of the wire transfer order at “the time a payment order for the benefit of the beneficiary is accepted by the beneficiary’s bank in the funds transfer.”65 Section 4A-406(b) provides that if the payment is “made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount of money.”66 Payment occurs, according to 4A-

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64 Supra note 2 at Section 4A-212.
65 Supra note 2 at Section 4A-406(a)(i).
66 Supra note 2 at Section 4A-406(b).
406(a), at the time the beneficiary’s bank accepts the order – thus an obligation is satisfied if a beneficiary’s bank accepts a payment order. The term “accepted” is governed by section 4A-209, while “completion” is subject to the provision of sections 4A-405(d) and (e). If a fund transfer system rule provides that payments made are provisional until receipt of payment, the beneficiary may be liable for the amount credited to the beneficiary’s account according to the requirements of section 4A-405(d). If the funds transfer system is one that nets obligations multilaterally and fails to reconcile settlement obligations, acceptance is nullified and the beneficiary must repay the beneficiary’s bank for the amount deposited.67

Judicial interpretation of Article 4A has indicated an adherence to follow the specific provisions of the Article when resolving conflicting claims. According to one bench, “Article 4A was crafted with the express purpose of creating – in an age of increasing automation – inflexible rules of liability for wire transfer disputes.”68 However, courts must still make binding decisions dependent upon the particular fact of the case, and may read in additional conditions to the statutory language of Article 4A. Precedents exist for the incorporation of a “general good-faith obligation on a receiving bank in accepting or rejecting payment orders,”69 while courts have also accepted that payment under section 4A-405(a)(iii) occurs “when a beneficiary’s bank credits a beneficiary’s account and immediately makes the funds available to the beneficiary.”70 These decisions clarify the terms upon which an underlying debt obligation will be discharged, but do not usurp the control the beneficiary’s bank has over the wire transfer process.

VI. CONCLUSION

The differentiation between the completion of a wire transfer order and the discharging of an underlying debt obligation is still a conundrum

67 Supra note 2 at Section 4A-405(e).
70 First Security, supra note 68 at paragraph 42.
to both the common law and statutory regulations. The concept of payment as interpreted by the common law and as governed by the statutory provisions of Article 4A of the Uniform Commercial Code is based upon the acceptance by the beneficiary’s bank of an originator’s wire transfer order. Although numerous transactions between various banks occur during a funds transfer, those transactions that discharge the underlying debt obligation of the originator of the payment order are the most fundamental because they drive the economic exchange.

The common law does not clearly decide between the role of the bank as agent or bailor: case law indicates the beneficiary’s bank may accept the payment order as payment on behalf of the beneficiary or the bank may be required to take additional steps to inform the beneficiary that the funds have been deposited with the bank. The uncertainty in the case law is compounded by the nature of the eurocurrency market where book entries that discharge associated liabilities fundamentally differs from traditional forms of payment. Thus, the analogies used by courts to make new judicial determinations are seemingly inadequate.

Although the statutory provisions of Article 4A of the Uniform Commercial Code extensively deal with wire transfer orders, they do not unequivocally clarify actions by a beneficiary’s bank to discharge a debt obligation. The decision of a beneficiary’s bank decision to accept a payment order initiates the provisions of Article 4A and associated liabilities, however the definition of ‘accept’ is subject to numerous statutory caveats.

Based on the significant size and number of financial transactions completed internationally via wire payment, the lack of a clear structure demarcating liability amongst parties increases instability in the international financial system. A significant risk is that of predictability, which is directly related to the legal rules regulating the payment system. Fry et al. (1999) note that legal risks are one aspect of the need for certainty regarding the operation of the system and that participants need to know what will happen in different circumstances.71 Under the common law, in jurisdictions which do not apply Article 4A of the Uniform Commercial Code, the incongruity between the payment order of a payor and the discharging of the associated debt obligation is a risk the payor must implicitly accept when using a wire transfer to discharge debt obliga-

tions. Article 4A of the Uniform Commercial Code is a first step towards defining the requirements to complete the payment process, however the point at which a debt obligation has been discharged, based upon acceptance by the beneficiary’s bank, must be made more definitive in order for all stakeholders to assess liability. The predictability and stability of the wire transfer process is dependent upon clear rules; this process facilitates international financial transactions and is thus integral to the maintenance of the international economic system.