Towards the creation of an international legal regime for the operation of eurocurrency deposits

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TOWARDS THE CREATION OF AN INTERNATIONAL LEGAL REGIME FOR THE OPERATION OF EUROCURRENCY DEPOSITS

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1. INTRODUCTION

One of the most important innovations in the area of international banking and finance is the development of a market for channelling short-term capital. This market is usually referred to as the eurocurrency or offshore currency market. Although the original development of this market can be traced to Europe, the prefix “euro” is a misnomer as the market has very little to do with the continent of Europe. The eurocurrency market is in essence an international money market where commercial banks deal in transactions involving currencies other than their own. In essence, the banks, usually referred to as eurobanks, incur obligations in currencies circulating outside the country of issue of the currency concerned or in International Banking Facilities in the United States.¹ Such national commercial banks accept deposits of such currencies and re-lend such funds either in the original currencies or in some other currency, to ultimate borrowers. In the same way that domestic banks provide domestic financial intermediation, eurobanks also provide financial intermediation on an international level.

The eurocurrency market differs from the foreign exchange market, that is, the market for the exchange of the means of payment of various countries. Since money is national in character, for the purpose of effecting payment in other countries there is the need for the exchange of

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currencies. The foreign exchange market exists to satisfy this need and may be defined as the organisational framework within which currencies are purchased and sold. In the eurocurrency market, however, there is no exchange of one currency for another as exists in the foreign exchange market. This is not to say that a currency which is the subject matter of a eurocurrency deposit, for example, may not subsequently be swapped for another. Rather, the distinction which is being made here is that only one currency is the subject matter of either a eurocurrency deposit or a eurocurrency loan at any point in time.

There are two sides to the eurocurrency market: the credit side and the deposit side. On the credit side of the market the banks deal in the provision of credit in currencies other than their own to the customers, who accept such funds. An example of such credit transactions could be in the form of direct loans such as syndicated loans or could be in the nature of indirect credit such as the issue and purchase of eurobonds or other euro-securities. This side of the market will not concern this article. The reason for this is that there exists a vast amount of literature on the credit side of the market, while very little exists on the deposit side. The deposit side of the market, which is the concern of this work, consists of the deposit of short-term funds by depositors in eurobanks, and placement of such funds by the eurobanks in the interbank market. The aim of this article is to determine the applicability of the common law rules on the operation of domestic bank deposits to the operation of eurocurrency deposits in particular and offshore currency deposits in general and, consequently, whether an international regime for the operation of eurocurrency deposits is a necessity. To this extent the article is concerned with the deposit side of the eurocurrency market, as opposed to the credit side of the market.

II. THE STATEMENT OF THE PROBLEM

When the eurocurrency market emerged, there was very little litigation concerned with the deposit side of the market. The reasons for this are not exactly clear. Recent events, such as the freeze imposed on Iranian
and Libyan euridollar deposits by the United States, on the one hand, and the restrictions placed on the euridollar deposits by the government of the Philippines on the other, have revealed the dearth in legal scholarship with respect to euridollar deposit transactions. In addition to these freeze and payment restrictions, other events, notably the expropriation of deposits held at offshore branches of US banks and the spate of actions brought against the home offices of such US banks, have also revealed the uncertainty which surrounds the operation of offshore bank branches in general. The actions on the part of the United States and government of the Philippines and the resulting litigation, as well as the cases concerning home office liability for expropriated offshore bank branch deposits, have revealed the existence of various grey areas, the legal ramifications of which are still unresolved, and given rise to a debate regarding the nature of the rules which should govern euridollar deposit operations.

The two sides of the debate are represented, on the one hand, by those who favour the continued application of the traditional common law regime on the operation of bank deposits to euridollar deposits and, on the other, by those who argue that the common law regime is not completely applicable to euridollar deposits. The advocates of the continued application of the common law regime contend that the euridollar deposit is in essence a contract between a bank and its customer. This being so, the traditional common law rules with respect to the banker-customer relationship are applicable to the euridollar deposit account. The advocates of the other view contend that issues such as (i) the concept of payment, including the time of the completion of payment, as well as finality of payment, (ii) the nature of the repayment obligation of the eurobank, (iii) the method of determining the proper law of a euridollar deposit, in the absence of an express stipulation of the proper law, and (iv) the question of jurisdiction, make the operation of


eurocurrency deposits unique and different from the ordinary banker–
customer relationship. They further argue that, because eurobanks are
located in the jurisdiction or territory of another sovereign, there are
additional considerations such as the expectation of the parties, in rela-
tion to the nature of the allocation of sovereign risk, which do not arise in
the same manner in domestic banking. This makes the common law rules
inadequate as a legal regime for the operation of eurocurrency deposits.
This article supports this latter argument and advocates the creation of an
international legal regime to govern the operation of eurocurrency depo-
sits and interbank placements.

III. THE NATURE OF A EUROCURRENCY DEPOSIT TRANSACTION

A typical eurocurrency deposit transaction could take place in the follow-
ing manner. We assume the existence of a country called “Arabina”,
located somewhere in Eastern Europe, with a central bank called the
Arabina National Bank (ANB). ANB has its head office in Arabina. ANB
also maintains an account with “Citizens Bank (US)”, located in
New York. ANB receives into its account with Citizens Bank (US)
payments in US dollars for the sale of its natural resources. The current
balance of ANB’s account with Citizens Bank (US) stands at US$10
million. We also assume that the government and monetary officials of
Arabina decide that instead of letting the funds sit idle in Citizens Bank in
the United States, they may be transferred into a eurodollar account in
the United Kingdom at an advantageous rate of interest. Since Citizens
Bank (US) has no branch in the United Kingdom, following negotia-
tions between ANB and a bank in the United Kingdom, ANB agrees to
transfer US$8 million into an account to be opened in the name of ANB
with the London branch of another US bank, “National Bank (UK)”. 
Although Citizens Bank (US) does not maintain an account with
National Bank (UK), National Bank (UK) maintains a correspondent
relationship with its US branch, namely National Bank (US). In concrete
terms, the funds transfer operation will take place in the following man-
ner: Citizens Bank (US) will transfer the relevant amount of the funds to
National Bank (US) for the account of ANB with National Bank (UK).
Although this transfer may be effected by means of a bank cheque or

5. A correspondent relationship is generally a system of reciprocal bank accounts
between participating institutions created to facilitate receipts and payment in foreign
currency. Banks with substantial international operations usually open accounts in their
names with banks overseas through and into which payments of foreign currency may be
made or received. Such correspondent accounts are usually referred to as “nostro”, or due
from accounts, and “vostro”, or due to accounts. See Dominique Carreau, “Legal Aspects
of International Deposits”, in Hans Smit, Nina Galveston and Sergei Levitsky (Eds),
p.202; Donald E. Baker and Ronald Brandel, The Law of Electronic Funds Transfers (2nd
edn., 1988), Chap.29–2, para.29.01[1].
draft, it is usual for the transfer of funds to be effected by way of debit and credit entries to accounts which both Citizens Bank (US) and National Bank (US) maintain with the Federal Reserve. To effect the transfer to National Bank (UK), National Bank (US) will credit the “vostro” or due-to account of National Bank (UK) and will then transmit a message to National Bank (UK) via SWIFT, instructing National Bank (UK) to credit the account of ANB with the amount of US$8 million. National Bank (UK) will thus enter a credit in favour of ANB and a credit in its own “nosto” or due-from account. Although this process is referred to as a funds transfer, no physical transfer of money actually takes place. Transfers are effected solely in the form of credit entries. Since no money is actually transferred during this whole process, the book entries made in the United Kingdom only reflect the entries made in the books of the two US banks and are sometimes referred to as mirror accounts or entries. Thus by giving up its claim against Citizens Bank (US), ANB now acquires a claim against National Bank (UK) for the amount of US$8 million.

A. The Process of Repayment

When a eurobank accepts a deposit denominated in the currency of another country, it undertakes certain obligations, including the obligation to repay, which is, in most cases, carried out by causing acts which take place in the country of issue of the currency concerned. This is because, as a general rule, most payment obligations involving the delivery and collection of eurocurrency take place in the country of issue according to the rules of its clearing system. In the scenario used above, then, the repayment obligation of National Bank (UK) will in most instances be performed in the United States by the delivery and collection of dollars in National Bank (US) or another bank in the United States nominated by the customer, ANB. This is not to say that it is not possible for payments to be effected without going through the clearing and payment system of the country of issue. As Professor Hal Scott argues, it is possible for payments to be made via “in-house” and correspondent bank transfers and in that manner avoid the clearing and settlement system of the country of issue. But the issue is not whether this is possible, but whether it is so usually used that it justifies an assertion that

6. Society for Worldwide Interbank Financial Telecommunication (SWIFT) is an international communications network for transmitting financial messages. Unlike other systems such as CHIPS (Clearing House Interbank Payments System—the clearing system for the US), SWIFT is not a funds transfer system and therefore has no settlement facility.
it is an implied term of the eurocurrency deposit contract that such a method of payment be used. It is the position of this article that, given the prevalent practice, it is possible to argue that it is an implied term of the contract that payments are to be made via the clearing and settlement system of the country of issue. This system of effecting payments is also dictated by practical considerations.

Only a globally organised system for clearing and netting large sums in a variety of currencies will lead to an efficient functioning of the repayments process. Since no such organisation exists, all payments of eurocurrency have to go through the only systems which currently possess the facilities for collecting and netting large sums of foreign currency: the clearing systems of the countries of issue. This is purely practical, given that central banks of the countries of issue of various major currencies are the only ones which will accept the responsibility for supplying unlimited quantities of that currency and that these central banks are committed to only their own clearing banks.

Furthermore, eurocurrency deposits are denominated in eurocurrency, that is, eurodollars, eurosterling and the like and not dollars or sterling per se. Consequently, repayment cannot be made in eurodollars or eurosterling, because they are only book entries, or what some commentators have referred to as quasi-money. Being eurocurrencies payment cannot be made at arm’s length and so eurocurrencies have to be converted into their corresponding currencies before repayment can be made. The process of converting the quasi-money, that is, eurocurrencies into their corresponding currencies generally takes place in the country of issue of the currency concerned. This is because there is no international body which can supply the needed funds in the various currencies. In the absence of an international organisation which is both willing to supply, and capable of supplying, unlimited quantities of a variety of currencies on demand, the only efficient alternative is to repay a deposit denom-
inated in a particular currency via the clearing and settlement system of the country of issue of that particular currency.\textsuperscript{16}

Moreover, effecting payment via the clearing and settlement system of a country of issue of a particular currency provides the speed, certainty and efficiency associated with a net–net settlement process, which is generally not available when payment is effected via correspondent or “in-house” transfers.\textsuperscript{17}

Unlike the domestic banking context then, in the eurocurrency deposit context, it is possible to identify three stages in the repayment process:

(1) the demand for payment by the customer;
(2) the preparation by the customer’s bank to effect payment; and
(3) actual payment: the collection of funds.

While all three stages may take place in the same bank in the domestic context, only the first two stages take place at the eurobank in the eurocurrency deposit context.

IV. THE APPLICABILITY OF THE COMMON LAW REGIME

The application of the common law rules concerning the operation of domestic bank deposits to the operation of eurocurrency deposits gives rise to various grey areas. These arise because of the inadequacy of the common law rules concerning the operation of bank deposits, when they are applied to the operation of offshore currency deposits in general and eurocurrency deposits in particular. The grey areas which will be discussed in this article are:

(1) the concept of payment in eurocurrency deposit operations, including the definition of what constitutes money and payment, as well as the place and time of payment in eurocurrency deposit operations;
(2) the method of determining the proper law of a eurocurrency deposit contract;
(3) the jurisdictional conflicts which arise in the operation of eurocurrency deposits in particular; and
(4) the legal effect of the imposition of restraints on the operation of offshore banks. This grey area includes the determination of when the home office of an offshore branch bank will be held liable for deposits held at the offshore branch.

In discussing these grey areas, this article will argue that the inadequacy of the common law rules concerning the operation of bank deposits, for eurocurrency deposits, justifies the need for a new legal regime—an

\textsuperscript{16} Carreau, \textit{op. cit. supra} n.5, at p.161; Hoffman, \textit{op. cit. supra} n.10.

\textsuperscript{17} Goode, \textit{op. cit. supra} n.9, at pp.82–83.
international legal regime—to govern the operation of eurocurrency deposits.

A. The Concept of Payment

One of the grey areas which arises when the common law rules on the operation of bank deposits are applied to the operation of eurocurrency deposits, concerns the concept of payment. This article argues in favour of a new body of rules to redefine the concept of payment as it applies to eurocurrency deposits. This includes rules concerning the nature of payment, that is, what constitutes payment; the time of payment and finality of payment; and the nature of the repayment obligation of banks, including the place of repayment of eurocurrency deposits.

The concept of payment as used in the common law is based on the legal definition of money and the legal doctrines applicable to money.\(^{18}\) This legal definition of money and the doctrines applicable to money are the result of the nature of the evolution of money in ancient history.\(^ {19}\) Money, in ancient history, evolved from the use of commodities, that is, chattels with intrinsic and economic worth, to the use of chattels without any kind of intrinsic value, issued by the fiat of the State and constituting engagements or promises to pay coin or specie and, finally, to the use of chattels in the form of paper money, without any value, also issued by the fiat of the State but circulating as money in its own right, that is, not constituting promises to pay specie.\(^ {20}\) Money in its concrete form or its legal definition is therefore considered to be a chattel which is issued by the fiat of the State, denominated with respect to a particular unit of account, and serves as the universal means of exchange in the country of issue.\(^ {21}\) The ultimate result of this evolution and definition of money is that money—in legal terms—can only be cash, and money in a bank, that is, a bank deposit, is also identifiable as cash.\(^ {22}\) This definition of money has influenced certain aspects of the common law rules on the operation

19. Ibid.
20. For more comprehensive discussions of the evolution of money, see Paul Einzig, Primitive Money (1966); Rupert J. Ederer, The Evolution of Money (1964) and A. R. Burns, Money and Monetary Policy in Early Times (1965).
22. For cases on this point, see Manning v. Purcell (1854) 2 Sm. & Giff. 284, 65 E.R. 402 and Parker v. Marchant (1842) 1 Y. & C.C.C. 290, 62 E.R. 893, aff'd (1843) 1 Ph. 356, 41 E.R. 667.
of bank deposits and for that matter, the banker–customer relationship, including both the nature of payment and the place of repayment of a bank deposit.

Under the common law, in the absence of a specific agreement to the contrary, the promise of a bank to repay the deposit of a customer is to do so at the branch where the account is kept, that is, the place where the deposit is maintained. 23 In the case of an offshore currency deposit, this would be the country in which the bank is located. 24 Although the reason for localising the repayment obligation of the bank is not clear, some commentators have argued that it may be based on the principle of corporate responsibility. 25 This article contends that although there may be an element of truth in the assertion above, the localisation of the repayment obligation of banks is due to the nature of the evolution of money and the consequent legal definition of money. Since money is considered to be a chattel, that is, cash, and a bank deposit is identifiable as cash, the common law perceives a bank deposit to be something which is kept in a definite and identifiable location. 26 The term “deposit”, itself from the Latin “depositum”, suggests the possession of certain physical attributes associated with locality. In the common law rules concerning the operation of bank deposits, then, there is a logical link between the place where the deposit is made and the place of repayment of such a deposit. This common law rule linking the place of repayment of a deposit to the place where the deposit is maintained gives rise to problems when applied to the repayment of a eurocurrency deposit. As the previous section observed, as a general rule, the repayment of a eurocurrency deposit does not occur at the place where the deposit is maintained, that is, the country in which the eurobank is located. In most cases the repayments of eurocurrency deposits take place in the countries of issue of the respective currencies, in accordance with those countries’ clearing and settlement rules. As mentioned earlier, this usual practice is due to purely practical considerations and does not preclude the possibility of the repayment of a eurocurrency deposit being effected via correspondent or “in-house” transfers as contended by some writers. 27 The reasons for this usage have already been made clear. 28 In addition to the above-mentioned reasons, the argument that repayment of a eurocurrency

27. Scott, op. cit. supra n.8.
28. See supra nn.8–14 and the accompanying text.
deposit takes place in the country of issue is also supported by the actual process of effecting repayment via electronic funds transfers.

The use of electronic funds transfers is an integral part of the operation of eurocurrency deposits. The characteristic feature of the electronic funds transfer process is that it enables funds to be transferred between parties in different parts of the world without the actual transfer of physical cash. When funds are said to have been transferred between a debtor, “A”, and a creditor, “B”, via their banks, “A Bank” and “B Bank” respectively, what really happens is that a notional transfer of funds takes place between A Bank and B Bank when the relevant entries are made in the books of a central bank. It is the notional transfer of funds between the accounts of both A Bank and B Bank maintained with the central bank which effectively produces payment as between the banks concerned and, consequently, their respective customers. Although this process of payment may be more relevant for the nature of payment per se, it is also relevant for the place of repayment of a deposit. If payment as between A and B is said to take place when the notional transfer of funds between the accounts of A Bank and B Bank is effected, then it follows that the place of payment will be the place where this notional transfer of funds takes place. This will be the location of the central bank, and in the case of an international funds transfer this will be the clearing system of the country of issue of the currency.

What the above suggests is that the common law rule with respect to the place of repayment of bank deposits is inapplicable to the repayment of eurocurrency deposits, because the place where a eurocurrency deposit or account may be maintained is not necessarily the place where repayment of the eurocurrency deposit takes place. As observed above, then, the process of repaying bank deposits may be divided into three stages: the demand by the customer at the bank where the account or deposit is maintained to be repaid; the preparation of the bank where the account is kept to repay the deposit; and the actual payment or delivery of the funds. While all three stages may take place at the same bank where the deposit or account is kept, in a domestic deposit context, this is not so with the repayment of eurocurrency deposits. In the latter case only the first two stages take place where the account is kept. The actual payment or delivery of the funds, whether in the form of clearing house funds, cash or other representative forms of cash, takes place—in most instances—in the country of issue of the currency. This suggests that the second stage (the preparation of the bank where the deposit is maintained to make payment, after it is demanded by the customer) does not constitute payment.

30. Goode, op. cit. supra n.9, at p.81.
It has been argued that since the very act of transmitting a payment message by a transmitting or originating bank, to a receiving bank, operates to produce payment, it is incorrect to assert that repayment of a eurocurrency deposit takes place in the country of issue. However, this argument, which is based on the process of credit transfers in the domestic context, does not seem applicable in the international context and also raises the issue of the time of the completion of payment in international funds transfers. One way of resolving this problem would be to draw a distinction between, on the one hand, the process of payment and, on the other, the actual collection or delivery of the funds. This distinction was drawn in the Wells Fargo litigation. However, since cover has to be provided by the sending or originating bank before a receiving or beneficiary bank is capable of effecting payment to the payee, the mere transmission of the payment message by the sending or originating bank, upon a demand by the payer–customer, cannot constitute payment. Furthermore, it seems inconceivable that the mere transmission of a payment order, upon a demand by the customer, should constitute payment in the absence of an acceptance by the receiving or beneficiary bank or of any other action on the part of the receiving/beneficiary bank which suggests that it has accepted the payment order for the benefit of the payee.

The argument that payment takes place where the eurobank is located, upon the transmission of the payment order of the payer–debtor, is flawed also in another sense. It fails to recognise that, irrespective of the transmission of a payment message, payment cannot be said to have taken place unless the funds transfer effectively constitutes the creditor’s bank a debtor to the payee for the relevant sum payable. In this respect, it is not incorrect to regard payment as taking place in the country of issue.

In addition to redefining the place of repayment of eurocurrency deposits, there is also the need for an international legal regime to redefine the concept of payment per se, to make the concept more appropriate for the operation of eurocurrency deposits. The nature of the evolution of money and the consequent legal definition of money suggest that an effective tender of payment can be made only with legal tender or cash. Thus demand deposits in banks do not constitute money and their use to effect payment does not necessarily discharge a debt. In the case

31. Supra n.3.
33. See e.g. the argument of Mann, op. cit. supra n.21, at p.76, that although payment may be made by any method agreed between the parties or acceptable to the creditor, an effective tender can only be made by proffering to the creditor the amount due in legal tender.
arising out of the US freeze of Libyan assets, therefore, the Commercial Court in London held that repayment of a eurodollar deposit totalling approximately US$131 million held on the books of a US branch bank located in London had to be made in cash. This was despite the defendant bank’s argument that, in the eurocurrency deposit context, payment is effected only by way of credit transfers to relevant accounts. According to the court, repayment of the eurodollar deposit had to be made in cash because all monetary obligations, in the absence of any term to the contrary, are to be fulfilled by the delivery of cash. However, the process of the evolution of money and payment has also given rise to other modes of payment which do not involve the use of cash or legal tender. Consequently, although the argument that all monetary obligations are to be fulfilled by the delivery of legal tender may have been useful in the period when legal tender and the other representative forms of cash were the only acceptable means of making payment, the rule is anachronistic in this day and age, where widespread use is made of credit transfers. This is more so in eurocurrency deposit operations where deposits are exclusively in the form of book entries in nominated accounts. Since credit transfers are widely used in modern financial transactions, then, it seems inappropriate to define payment exclusively in terms of the doctrines which regulated the use of coins and, subsequently, paper money. Credit transfers are a legitimate means of effecting payment although no physical transfer of cash is involved. Using the hypothetical example adopted earlier, it is possible to show that where debtor A has to make payment to B and such payment is to be effected by the transfer of funds between A and B, via their banks, A Bank and B Bank respectively, all that is necessary for payment to take place is for a notional transfer of funds to occur between A Bank and B Bank when the relevant entries are made in accounts maintained on the books of a central bank. It is this notional transfer of funds between the accounts of both A Bank and B Bank maintained with the central bank which effectively produces payment as between the banks concerned and, consequently, their respective customers. Payment in this non-cash sense is thus effected solely by the mere transfer of claims. The claim which the original creditor—B—had against the debtor—A—now becomes a claim against the creditor’s own bank: B Bank. The funds transfer process, and the consequent notional transfer of funds between the accounts of the banks concerned, with a central bank, effectively constitute the creditor’s bank, B Bank, a debtor or obligor of the payee, B, for the relevant amount of the debt. This substitution is effective to discharge the obligation of A and is equivalent

34. *LAFB v. BT*, supra n.3.
to the use of cash to make payment. This process of making payment is even more important in eurocurrency deposit operations.

One of the reasons given by the Commercial Court in London for holding that repayment of the eurodollar deposit had to be made in cash was that the defendant, Bankers Trust Co., had failed to establish the existence of a custom or usage in the market which required payment to be effected by credit transfers and not cash. It is arguable, however, given the fact that eurodollars are not dollars per se and have to be converted into dollars in the country of issue before payment can be made, that it was not necessary for Bankers Trust Co. to establish the existence of such a custom. Nevertheless, the opinion of the Court suggests that, in the absence of an express term, whether a depositor of eurocurrency will be repaid in the country of issue of the currency or in the country in which the eurobank is located will depend on the nature of the course of dealing between the parties and the circumstances of the case. The situation which the decision has created is one of uncertainty. For it is not even clear what kind of course of dealing will make a court conclude that repayment has to take place in the country of issue. It is thus possible to argue that, in the absence of an international legal regime to establish clearly this process of making payment as a custom or practice of the eurocurrency market, it is more likely than not that the precedent set in the case will be followed in subsequent cases of a like nature. Given that this has given rise to a situation of uncertainty, it justifies the need for, and argument in favour of, an international legal regime for the operation of eurocurrency deposits.

B. The Time of Payment

The use of electronic funds transfers in eurocurrency deposit operations also highlights the need for a body of rules to determine the time of the completion of payment and finality of payment in credit transfer operations. Conceptually, payment by the process of credit transfers may be said to take place when the bank of the payee/customer is constituted the debtor or obligor of that payee/customer in place of the payer/debtor, in respect of the amount due.35 The determination of the time of payment in credit transfers thus involves the determination of the point in time when this substitution takes place.36 The advent of electronic or automated credit transfers has made the determination of the time of payment in non-paper-based credit transfers even more uncertain. This uncertainty has made it difficult for both jurists and academics to extract principles

35. Geva, op. cit. supra n.32; King, op. cit. supra n.32.
36. Geva, ibid.
which constitute a consistent body of legal doctrine governing the determination of the time of the completion of payment. Since eurocurrency deposit operations are facilitated primarily by the means of electronic funds transfers, the uncertainty in the common law regime leaves much to be desired. An examination of the cases which have sought to determine the time of the completion of payment in electronic funds transfers reveals that it is unclear if that determination is to be based on:

(1) whether the payment process is “in-house” or not; 37
(2) when an internal decision is made to credit the account of the payee/customer and then this decision is acted upon; 38
(3) when a credit entry is actually made, as opposed to the mere decision to credit; 39
(4) when the payee’s bank accepts or receives the payment order, as opposed to making a credit entry; 40
(5) whether notice of the credit to the account of the payee is given to the payee; 41 and
(6) the particular bank practice in question.

One solution to this problem of determining the time of the completion of payment has been advanced by Professor Geva: the “hypothetical positive response”42 test. This test is based primarily on the availability of funds. In general, this hypothetical positive response theory states that the time when payment is completed is the point in time when “an inquiry by the payee-customer as to the arrival of funds, would be responded to with a positive answer from the [payee’s] bank”. 43 Although this approach has merits, it also has its problems. For instance, it is unclear if the availability of funds is to depend, on the one hand, on availability per se, that is, the funds are in the real sense available for withdrawal, or, on the other, on the fact that the originating bank has initiated the process

38. See The Brimnes, ibid, for the decision to credit theory of the time of the completion of payment.
39. See Eyles and Momm, supra n.37 for the posting of credit theory of the completion of payment in funds transfers.
40. See the CA decision in The Laconia, supra n.37, for this approach to the determination of the time of the completion of payment.
41. See Rekstin, supra n.37.
42. Geva, op. cit. supra n.32, at pp.113–114.
43. Ibid.
which will make the funds ultimately available, but the funds are not yet available.

Furthermore, as Geva himself observes, the hypothetical positive response test also does not solve the problem of subjecting the payer to the uncertainties of the internal accounting procedures of the payee’s bank. This general dilemma of uncertainty and the absence of any “golden thread” running through the jurisprudence and, for that matter, the common law justify the argument in favour of an international legal regime to govern the operation of eurocurrency deposits, including rules with respect to the determination of the time when payment may be said to be completed. Given the volume of international financial transactions which are effected via electronic funds transfers, this need cannot be overemphasised.

One possible approach is to define the time when payment is completed in terms of the acceptance of the payment order by the beneficiary bank for the benefit of the payee. This is a logical development from the nature of credit transfers. Unlike a debit transfer, a credit transfer is initiated by the debtor. This means that it is possible for the originating or paying bank to determine if the sender of the payment order has adequate funds to cover the transfer. In general then, a sending bank is considered to have committed itself to effecting payment as soon as it does an act indicating that it has accepted the payment order of the sender/customer. From this it is possible to argue that the point in time when payment to the payee is completed is as early as when the beneficiary bank does an act suggesting that it has also accepted the payment order on behalf of the payee, sent by the originating bank. The assumption is that the originating bank would not have accepted the payment order of the sender/customer and effected a corresponding transfer had there been insufficient funds to cover the transfer or if the originating bank had reason to believe the funds to cover it would not be forthcoming. Acceptance of the payment order by the beneficiary bank on behalf of the payee is the approach currently adopted by Article 4A–405(a) of the Uniform Commercial Code as well as the UNCITRAL Model Law to determine the time of the completion of payment. These two legal regimes may therefore be used as a model for any proposed international legal regime for the operation of eurocurrency deposits.

In addition to the need for a body of rules to determine the time of the completion of payment, there is also the need for rules with regard to the associated issue of payment/receiver finality. Receiver or payment finality concerns the time when payment to the payee is regarded as final and consequently irreversible. Under the common law rules on the use of cheques, the decision of a bank to post credit to the account of the payee upon the receipt of a cheque payable to that customer does not imply a credit risk decision on the part of that bank. Credit to the account of the
customer is in this respect regarded as being conditional and dependent on the availability of funds in the account of the payer to cover the amount of the cheque. But the situation is not that clear in the case of non-paper-based transfers, including electronic funds transfers. It is unclear whether (i) a beneficiary bank may use its own discretion and post provisional credit to the account of a payee upon the receipt of a payment order but prior to the arrival of funds to cover the order, and (ii) the decision to post credit to the account of the customer concerned implies a credit risk decision on the part of the beneficiary bank, that is, it has assumed the risk of non-payment or sender failure. As a corollary of the above, it is also not clear if a beneficiary bank which is not prepared to assume the risk of non-payment has a right to delay the acceptance of a payment order before the receipt of cover or to reject any payment order which is not accompanied by cover. Given that the use of electronic funds transfers plays an indispensable role in the operation of eurocurrency deposits and that the beneficiary bank is in most cases paid through another account maintained on the books of an intermediary bank, the need for clarity with respect to receiver finality cannot be overstated. In this respect, it is relevant to mention that Article 4A–405(c) of the Uniform Commercial Code provides for receiver finality when funds are made available to the payee. Given the indispensable nature of electronic funds transfers to the operation of eurocurrency deposits, the uncertainty in the common law with regard to the time of the completion of payment, as well as receiver finality, justifies the support for an international legal regime for the operation of eurocurrency deposits.

C. The Law which Governs the Eurocurrency Deposit Contract

The proper law of deposit contracts is another common law rule which has been influenced by the cash-orientated definition of money and the consequent linkage between the place where the deposit is maintained and place where it is repaid. Under the common law, since a bank is normally required to repay a deposit at the branch where the account is kept, in the absence of an express choice of law the proper law of the deposit contract is the law of the place where the account is kept or the deposit is maintained.44 This is said to be the place or system of law with which the deposit contract has its closest and most real connection. The proper law rule is therefore also based on the perceived linkage between the place where the deposit is maintained and the place of repayment. But as this article has argued, in the eurocurrency deposit operation the

place where the account is kept is not necessarily the place where the deposit is repaid. Consequently the linkage between the place where the account is kept and the place of repayment is non-existent in the eurocurrency deposit context.\footnote{See supra nn.8–17 and the accompanying text. For other detailed discussion of the problem concerning the proper law of the eurocurrency deposit, see Edmund M. A. Kwaw, "Determining the Proper Law to Govern the Eurocurrency Deposit Contract" (1993) 18 Queen's L.J. 440–476.} If this is the case, the proper law rule used in the domestic context needs to be reformulated to make it more appropriate for the eurocurrency deposit operation. Not only is there a need for a governing law rule which is not dependent on the perceived linkage between the place where an account is kept and the place where the deposit is repaid, but there is also the need for a rule which is capable of taking into consideration the variety of contractual relationships possible in the eurocurrency deposit context. The common law proper law rule assumes that there can be only one deposit contract which is subject to one law, the law of the place where the deposit is maintained. But the nature of eurocurrency deposit operations is such that it is possible for a variety of deposit arrangements to exist. For example, although a deposit contract may exist between a eurobank located in “Urbania” and a depositor, where the subject matter of the contract is the currency of “Ruritania”, it does not follow ipso facto that the deposit contract in question is governed by the law of Urbania. In this hypothetical example, the deposit contract between the eurobank and the depositor may, for instance, be part of a master account arrangement between the eurobank branch in Urbania and its head office in Ruritania. In order to determine the law which governs the deposit contract between the eurobank and the depositor in this context, in the absence of an express choice, it is necessary to examine all the circumstances of the case. Furthermore, when a eurobank accepts a deposit denominated in the currency of another country, it accepts obligations, including the obligation to repay, which is, in most instances, carried out by causing acts which occur in the country of issue of the currency.\footnote{Carreau, op. cit. supra n.5, at pp.160–161; Kwaw, idem, pp.445–446.} The eurocurrency deposit contract is thus subject to at least two systems of law: the law of the place where the eurobank is located and the law of the currency. Whichever of these governs the deposit contract in question, in the absence of an express choice, depends on the nature of the deposit contract in question and the circumstances of the case. Despite the close connection of the eurocurrency deposit contract to various systems of law, there is no indication—in the traditional proper law rule formulation—why the place where the eurobank is located, and not the country of issue, is considered to be the closest connection with the contract. In the eurocurrency
context, then, although an account is kept where the eurobank is located, this is not necessarily determinative of the governing law as it is in the domestic context. In the eurocurrency deposit context, any rule which seeks to determine the law which governs a eurocurrency deposit contract in the absence of an express choice, must both transcend the limitations of the place where the account is kept and be capable of examining all the connections of the deposit contract with the various systems of law.

This article advocates a reformulation of the proper law rule in terms of the law which defines and determines the substance of the obligations between the eurobank and the customer. Although this approach, when applied in the domestic context, will produce results similar to the traditional proper law rule, its advantages are that it avoids the ambiguities which come with the application of the traditional rule in the eurocurrency deposit context and it also makes it possible to accommodate various eurocurrency deposit arrangements.

D. Extraterritoriality and Conflicts of Jurisdiction

Unlike a domestic bank deposit, the nature of the eurocurrency deposit is such that it straddles many jurisdictions. The effect of this is that the eurocurrency deposit is subject to multiple schemes of regulation. The host country of the eurobank, that is, the country in which the eurobank is located, the home country of the eurobank, or the country in which its head office is located, the country which is the domicile of the depositor, and the country whose currency is the subject matter of the eurocurrency deposit contract, may all have legitimate grounds for regulating the relationship between the offshore bank and the customer in question. Legitimate grounds may be said to exist because of the existence of a genuine link between the country seeking to exercise jurisdiction, and the subject matter of the legislation. The result of this is that jurisdictional conflicts are a distinct possibility in the operation of eurocurrency deposits. There are various examples of situations involving jurisdictional conflict which may arise in the operation of eurocurrency deposits.

1. Exchange control regulations and jurisdictional conflicts

The imposition of exchange control regulations by the country of issue of the currency which may either modify the nature of the contractual obligations under the deposit contract or restrict the use of the currency to effect payment, may give rise to a jurisdictional conflict. In this

47. See Kwaw, op. cit. supra n.45.
49. One of the arguments raised by Citibank and the other commercial banks in the case involving the imposition of a freeze on Iranian assets was that the US freeze order was an exchange control regulation. The imposition of exchange controls is governed by Art.VIII, s.2(b) of the IMF Agreement. Where a country of issue enacts an exchange control
situation a jurisdictional conflict arises when the exchange control regulation, which is intended to regulate the use of that country’s currency, conflicts with a law—requiring all contractual obligations to be honoured—of the country where the offshore bank is located.

2. Freezing orders and jurisdictional conflicts

Jurisdictional conflicts may also arise from the imposition of freezing and blocking orders—by either the home country of the offshore bank or the country of issue—on certain accounts maintained at the offshore branch. Such measures, as seen in the case involving the imposition of the US freeze on Libyan assets, may then conflict with the law of the country in which the offshore bank is located, which may require all banks located in that territory to honour banking contracts.

3. Discovery orders and jurisdictional conflicts

Jurisdictional conflicts also arise when either the home country of the offshore bank or the domicile of the depositor passes laws which require the offshore branch bank to produce certain documents and information concerning either the eurocurrency deposit account of a customer or the eurocurrency deposit operations of the offshore bank. Such laws give rise to a jurisdictional conflict when they come into conflict with bank secrecy and confidentiality laws of the host country.50

In all these situations involving jurisdictional conflicts, the issue concerns the validity of the extraterritorial effect of laws, that is, whether a country can pass laws which then purport to have effect in the territory of another. Because the common law rules on the operation of bank deposits are territorial in scope, they do not contemplate offshore currency deposits. Consequently, there are no provisions in the common law rules which are aimed at assisting courts to resolve jurisdictional conflicts. Even the rules of the conflict of laws, or private international law, which are called into play when a case involving a foreign element arises, are based on the notion that laws are territorial in scope.51 The common law therefore

regulation, any exchange contract in existence which is contrary to the exchange control regulation becomes unenforceable. The practical effect of this provision is that such an exchange control regulation is given extraterritorial effect, and becomes enforceable by the courts of another country.

50. See e.g. US v. First National City Bank 396 F.2d 897 (2nd Cir. 1968) concerning the production of documents and other material evidence by a branch of First National City Bank in Germany, and US v. Bank of Nova Scotia 691 F.2d 1384 (11th Cir. 1982) cert. denied 462 U.S. 1119, which involved a branch of the Bank of Nova Scotia in the Bahamas.

incapacitates itself from even considering the validity of the intraterritorial exercise of jurisdiction with extraterritorial effect, in any circumstances. This approach of the common law, and thus of the courts, is unrealistic, if not anachronistic. Where the authorities of various countries are faced with transactions, including international business crimes which are planned internationally, an approach which is rigidly territorial and does not take into consideration the international nature of modern business transactions and, for that matter, international banking operations is ineffectual. 52 Although a number of States have concluded various bilateral agreements aimed at resolving jurisdictional conflicts between them, 53 these memoranda of understanding and mutual assistance treaties do not solve the problem. First, bilateral agreements are based on the premise that a State has no legitimate reason in seeking to have its law applied extraterritorially and, furthermore, they do not cover all situations to which a State may have an interest in applying its laws. 54

The approach, then, should be not to preclude extraterritoriality, since it is desirable, but, rather, to create a framework of rules which:

1. provide for extraterritoriality;
2. determine the validity of extraterritoriality;
3. take into consideration the paramount interests of the State seeking to exercise jurisdiction on the basis of territory; and
4. also provide the courts with a method of resolving jurisdictional conflicts.

This approach involves posing two questions: whether the States concerned have jurisdiction to prescribe laws in relation to the person, conduct or activity in question; and whether such jurisdiction has been properly exercised. To answer these questions, courts need to adopt a two-pronged approach. To determine if a State has jurisdiction, courts should first determine if the jurisdictional conflict falls within Article VIII, section 2(b) of the International Monetary Fund (IMF) Agree-


The IMF provision is applicable if: the legislation concerned is an exchange control regulation, the deposit contract concerned is an exchange contract within the meaning of the provision, the deposit contract involves the currency of a member; and the exchange control regulation in question is imposed consistently with the IMF rules. If the IMF provision is applicable, the provision goes beyond the territorial principle of private international law and gives extraterritorial effect to the exchange control regulation of the IMF member concerned. On the other hand, where the conditions above are not met, in answering the first of the two questions posed above the court must proceed to determine if the exercise of extraterritoriality is justified on other grounds. This may be the case if there is a genuine link or connection between the regulating State and the person, conduct and activity in question, such that the activity or conduct in question has a direct, foreseeable and substantial effect on the legislating State. This high threshold is aimed at taking into consideration the paramount interests of the State seeking to exercise jurisdiction on the basis of territory. Thus, although the exercise of jurisdiction may fall within the traditional principles of jurisdiction and may thus be said to be justified, in the absence of a direct, substantial or foreseeable effect on the legislating State, the existence of a genuine link alone will not justify extraterritoriality.


58. For a discussion of the two interpretations of this term, see Edwards, idem, p. 892; Balfour, op. cit. supra n. 56, at p. 132; Mann, op. cit. supra n. 21, at p. 386 and Williams, idem, p. 345.

59. See Balfour, idem, p. 137; Joseph Gold, “Article VIII, Section 2(b) of the IMF Articles in its International Setting”, in Horn, op. cit. supra n. 56, at p. 88.
If the exercise of jurisdiction is justified, the court should then proceed to answer the second question, that is, whether jurisdiction has been properly exercised. This second step in the resolution of the jurisdictional conflict involves the determination of the international law limits on the exercise of jurisdiction and the application of those limitations to the exercise of extraterritorial jurisdiction in question. The exercise of jurisdiction may be said to be proper if it is in accordance with the two principles of non-intervention and of reasonableness.60 Having said this, it needs to be added that in the absence of an international regime which provides for extraterritoriality in certain specified circumstances and the resolution of jurisdictional conflicts, courts will be confined to applying the common law private international law rules which, based as they are on the notion of the territoriality of laws, preclude the exercise of extraterritoriality. This justifies the call for a legal regime to govern the operation of eurocurrency deposits in particular.

E. Home Office Liability and the Allocation of Risk of National Intervention

Another grey area which arises in the operation of eurocurrency deposits concerns the issue of home office liability for deposits maintained at offshore branches. Under the traditional common law rules concerning the operation of bank deposits, the obligation of a bank to repay a deposit is localised and rests on the branch concerned.61 A customer may demand and obtain repayment only at the branch where a deposit or account is maintained. This localisation of the repayment obligation of the bank is capable of being modified as a result of (a) a subsequent agreement between the customer and another part of the bank, (b) credit risk, resulting in the closure of the branch where an account is maintained, and (c) a wrongful refusal of the branch to make payment resulting in a breach of contract. In all these situations another branch of the bank, usually the head office (sometimes referred to as the home office), will be liable either under the prior agreement (as in case (a)) or as principal (in cases (b) and (c)) and will be obliged to repay the deposit in question. The issue of home office liability, on the other hand, concerns whether the head office of a bank may be held liable for the deposits maintained at an offshore branch, not for any of the above-mentioned reasons but for national intervention in the operation of the offshore branch.62 By

61. Ogilvie, op. cit. supra n.44; Hapgood, op. cit. supra n.44; XAG Bank v. A Bank, supra n.44.
national intervention is meant activities, usually of the host country, which have the effect of placing restrictions on the operation of the offshore branch, including the obligation to repay a deposit. These restrictions or forms of national intervention may include the imposition of freezing and blocking orders and expropriation of the deposits of customers. While the issue of home office liability for deposits maintained at offshore branches has also been raised in those cases involving freeze orders or the mere suspension of the obligation of the offshore branch bank to repay, it properly arises only in the event of an expropriation. This is because a freeze order merely suspends the obligation of the offshore branch and does not result in the transfer of the debt; therefore the customer still has a claim against the offshore branch. An expropriation, on the other hand, involves the enforced transfer of the debt of the offshore branch, or an involuntary assignment. Consequently, the ownership of the debt is also transferred.

In the domestic context, an involuntary assignment of a debt of a bank by way of an attachment or garnishment, discharges the obligation of the garnishee bank. Although this means that an act of law, including the appropriation of a deposit by the State, should discharge the debt of the bank as regards the amount of the deposit, the situation is not as clear in the international context. When restrictions are placed on an offshore currency deposit, the depositor must determine where the funds may be reclaimed. In most instances, depositors, even after an expropriation purports to discharge the debt of the bank with respect to the particular deposit, have brought actions against the bank’s head office claiming to be repaid the deposit. Faced with this situation the courts have then had to determine if the head office of the offshore bank was liable for the deposit. Although the expropriation of a bank deposit amounts to an involuntary assignment of the debt, the courts over the years have avoided the domestic analogy and have used a variety of approaches to determine whether the home office of the offshore branch is to be made liable for an expropriated deposit. These approaches include the act of State doctrine, *situs* of the debt or the place where the debt is situated, and the principle of corporate responsibility.

The *situs* of the debt approach has been used in conjunction with the act of State doctrine. In general, this doctrine prevents the courts of one State from challenging the conduct of another sovereign State. Consequently, an expropriatory act—which is considered to be an act of a

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sovereign State—is regarded as valid and unassailable by the courts of another State. In using the situs of the debt approach, the courts have articulated the rule that the liability of the home office for the debt of its offshore branch depends on whether the debt is situated in the expropriating country at the time of the expropriation. This is in accordance with common law lex situs rule, that the law of the place where a debt is situated determines the legal effect of an expropriation.64 The situs of a debt in the conflict of laws is the place where it is recoverable or enforceable, usually the residence of the debtor.65 Thus if a debt is located in an expropriating State at the time of the expropriation, the courts have held that the State is capable of collecting or enforcing the debt, and such a collection is legal in terms of both the lex situs rule and the act of State doctrine.66 In certain circumstances then, where the debt has been found not to have been situated in the expropriating State at the time of the expropriation, the act of State doctrine has been inapplicable as a defence for the bank home office against demands by customers for repayment of expropriated deposits.67 In using the doctrine of corporate responsibility too, the courts have held in certain circumstances, that since the head office or parent of an offshore branch is ultimately liable for the debts of its branch in accordance with the principle of corporate responsibility, the head office must repay the expropriated deposit.

But courts in the United States have also modified their application of these approaches by introducing other factors or considerations defined by their perception of the totality of the contractual obligation of the parties. For example, even though there have been cases where the situs of a debt has been found to be the expropriating country at the time of the expropriation, the courts have held that due to the paramount nature of the expectation of the parties, specifically the depositor’s, both the lex situs rule and the act of State doctrine were irrelevant.68 But these modified-approach cases have lacked any form of framework or guidelines to guide jurists in the process of determining home office liability. The result of this is that there is a considerable amount of confusion and

64. See Jabour (F & K), supra n.51; Lawrence Collins (Ed.), Dicey and Morris: The Conflict of Laws, Vols.1 and 2 (11th edn, 1987), pp.1161–1162.
66. See e.g. Perez, supra n.4, where a deposit was held to have been situated in Cuba at the time of the expropriation. Consequently, the Cuban government could enforce the debt.
67. See Vishipco, supra n.4, where it was held, that since the debt was no longer situated in Vietnam at the time of the expropriation, the deposit was not affected and could not be collected by the Vietnamese government.
68. See Garcia and Trinh 1, supra n.4.
uncertainty surrounding the determination of home office liability for deposits of offshore branches. Both academics and jurists have been unable to extract any consistent principles which may be said to constitute a doctrine on the issue of national intervention and home office liability.

This article argues that the unique nature of the offshore currency deposit justifies the adoption of an approach which is different from the traditional common law *lex situs* approach as well as the approaches adopted by the US courts. Unlike the operation of deposits in the domestic context, the offshore currency deposit is exposed to an additional sovereign risk. It thus seems reasonable that, in determining the obligations of the banks concerned in the event of the imposition of any restriction, other factors or variables relating to the contractual obligation of the parties, as derived from all the circumstances of the case—including the expectation of the parties and the nature of the allocation of risk—should be taken into consideration. To the extent that the traditional common law *lex situs* and the other approaches used by the courts do not envisage this additional consideration, they are inappropriate for the international context. A better approach—which this article proposes—is one which seeks to take into consideration the nature of the contractual obligation of the parties as derived from all the circumstances of the case.

According to this approach, it is within the expectation of the parties that in consideration of the high interest rates available in the offshore banking market, the parent bank bears the credit or commercial risk while the customer bears the sovereign risk. This basic expectation is a presumption and, consequently, capable of being negated. When faced with a case involving the issue of whether a home office bank is liable for the deposit maintained at an offshore branch, courts should determine if this basic presumption has been modified or varied by the express contractual obligation of the parties. Such an express contractual obligation of the parties, including representations to the effect that the security of the deposit of the customer is guaranteed, represents a contractual allocation of risk. One effective method of expressly and contractually allocating the risk of political or sovereign intervention in the operation of an offshore deposit is for parent banks to make use of master contracts including terms with respect to the allocation of risk. Such master contracts may then be incorporated by deposit contracts used by offshore branches. In the absence of such a contractual allocation of risk, the court should determine if the basic expectation has been modified or varied by an implied contractual obligation as derived from all the circumstances of the case.

In the absence of an international legal regime to provide the framework of rules and guidelines to assist the courts in the determination of home office liability, however, it is unlikely that the uncertainty and
confusion which have characterised this aspect of international banking law will immediately cease to be a problem.

F. Characterisation of Legal Relationships in International Funds Transfers

Another grey area with which this article is concerned is the characterisation of the legal relationships involved in the process of international funds transfers. While the common law is quite clear about the existence of an agency relationship between the bank and its customer with regard to the collection of cheques and other negotiable instruments, there is a considerable amount of uncertainty about the characterisation of the legal relationships involved in credit transfers. There is no consensus in judicial circles or the academic community about the nature of the legal doctrine from which the relevant rules to govern credit transfers are to be derived. While one group of scholars argues in favour of the existence of an agency relationship between all participants in the process of credit transfers,69 others contend that this is incorrect.70 For this latter group of people, while the relationship between the sending customer and the originating bank may be characterised in terms of principal and agent respectively, that between the receiving bank and the payee customer is a normal incident of the banker–customer relationship.71 According to this argument, when a bank receives funds on behalf of its customer it does so as a debtor of the customer in accordance with the rules of the banker–customer relationship.72 Consequently, such a bank cannot be deemed to be an agent of the customer in that context.

Since the operation of eurocurrency deposits straddles many jurisdictions, it is only reasonable to expect some measure of uniformity in practice as well as judicial interpretation of such practice to promote the integrity of the system. Given the uncertainty in the common law characterisation of the legal relationships involved in credit transfers, however, there is little possibility of achieving uniformity and certainty. This does not augur well for certainty in the operation of eurocurrency deposits, of which international credit transfers constitute an integral part. It is,

69. See e.g. E. P. Ellinger, “The Giro System and Electronic Funds Transfers” (1986) Lloyd’s Maritime and Commercial L.Q. 178, 195, who argues that the “only positive rule” is that most of the relationships involved in the process of credit transfers are governed by the law of agency, and Lord Chorley and J. Milnes Holden, Law of Banking (6th edn, 1974), p.266.

70. See e.g. King, op. cit. supra n.32; Bradley Crawford, “Credit Transfers of Funds in Canada: The Current Law” (1979) 3 Can. Business L.J. 119.


72. King, idem, p.375.
however, doubtful if certainty and uniformity in the characterisation of legal relationships will emerge out of independent judicial activity. This is the more so because of the international character of eurocurrency deposit operations. This uncertainty in the common law is another factor which illustrates the inadequacy of that legal regime to govern the operation of eurocurrency deposits, and the consequent need for an international legal regime.

V. CONCLUSION

As a result of the overall uncertainty which results from the application of the common law rules on the operation of bank deposits to eurocurrency deposits, this article advocates the creation of a legal regime at the international or multilateral level to govern the operation of eurocurrency deposits. It has been argued by some that the problem is not the common law per se but, rather, the application of the common law by jurists. Thus, while the principles of the common law are, in themselves, adequate to govern the operation of eurocurrency deposits, the problem arises when the principles are incorrectly applied by judges. This argument is not an accurate reflection of the problem. For, although there have been instances of incorrect application of the common law rules on the operation of bank deposits, principles such as the concept of payment, the place of repayment of bank deposits, the time of payment, the proper law of bank deposits and the territorial scope of legislation, are all principles of the common law which are per se inadequate as principles, and not because of the way they are applied by judges. Furthermore, the existence of general uncertainty and inconsistent decisions when the principles are applied to eurocurrency deposits says something about the adequacy of the principles in question. Moreover, the fact that the issue of receiver finality with respect to credit transfers has also not been adequately addressed in the common law is another indication of the inadequacy of the common law rules. In addition to the above, the uncertainty in the common law characterisation of the legal relationships involved in credit transfers also suggests that it is inadequate for eurocurrency deposit operations. The best solution to the problems discussed in this article is the creation of an international legal regime.

Such a regime, which may be created under the auspices of UNCITRAL or any other international body such as the International Chamber of Commerce, may take the form of uniform customs and practice for eurocurrency deposits, which may then be referred to by banks in eurocurrency deposit contracts, or a uniform law for eurocurrency deposit contracts. Although it is beyond the scope of this article to specify the exact nature and content of the provisions of such an international legal regime, it is possible to make certain definite proposals.
First, the proposed international legal regime should include provisions which clearly specify its scope or sphere of application. It should preferably be limited to eurocurrency (wholesale) deposit operations as opposed to the generality of offshore currency deposit operations.

Second, the proposed regime should also include provisions which deal with the formation of eurocurrency deposit contracts, to include provisions concerning the nature of the communication between the parties which precedes that actual formation of the contract, the terms of the contract, and the documentation needed for such contracts. Unlike the deposit of eurocurrency by a depositor in a eurobank, the interbank placement of eurocurrency is not formally documented. As a corollary of the above, there should also be provisions which deal with the formation of the contract involving an interbank placement, the nature of the documentation which is evidence of such a transaction, and the terms which should be embodied in such documentation. Since there has been no effort to adopt standardised documentation, as exists, for example, with respect to swap transactions, this provision will ensure more uniformity in the documentation used.

Third, since the process of operating eurocurrency deposits involves the use of funds transfer processes, the proposed regime must also include provisions which define or characterise the nature of the legal relationships involved in the funds transfer process, define the nature of the legal obligations of the parties involved in the process, determine the effect of such obligations, and specify the nature of the remedies available to the parties for breach of any of the specified obligations.

Fourth, the proposed regime must clearly specify the nature of payment in the eurocurrency deposit context, as discussed in this article. In this respect, it must specify the acceptable forms of payment taking into consideration the unique characteristics of the eurocurrency system, including the predominant use of payments into bank accounts or credit transfers, draw a distinction between the common law repayment obligation of banks and the repayment obligation of the eurobank, and provide rules for the determination of the time of payment and the issue of receiver finality.

Furthermore, the proposed regime must also contain provisions which deal with the reformulation of the proper law rule. It is important, in this respect, that any international regime de-emphasise the place of repayment of a bank deposit as the primary determinant of the closest and most real connection of a deposit contract with a system of law. This article has argued in favour of the system of law which defines and determines the substance of the obligation between the eurobank and customer, as the most appropriate formulation of the proper law rule. It would be appropriate for the relevant provision in the proposed regime to give examples of connecting factors which may influence the determination of the
location of the system of law which governs substance of the obligation. This could include factors such as the system of law which determines the nature of the debtor–creditor relationship between the eurobank and customer, and the incidents of that debtor–creditor relationship.

Sixth, since the eurocurrency deposit is subject to multiple schemes of regulation, the proposed international legal regime must provide for the possibility of extraterritoriality within certain definite circumstances, and also provide a framework of rules to guide the judiciary in the resolution of consequent conflicts of jurisdiction. Such a provision must provide for a two-pronged approach. Courts must determine whether the States seeking to exercise jurisdiction have standing to do so and whether the exercise of jurisdiction in question has been proper. Although a State may have standing to exercise jurisdiction either because of the IMF rules or the existence of a genuine link between the State concerned and the activity, such an exercise of jurisdiction still has to be proper. In this latter respect, the proposed regime should specify conditions which will determine the proper exercise of jurisdiction. This article has argued in favour of the imposition of a direct, foreseeable and substantial effect on the legislating State as a basis for the proper exercise of jurisdiction. It would be appropriate for the international regime to define the prerequisites for satisfying that direct, foreseeable and substantial effect.

Finally, the international legal regime must also deal with the problem of determining the obligations of international banks in the context of national intervention. In this respect, it must provide for those obligations to be determined on the basis of the contractual obligations of the parties, to be determined in turn from all the circumstances of the case. Using this approach, the regime may provide examples of the multiplicity of factors which may determine the contractual obligation of the parties. Such factors may include the expectation of the parties (as inferred from generally accepted market practices, including the availability of higher rates of interest, from express statements made by bank officials, or from other circumstances, including the existence of a private contract between the offshore bank and the customer) and the degree of awareness of the customer about the increased possibility of sovereign risk, based on each customer’s nature, a sophisticated customer (such as a bank or other financial institution) being treated differently from an individual.

In addition to these provisions concerning the operation of eurocurrency deposits and interbank placements, it would also be appropriate for the proposed regime to include principles constituting a code of practice for participants in the eurocurrency market. Such a code will be concerned with providing rules to guide the conduct of market participants, such as:

1. the prompt communication of terms of a deal between a bank and customer or between banks;
(2) procedures with regard to the communication of confirmation of either the deposit or placement of funds;
(3) procedures with regard to the accurate documentation of the terms of a eurocurrency deposit and interbank placement; and
(4) procedures for arbitration or resolution of disputes between banks engaged in the interbank market.

The creation of such a regime will introduce certainty and predictability into the operation of eurocurrency deposits and promote the integrity of the international banking and financial system.