What is this thing called international financial law? Part 3

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In the third article of the series, the author looks at one of the basic building blocks of international financial law: money.

As the old adage goes, "*money makes the world go round*", and naturally everything and everybody seems to be on the roundabout. Including lawyers – and the law.

While this most basic of axioms has always held true, recent events on the international financial markets have shaken overall confidence and money flows have abruptly slowed down: it all seems to be going round rather less energetically than before. Nevertheless, whether money flows abundantly, or moves quickly – or not – the law, and international financial law (IFL) in particular, has always been especially attentive.

Essentially, this is because in IFL, the concept of "money" is a core issue, and an ever-abiding concern. After all, a financial instrument, transaction or relationship is, by its very nature, one that involves in the end an obligation for the payment or transfer of money, or an obligation to transfer another financial instrument. As a consequence, IFL involves transactions, instruments and relationships that are predicated on financial flows, which in turn, involve currencies. A notable trait of international financial transactions is that these cash flows may either be denominated in domestic currencies (ie in domestic currency from the point of view of each individual investor) but may also be defined in currencies that are not those of the individual investor's jurisdiction: that is to say, *foreign* money. At least in economic terms, money is not an incidental feature of the financial instrument transaction or relationship; it is the subject matter of the performance, the actual deliverable.

Given this situation, it should come as no surprise that the first step in the IFL protocol – characterisation of the relationship under review – should be centrally concerned with this fundamental and inescapable legal issue, namely: what is "money"? Only after having decided this issue can one then answer the next question: how do you characterise "foreign" money? Only after one has characterised the nature of the cash involved can one characterise the nature of the instrument, transaction or relationship which involves the cash and, if all goes well, should eventually lead to its ultimate delivery.

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A. The basic building block of financial markets: a monetary obligation

A financial instrument can indeed be said to be one in which the prime obligation is a financial obligation. A financial obligation is generally defined as an obligation involving the payment or transfer of money, or alternatively involving the transfer of another financial instrument, which amounts to the same thing in the end.[1] By contrast, any contract to transfer or deliver tangible or intangible goods such as commodities or industrial rights (patents, copyright, etc) or other economic or legal interests in such goods are not normally considered financial instruments.[2]

Having asserted this, a relatively uncontentious, almost self-evident notion, it may come as a surprise to learn that the law seems to like to be intensely precise when it comes to money matters. This fact has imposed, and likely will continue in the future to impose, two fundamental imperatives on parties dealing on the international financial markets. The first is the rather common-sense necessity (but oft forgotten) of trying to ascertain how a given legal system might categorise what is assumed to constitute a monetary obligation. As we shall see, the legal consequences of not being a monetary, or payment, obligation are quite different from the consequences of an alternative classification, both in terms of private and of public law. A choice of approach in this respect continues to be a major source of legal consternation in cross-border relationships, unresolved as yet at the level of any overarching body of rules, law or principle.

The second imperative is not to fail to notice the peculiar nature of global payment systems. Legally speaking it may be argued that these systems of payment may well have changed, in fundamental ways, the nature of money.

Predictably, problems have emerged in the past in relation to cross-border financial contracts, in particular when these are considered novel or innovative from the perspective of a receiving jurisdiction (such as a brand new form of derivative). More surprisingly, problems have arisen even in relation to seemingly straightforward relationships such as international bank deposits.

As is the case in facing any problem, in order to tackle it, one must first be aware that it *is* potentially a problem. One of the ways in which legal systems may well diverge is precisely on the fundamental characterisation of money.

B. Characterisation of monetary obligations

In the aftermath of 2002, when the euro became the official currency of those European countries participating in

monetary union, it would have been natural and legitimate to expect that any difficulties in relation to what constitutes "money" would have disappeared, at least in Europe. In the European Union there seemed to be a ready-made answer to the question of what would thenceforth constitute "money": the euro.

Well, perhaps not.

In actual fact a number of currencies such as the pound sterling, and the Swedish krone, amongst others, remained the official currencies of those members of the European Union that did not participate in monetary union. What exactly is the legal status of these currencies in European systems when utilised in cross-border transactions? Are financial instruments or relationships in those currencies to be considered monetary relationships ? The answer is, in reality, *do not assume* so (although it would, perhaps, seem quite reasonable to do so).

Do assume, though, that it matters.

Take the example of a loan contract governed by English law between a Spanish borrower and an English bank. If the loan contract provided for advances to be made in Swedish krone, how would the various payment obligations be considered under English and Spanish law? Would the krone be considered legal tender? Would it enjoy the status of money, albeit foreign money ("foreign", even if Sweden is a fully fledged member of the European Union)? Would the transfer of the krone be considered a money or payment obligation or would it be considered something else? Does it matter? The consequences of English or Spanish law thinking that an obligation in a foreign currency amount is not a monetary obligation are easily imaginable – is a purported "loan" of that "money" in legal terms truly a loan? How is it taxed? What do creditors need to prove in bankruptcy, and so on. If you think that there may be a problem with a simple instrument such as a loan, then consider the implications for international bonds, derivatives and other, more complex, capital market instruments,

This particular issue is a real problem and not merely a theoretical possibility, as the anectodal experience of Finnish and Swedish border towns has recently underscored. Tornio is an ancient town in Finland now positioned near the more recent sister settlement of Haparanda, which is in Sweden. Both Finland and Sweden are part of the European Union. In 2002, although part of the European Monetary Union, Sweden had not yet opted to adopt the euro. One consequence of this fact was that the citizens of Tornio, who regularly walked across to contiguous Haparanda with euros in their pockets, found it difficult to understand why they could not spend them there, when they could spend them on holidays in Spain. In order to conserve neighbourly amity, Haparanda tooled up. According to a *Wall Street Journal* article at the time: "Haparanda's banks were the only ones in the country [Sweden] to hand out euro notes and coins . . . and all the cash registers at . . . the town supermarket, were programmed to accept Euros."[3] Practically speaking, everyone appears to have wanted the euro to be accepted as currency in Haparanda and commerce probably continued to thrive on this basis, creating (in lawyer's terms) trade usage and consuetude. Nonetheless (still legally speaking) whether the euro would have been accepted as legal currency in a Swedish Krone regime remained a potential problem. Would a Swedish shopkeeper suffering from an attack of momentary Nordic misanthropy have to accept the Finnish offer of euros, or would the piqued Finnish shopper have to trek back home empty handed? Gripping.

Extending the problem to more abstract levels: would an offer of Swedish krone be regarded in Finland (or conversely, the offer of euros in Sweden) as a legitimate discharge of a monetary debt incurred between cross-border creditors and debtors? One can begin to see the importance of the question for a vast array of transactions, instruments and relationships entered into and traded on the international financial markets. The implications of the legal answer are acutely important for financial contracts, since the very object of many of these is the delivery of sums of money, in one form or other.

What is the European solution to this general issue? Not unanimous. Often the fundamental query relating to the nature of the obligation (monetary or not) does indeed arise, alas, without any common – let alone routine – European answer.

If we cast our mind back to the archetypal example cited in the first article of this series, of a loan governed by English law between an American incorporated bank and a Chinese corporate borrower guaranteed by an Italian parent company, then we can easily imagine the type of additional complications that arise when one widens the net to involve other jurisdictions on the planet (jurisdictions that are not even associated with any economic union and may have no common thread of law).

Markets grind on (we hope) without paying too much attention to these seemingly (over) refined issues, in part secure in the knowledge that domestic laws have over decades of internationalisation developed a set of rules to deal with these irritations. Regrettably, this does not always seem to be entirely the case. A few surprises have indeed arisen in relation to capital markets instruments such as swaps. And, as we shall see below, there has also been an unpleasant wake-up call regarding simple international interbank deposits, the backbone of the markets. Such problems as have arisen have been particularly delicate as they challenge the very nature of cross-border transactions and subvert what operatives (traders, bankers, fund managers, etc) think is actually going on in international and offshore capital markets. It is always useful to recall that just because the capital markets have invented an instrument or relationship which works and parties find satisfying, even vital, to the economics of the markets, does not mean that all or any legal systems will accept, accommodate or fully understand the product, in legal terms, immediately, soon or at all, in the manner expected by the parties.[4]

Without a uniform set of domestic rules or a general almanac to consult in relation to the existing rules in various jurisdictions (many of these rules, in the event, are far from resolved or certain), it would seem difficult to tackle the problem. Indeed, capital markets transactions are so fast paced and numerous that case-by-case analysis is often impracticable. General guidelines to help cope with potential diversity appear to be the only practical solution,

pending a detailed knowledge of domestic laws, assuming that these in any case actually reach a level of legal certitude.[5]

Fortunately, patterns can be discerned – as can the basic terms of reference for the problem. These are worth investigating.

C. Define money, please

Economic definitions see money as a medium by which commercial exchanges are measured (initially, a "physical" medium, but, following the advent of electronic money, no longer necessarily so). Coins and other forms of money have thus usually been described since very early times as incorporating "a medium of exchange", "a measure of value" and "a store of value"?[6] Later refinements further underscore the fact that money was also "a unit of account" and "a measure of deferred payment".

In order to distinguish money from other units or tools of calculation a number of other features of money need to be sketched out. To be proper money, an object needs to be convenient, divisible, homogeneous and durable. This tends to exclude salt, shells, camels and wives as means of exchange entitled to belong to the monetary family.[7]

Central banks and economic ministries think in terms of an extended notion – denoted "money supply" – which includes all sorts of non-currency money instruments, hetero-money and quasi-money assets.[8] Essentially, economists tend to consider as money or money equivalents a large range of instruments which go well beyond coins and banknotes.[9]

Legal definitions tend to be narrower. Although it may be tempting for some to insinuate that this may be so because economists are naturally more avaricious than jurists, it is more probably so merely because jurists in this area have tended to be particularly hard-nosed and conservative. To them, solid coin is definitely money, paper notes have only grudgingly been accepted over the centuries; anything else is suspect.[10] As we shall note, legislators have traditionally been even less helpful.

A brave legal theorist like Professor Mann some years ago coined a definition which seems to approximate to a common modern legal understanding of the term. On the theme of what in legal terms constitutes money he writes:

> "It is suggested that in law the quality of money is to be attributed to chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as universal means of exchange in the state of issue."[11]

By chattel, Mann means that to be money, an object must be physical property which can be transferred physically. Technically speaking, to be money it must be a chose in possession (a tangible moveable, as it were) although it can also be (as in the case of banknotes) a chose in action. Only those chattels issued by the state or by its authority will qualify as money. Anything else (private tokens or private paper) is a private object which may in fact be considered an accepted means of exchange by the populace at large, but which *at law* does not have to be (usually only the state or state-authorised bodies can mint or print money and private issues may even be considered unlawful). Whatever is the face value of a money object (its denomination) will at law be its nominal value, irrespective of other considerations (the amount of valuable metal of which it is comprised or the identity of the promisor on the bank note); it will discharge debt to that amount and thus fulfil the role of a reliable, constant unit of account. Money objects will have the force of law behind them and have to be universally accepted in the jurisdiction as a means of exchange (though not necessarily the only allowable means). Strangely, Mann fails to mention fungibility, which as, is well known, is another well-established trait of money.[12]

Although a grand attempt at legal systemisation and undoubtedly a careful reflection of legal understanding in many jurisdictions, it is, of course, (merely?) legal theory. In terms of hard legislation – so far as one can see – most legislation appears to be far more superficial. Each jurisdiction appears to be content with declaring what in their domain constitutes "currency" or "legal tender" without bothering to make plain the notion of "money" underpinning it. Presumably, it is perhaps justly expected that members of capitalist societies know full well what money is, without the need for someone else – in particular the state – needing to define it.

Indeed, at times one seems to detect a certain embarrassment on the part of states and legislators; hesitation in defining the exact nature of money, as if they did not consider themselves reliable arbiters.[13] Often, the legal language used in statute to identify money might involve a merely descriptive phrase such as : "The monetary unit of . . . shall be X" or "X shall be the legal tender of . . ." or "the tender of X shall be a legal tender for the payment of a debt/an amount . . .". No specific definition of what would constitute money, legal or otherwise, is ever offered.

In the common law world, in order to identify what is to be money throughout the land, the various Currency and Bank Note Acts, and Coinage Acts promulgated over the years in the United Kingdom and Ireland have in essence made reference to banknotes and coins made and issued by the Crown or by the Irish Republic under the exclusive powers they enjoy at law, or of banknotes created and issued under the special statutory powers granted to them by the Bank of England or Bank of Ireland. These paper or metal items are listed and described, and then simply declared to be "legal tender". Interestingly, elsewhere in the common law world, the equivalent Australian Currency Act specifically creates the analytically neat concept of "monetary unit".[14] By contrast, US currency legislation merely states that certain coins and notes shall be legal tender and foreign coins and notes shall not.[15] Nobody seems to bother defining money.[16]

On the civil law front, the Italian Civil Code, for example, at Articles 1277ff talks of "money having legal currency" ("moneta con corso legale") – money with legal currency seems to be the functional, if not exact, theoretical equivalent of legal tender; it unfortunately provides no indication of what is intended at law by "money" (presumably it is whatever the common-sense concept based on situations

of fact suggests and the law has established elsewhere). After the introduction of the euro, civil law jurisdictions seemed to have largely followed a similar tack to that taken by Spanish legislation: Article 3.2 of Spanish Law 46/1998 on the introduction of the Euro simply provides that "euro-denominated banknotes and coins shall be the only legal tender in Spain". Still no need to define money in order to define nationally acceptable currency.

No wonder the overall impression is that statute and legislation do not seem particularly helpful in determining the legal definition of money. Paradoxes abound. In England and Wales, for example, gold coins (of a certain weight) are considered legal tender, whereas Scottish and Northern Irish banknotes are not.[17]

In terms of case-law, often the position taken on what constitutes money seems to be relatively varied . At times the concept of money is enlarged to include anything that passes for or is used as money. It is said that the concept of money depends on its context.[18] It may tend to be widely construed in the case of succession, tax and money-laundering matters (where in point of fact no mention of money, as such, is actually made), narrowly in criminal cases.

So, is there any ordering principle on the legal horizon?

D. Patterns emerge on the question of money

Happily, a certain number of predictable legal categories seem to be commonplace.

A common distinction made in many jurisdictions would be the one made between money of account and money of payment. Simply put, the money in which the debt is stated in a contract is the unit of account for the purposes of calculating what one party owes another – this unit of account (which may or may not be the legal currency of the parties) is known as the "money of account". The currency of payment as agreed to by the parties or as imposed by the relevant jurisdiction is the "money of payment". So, returning briefly to the loan example of an American bank lending to a Chinese borrower, if the loan from the American bank to the Chinese corporate was in Japanese yen, the yen would be the money of account. The debt is in yen, not dollars (creditor currency), not sterling (governing law currency), not renminbi (debtor currency). It seems quite normal for many courts worldwide to accept this both in domestic law and according to prevailing local principles of private international law. If the loan provides that payment be actually made in yen, then that is the "money of payment" agreed to by the parties. It is possible, though not commonplace, that the parties agree that the money of account (in our case, yen) and the money of payment could be different (eg debt obligation in yen, actual payment to be made in dollars by converting the yen into dollars at the yen/dollar conversion rate).[19] It is also possible that the relevant courts (US, UK, Chinese), while recognising the debt as a yen debt, can provide that the actual payment following judgment be made in the local currency (legal tender) of the debtor – in our case, that would be renminbi – or in the legal tender of the court deciding the dispute – dollars in the case of a US court, sterling in the case of the UK court. Nowadays, it is equally possible that the court orders that payment be made in yen. It depends on the local rules.[20] But these appear to be the available possibilities.[21]

For convenience's sake, we can visually summarise the above discussion in Figure 1, which describes the range of options that might normally be applied in contract and, to the author's knowledge, by courts generally in relation to our archetypal loan.

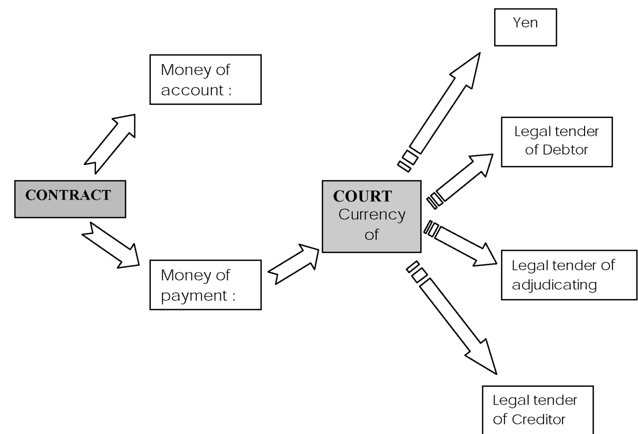

Figure 1

In addition to the above, there appears to be another common legal category extant in relation to money.

Luckily, most jurisdictions seem to be aware of its existence, and consequently, happily subscribe to this notion, which goes by the name of "nominalism". This principle aims to keep the amount of a debt obligation fixed despite fluctuations in the money's purchasing power or exchange rate. According to this doctrine, a debt payable at a future time implies an obligation to pay the nominal amount of the foreign debt at the date of payment, ignoring any fluctuations in that foreign currency (in relation to the court's local currency). This principle of nominalism leaves the creditor at risk of currency depreciation and the debtor at risk of currency appreciation but creates legal certainty by excluding repeated tweaking of the debt amount.[22]

These hypotheticals are relatively manageable in that they are resolvable within a limited range of options, well known and easily discoverable. Beyond these starting concepts of money of account and money of payment, and the nominalist bias, however, lurks an unresolved range of questions which strike at the heart of modern financial instruments. Foremost amongst these is the question of how a foreign money debt would be *characterised* by a court, or courts (recall the three step IFL model from the first paper in this series).

E. Basic answers

A logical starting point is the axiomatic commonplace that a foreign currency obligation will either be characterised as a monetary obligation, or as not. A set of possibilities which is logically bounded.

Unfortunately, this simple binary logic is subverted by the existence of conceptual categories, in law, beyond that of

"money"/"not money". One of these categories is the concept of "legal tender". There are others. Let us run through the basic available permutations.

Foreign currency may be regarded as legal tender, in which case it would legally be the equivalent of local currency. This means that, at law, the transfer of that coin or currency to the creditor will discharge the debt according to the local law. Returning to our loan example, if this were considered to be so in relation to the yen amounts in the loan, then yen would be regarded as legal tender even in the non-Japanese jurisdictions involved. Of course one needs to be clear what the concept of "legal tender" entails. It may mean that *only* the currency deemed to be legal tender – and no other – can be used to make payment in the relevant country being considered. Payment made by other currencies would be illegal. This is a rather extreme, exclusivist stance, but not unheard of.[23] Or it may mean that it is a currency, which, if offered (ie tendered, hence the term, legal "*tender*") cannot be refused by a creditor as a legitimate discharge of the debt owed, whereas other currency or money, which is not legal tender, may be. Thus if a debtor offered to pay a debt in Germany in euros (legal tender in Germany), then the creditor cannot say that that payment would not in principle discharge the debt, whereas he could legitimately refuse to accept payment in Deutschmarks. This may not be the same as saying that the only means of discharge for a debt that may be agreed by parties is payment by legal tender.

Alternatively, it may be that the foreign currency is *not* recognised as legal tender but is still recognised as money – albeit someone else's, money – and that, consequently, the special rules applying to money obligations generally also apply to the foreign currency debt.[24]

Another possibility is that the foreign currency is not considered money. In that case the obligation would not be characterised as a monetary obligation, nor indeed a debt, but as a promise to deliver a commodity, a promise to deliver specific physical coins or liabilities, a *res specie* obligation. Hence, the loan of yen could be seen as the equivalent of transferring a commodity (yen notes or coins) and not money, and the loan not perceived as a money debt but as a contractual claim of a different nature. According to this view, a foreign exchange contract could be seen as the mutual exchange, or barter, of foreign coins or notes, or their equivalent, ie the delivery of a commodity (foreign coins or equivalent) against another currency rather than the delivery of a commodity against payment with legal tender or, indeed, with money.[25]

All the foregoing can be schematically visualised as shown in Figure 2.

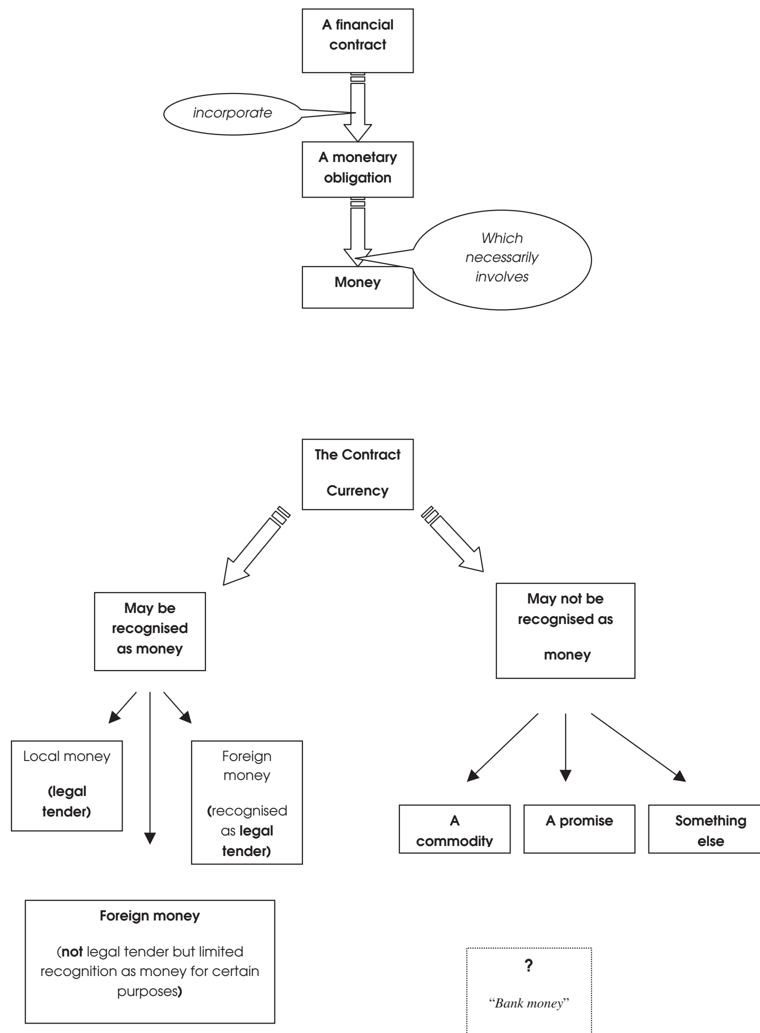

Figure 2

Payment is an independent issue, since in many jurisdictions payment can be made without money.[26]

This all means that we have just potentially stepped into a minefield.

A foreign currency loan may or may not be a loan, money advance, deposit, line of credit but thought of as a bailment, a deposit, a sale or a barter contract, depending on its structure, on the relationship between the parties involved and the currency used.[27] Equally, a bond may not be a bond in your jurisdiction because it is not denominated in local currency but in foreign coin. In these cases the consequences may be dire. Rules relating to creditor actions and representation, to debtor defences, to jurisdictional questions and judicial procedures and so on, would disapply. Unless one had available a handy, alternative legal description of the transaction, the tax and regulatory authorities may impress unpleasant outcomes on the deal.[28]

No need to worry. Clearly the issue is eminently foreseeable and the actual solutions appear to be limited to a foreseeable range of options (in general, foreign currency exchanges are regarded as money obligations or equivalents or as commodity-like transactions). As unnerving as all this might seem to the novice, the degrees of freedom allowed by Roman-inspired legal systems do not seem to be infinite and the actual solutions adopted appear to be recurrent.[29] The wider world may hold some surprises in store, but even here the potential variety would not be infinite.

Perhaps we can attempt a brief taxonomy of the main issues to be aware of :

1. *Payment by legal tender will definitely discharge the debt and an obligation styled in legal tender definitely constitutes a monetary obligation.*
2. *Delivery of currency that is not legal tender may be considered "payment" – or it may not. An obligation in currency that is not legal tender may or may not be considered a monetary obligation.*

   In consequence, such an obligation may or may not enjoy the benefits of the special rules (defences, privileges and presumptions) conferred on monetary obligations by most jurisdictions

Does it matter if it is a monetary obligation? Unfortunately, yes. What happens in legal terms if it is not a monetary (pecuniary) obligation nor a debt? In the first place, a monetary obligation creates a money claim, or debt . Pleading the claim means pleading for a certain sum (liquidated damages) and no assessment of the actual loss needs to be undertaken since it is equivalent to the value of the debt (principal plus interest). In contrast, if the currency obligation is not considered a money obligation, then unliquidated damages may need to be proved. If the currency is considered a commodity, then the general rules of contract would apply. Whereas delay in paying a debt gives rise to the right to interest (either automatically at law or by virtue of specific contractual stipulation, or both), a delay in delivering a non-monetary item would be considered simple breach of contract and be subject to any rules of mitigation (of loss). The loss would in theory need to be determined with reference to the market value of the commodity (the currency) not delivered, at the time of breach and at the time damages are claimed . Even if the value is established with reference to exchange rates of currencies, the complications that normally arise in relation to timing (which reference rates are to be used: the rates at the time of contract, of the pleading, of the actual hearing, of the judgment, or of the enforcement?) would perhaps be procedurally and substantially more complicated than they would be in the case of a judgment for a money amount in foreign money. Actions for debt may enjoy the benefits of summary procedures, which a normal claim in relation to goods or contract does not. Money obligations may not be vulnerable to possible defences such as illegality, impossibility or frustration in the same manner in which normal contractual claims would be.

Table 1 may be a handy first guide.

Table 1

Money	Goods/commodities
A monetary obligation creates a money claim or debt: plead liquidated damages, no loss assessment	Obligation to deliver goods, contractual claim: plead unliquidated damages, loss assessment
Nominalism (nominal value of the currency discharges the obligation regardless of the relative purchasing power of that currency)	Delivery (generic or *in species)* discharges the obligation
Delay: generates interest, at law, either automatically or upon specific pleading	Breach: yields damages subject to duty to mitigate loss; assessed with reference to a variable (market value at time of contract, or of hearing, or of judgment)
Summary judgment procedure	Assessment by court under ordinary rules of procedure and evidence
Illegality, impossibility, frustration, etc, may not be applicable	Illegality, impossibility, frustration, etc, applicable

ustright To complete the overall picture, some reference to actual historical events might be instructive. Historically, the legal tender – coins or banknotes – of one country has often been used as money in another. Apparently Greek coins had wide currency in the Roman Empire even though they were not officially imperial coins, often being more highly prized than the official mint, especially when in the late Empire the metallic content of the imperial coin was debased. (The reverse appears to have been the case under the Byzantium Empire.). More recently, In the eighteenth century, Spanish dollars, or "pieces of eight" as they were called, were in circulation in the original thirteen colonies in America as *de facto* legal tender and were indeed recognised as official legal tender in one of these, Virginia. In contemporary times, several countries use the US dollar as their official currency and many others allow it to be used in a *de facto* legal capacity. This has also been the case with the Australian dollar, the Indian rupee and the Swiss franc. Some hope it might become the case with the euro. Of course, a distinction should be drawn between the following legal situations:

1. Where payment in another nation's legal tender is tolerated (eg as any tourist guide will confirm, payment for goods in Russia in anything other than the ruble is not legal, except for payment in dollars in official state stores; payment in dollars and euros nevertheless appears to be the standard commercially).
2. Where the value of a currency is legally pegged to another. For a time, the Argentinian peso was pegged to the US dollar. It may well be that Argentinian merchants accepted a payment in US dollars as commercially equivalent to a payment in local, legal tender; however at law, this was not the same as recognition of the US currency as legal tender.
3. Where there is actually more than one officially recognised monetary unit, one of which is another nation's currency. A number of jurisdictions around the globe are in this situation.
4. Where artificial or composite currencies are recognised for payment purposes or as legal tender. Some of these, such as the East Caribbean dollar or the African Community franc, would undoubtedly be considered money. On the other hand, the SDR (Special Drawing Rights of the International Monetary Fund) and the ECU have not been considered money, even if they could be used for payment.[30]
5. Where old legal tender no longer in circulation are offered. If still redeemable and exchangeable by the central bank (eg the old European currencies in Europe), then it may be considered money though no longer legal tender. Outmoded, non-redeemable, or old legal tender would, at law, probably be considered a commodity.

The variety of historical possibilities are quite extensive.[31]

F. Bank money

Despite the fact that, at least in the most widespread legal traditions, the legal possibilities seem to be finite, and predictable, legal realities have nonetheless wrong-footed the markets.

In the middle of the 1980s, after more than a decade in which international bank deposits had become commonplace and the so-called "Euromarkets" had grown to sizeable enough proportions to gain the attention of local central banks and of their international "trade association", the Bank for International Settlements (and to merit close scrutiny from bank and market regulators as a whole), it was commonly assumed that there was no real legal issue. After all, the deposit and lending market was huge[32] and an international bank deposit was, after all, an everyday occurrence and behaved just like an ordinary bank deposit.

So it was assumed when a non-US entity placed various millions of US dollars with a bank in London. The entity was the Libyan government. The Bank was Bankers Trust Corporation, a US-incorporated bank acting out of its London branch. When the US government imposed a moratorium forbidding, *inter alia,* payments from US banks to Libyan persons, Bankers Trust refused to pay over monies to the Libyan depositor. Although the case was decided by the English courts on other technical grounds, the court did, in passing, touch upon the question of the nature of the non-domestic bank account, an account denoted in a currency that was not the currency of the Bank, the depositor, or of the jurisdiction in which it was seemingly located. The account itself had been variously described by the parties as "international", "euromarket" or "offshore" but never "domestic". This was because the deposit in question was placed outside the US, the home jurisdiction of the US dollar, the currency of the account, and outside Libya, the home jurisdiction of the depositor.[33]

Legally speaking, a number of views were open to the English court that could be taken with respect to the nature of the currency sitting in an "international" account, indeed of the nature of the account itself.

But, of course, to some, even today, the answer looks quite straightforward. The parties were just doing what the central banks regularly did almost on a daily basis.[34] Hence, it could be assumed that the normal rules would apply. It was a money deposit subject to the normal rules . . . On the other hand, perhaps it was a money deposit subject to special rules . . . Then again, on second thoughts, it might have been some sort of special type of money deposit. Actually, perhaps it wasn't a money deposit at all, but something else again . . . Not surprisingly, all these notions have been espoused by various authors and by various parties, in European courts and elsewhere.

Alas, the basic point seems to be that it is not entirely clear what international banks are – hence what the international capital markets are – actually dealing in.

According to the English courts, as it turned out, there was nothing unique in the nature of the payment and settlement system of the international bank markets to warrant the conclusion that the offshore dollar deposit should be treated differently from a normal bank deposit. Traditionally, a bank deposit implies a cash or physical deposit. Even though the bank deposit may actually be a claim (the customer/depositor/creditor has the right to be repaid at some stage – on demand or at some predetermined time) it has been identified as a cash deposit with a definite and identifiable location.[35] It is cash deposited at a given location, to be repaid at that same location (unless otherwise agreed), like any ordinary domestic bank deposit.[36] Courts in the US only partially agree with this view. Some legal theorists completely disagree.[37]

Professor Mann, and learned economists, both contend that the international financial markets are not cash based. Rather they involve dealings that are really book entries (once physical in *nostro* and *vostro* accounts, now electronic blips on the screen).

After this initially convergent assessment, the lawyers and economists part company. Economists have no doubt that we are dealing in money (of some sort). Bluntly put, if for the economist pieces of paper (bonds) can be seen as money equivalents, there is no doubt in his or her mind that transfers of bank funds represented by digital accounting are the same as transfers of money. Mann demurs. Bank credits and bank debts are not the same as money. Money needs to be a tangible moveable. Only then may it be delivered. And only

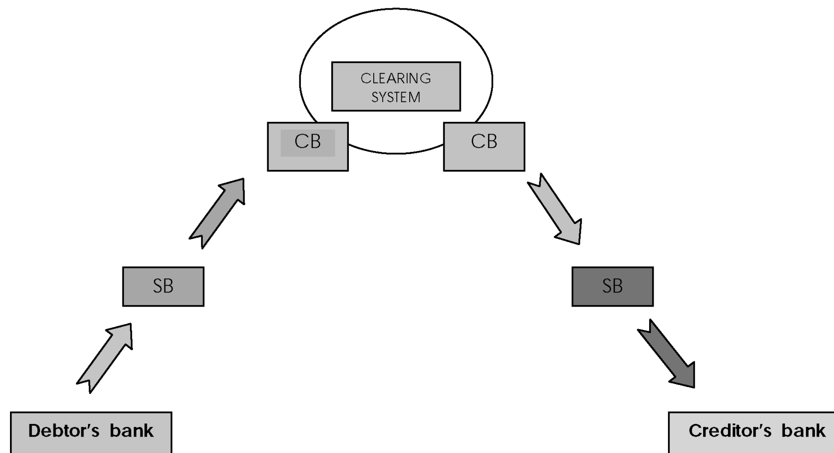

Figure 3

then does it pass to the other party. Only then does the receiving party gain title (absolutely).[38] The physical transfer of the money moveable is what we mean by payment. And payment discharges the obligation; nothing else normally does.[39] On that basis, since the international cash deposit does not represent a physical deposit but, *by its very nature*, a chain of bank credits or book debts, then it is not money.[40] Not being money, the transfer of bank funds internationally (transfer of a book debt to a creditor account) may not constitute payment in the usual sense. Even if a creditor accepts this transfer ("bank money") in payment of a debt, the transfer itself is not regarded as *money* and the credit transfer does not constitute *payment* in law in the strict sense (it expresses a debt or contractual obligation, ie *represents* the medium of payment and does not *constitute* the medium itself).[41]

To be clear: the reason that one may argue this later proposition (that the bank transfer does not constitute payment) has to do with the nature of what has, in effect, been "delivered". In reality, no chattel (roughly speaking, a tangible moveable) is delivered, only a chose in action (again, approximately, an intangible moveable, or if you like, a credit). Payment is purported to be made not with the delivery of cash (coins, notes) but with the "delivery" of a claim to receive money. This money claim is originally the payer's claim on his bank which is somehow transferred and substituted by a claim on the payee's bank. This looks like the transfer of promises rather than of an immediate receipt of something which legally discharges or effects a release of the debt (ie effects "payment").

Not everyone agrees with this way of looking at things. Some authors believe that even if money is a physical object (and not a mere contractual construct), payment nonetheless occurs when money *claims* are transferred. What do the courts think? The English courts seem to be clear that payment occurs not only when actual cash but also a right to receive cash is involved (as, for example, the case of sums standing to the credit of a bank account).[42] Not all courts may think likewise, depending in part on the way their legal concepts are parsed.

Even if the more relaxed English position is adopted, at least two theoretical problems come to mind in relation to the payment by transfer of money claims. First of all, what sort of claim is it: a payee's direct claim on his (the paying) bank, or a payer's claim on the payees bank in favour of the payee? Secondly, how does the transfer exactly happen, legally speaking: assignment, novation or something else? Still unresolved. Oh, and by the way, what if something unforeseen occurs in the process (delay, mistake, fraud): where does the risk fall? If there is extra risk, then perhaps the transaction starts to looks a lot less like the legal equivalent of a money payment than it might otherwise be said to resemble.

To better understand the above, we should delve into how the international settlement system actually works, where the basic legal issues are even more complicated than in the domestic setting. Figure 3 illustrates the theory, which I will dub the Chain Theory, of international "bank" money.

Taking our previous example of the cross-border loan between the American bank and the Chinese borrower: according to the Chain Theory, when a "payment" in yen is made from the Chinese debtor to the US creditor through the international banking system there is no actual transfer of money between the parties. Yen is not legal tender for either party nor is it legal tender in the London market where the accounts for our present purposes may be thought to be kept. What happens is that the debtor's London bank debits *its* account with its settlement bank (SB) which in turn debits *its* account with its correspondent clearing bank (CB) in Japan (I am only using a hypothetical example and not suggesting that this is the actual way it works in Japan) which at the end of the trading day nets its position with the CB for the SB of the Creditor's bank, in yen.

Notice a number of things:

(a) the six banks may be in different physical and legal locations;
(b) no yen is actually delivered to the creditor or his deposit bank;
(c) it seems that yen is only exchanged in Japan;
(d) yen is only truly "money" in Japan (a reasonable assumption for the purposes of the example).

I would also add the postscript that even if yen were delivered in London, there is no reason why, in theory, it would

necessarily need to be considered "money", in the full sense, in that place.

Condition (b), which underscores the dematerialised nature of modern bank money, is of course also common in domestic banking. On the other hand, conditions (a), (c) and (d) are peculiar to international cross-border banking.

The legal repercussions of these erudite disquisitions are enormous. Depending on which view is taken, important issues such as the relationship between parties, the *situs* of the debt, the applicable law and jurisdiction, conflicts, extra-territoriality and so on will be resolved differently. These issues have in fact been stress-tested in at least one jurisdiction and the results were found to be open-ended and, ultimately, inconclusive.[43]

Many of these issues chime in with the concerns over payment certainty in international settlement and clearing systems, hence a number of conventions might neatly resolve this aspect of the problem.[44] What remains overhanging is the impact that this basic characterisation step may have in a particular jurisdiction in characterising the financial instrument itself.[45]

While credit cards, debit cards and new electronic money are viewed with caution and not confused with money (they are forms of debt or contractual obligations, ie they *represent* the medium of payment and do not *constitute* the medium itself), it was at the very least surprising to learn that the international bank deposit might not be considered a cash transaction, that is to say that transfer of the legal content of a deposit might not be the equivalent of transfer of money.[46]

G. Answers

Ultimately, there will of course be appropriate legal solutions given to any problems which arise in relation to money, monetary obligations, payment and discharge. Hopefully, the solution itself will not in itself constitute a problem for the unprepared adviser.

In IFL, ascertaining whether this – most fundamental – of issues is an issue at all, should be – yes – perhaps a fleeting thought, but one better had, than not. Just when you thought that the exchange rate on holiday was the only international money problem you were ever going to have . . . ■

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1 The consensus seems to be that the word "finance" derives from the Old French *finer,* meaning "to finish or settle a debt'

2 I am not of course proposing that only financial obligations provide for the payment or transfer of money. Transfers of goods obviously entail payment obligations. The point here is that financial instruments are constructed on the ultimate delivery of money , and not in exchange for goods or services. Even instruments such as warrants (on shares) or financial options or futures on financial paper or shares are considered financial instruments because in the vast majority of cases they give the right to receive paper that ultimately gives the right to receive payment of money (interest on t-bills, dividends) or liquidation cash flows rather than goods. One cannot be too rigorous since the concept of financial instrument is not a legal category.

3 "Mayor Spreads the Euro Spirit With His Effort to Merge Towns", *Wall Street Journal* 21 May 2002.

4 This has tended to be experienced with the swap market, as will be discussed more fully in the next article. For the economist, this situation is seen as an unfortunate fact of life. For the jurist it is so for good reason..

5 One should not assume this.

6 Money certainly was a store of value (the value of the money was durable, storable and retrievable) . This was definitely the case when national banknotes were convertible into gold at fixed rates (when that is the so-called "gold standard" applied). Once the gold standard was disapplied, the intrinsic worth of national banknotes was lost; the value represented by them is now largely statutory, hence conventional, and adjustable according to political economics. The intrinsic value of gold or silver coinage is rather more obvious.

7 Though they remain distant relatives to money. They still may be used as means of exchange (except for wives, of course) .

8 There are three basic central bank definitions of money: M1, M2, and M3. According to the Federal Reserve Bank of New York:
"[M1] consists of currency in the hands of the public; travellers checks, demand deposits and other deposits against which checks can be written. M2 includes M1 plus savings accounts, time deposits of under $100,000 and balances in retail money market mutual funds.
M3 includes M2 plus large denomination ($100,000 or more) time deposits, balances in institutional money funds, repurchase liabilities issued by depository institutions, Eurodollars held by U.S. residents at foreign branches of U.S. banks and at all banks in the United Kingdom and Canada."
Since credit cards do not fall under M1, M2 or M3 they are not considered to be part of the money supply.

9 Traditionally, economists have sometimes divided money up into "primary" and "secondary" money. Primary money is usually cash. Secondary money is a claim on cash. In the UK primary money takes the form of coin plus the liabilities of the Bank of England, while secondary money takes the form of commercial bank deposits. Certificates of deposit, bonds and other forms of financial paper may also be included in some definitions of secondary money. Another distinction drawn is between primary money (objects with intrinsic worth) and fiduciary money (tokens, paper money, certificates, promissory notes, the value of which depends on the

confidence of the holder in being able to exchange it for other goods or for primary money). In reality, the extension by economists of the term of "money" to items which are known as primary and secondary money parallels the actual sociological evolution of currency, which went from being asset-backed, convertible or exchangeable, into the underlying asset backing it, to being purely notional "fiat" money. Fiat money is considered money because it is backed not by goods but by the declaratory fiat or authoritative declaration of a government: in other words, it is currency, because the state says so. Just a piece of paper, as it were, and not necessarily backed by a physical commodity. The next step, towards seeing other pieces of paper as money, is a short conceptual leap.

10 Interestingly, legal definitions are closer to the original concept of money. Money, in the form of coin, is thought to have first been brought into this world in a temple. The word is from the Latin *moneta*, perhaps the name of the goddess in whose temple money was said to have been first minted – ironic to modern minds in the light of subsequent biblical disapproval of the presence of money-changers on sacred ground. Standard definitions for money in dictionaries tend to relate that the first true money was "metal stamped in pieces". Today, it is assumed that money in the normal parlance is composed of metal or paper. We now also need to add polymers to the list, as in the case of Australian banknotes and the banknotes of the numerous other countries now using the same polymer technology.

11 FA Mann, *The Legal Aspect of Money: With Special Reference to Comparative Private and Public International Law* (Oxford University Press, 1992). This was the fifth edition: the first edition of this remarkable work was written in the mid-1930s.

12 In order to pay or repay a monetary obligation it is not necessary to deliver specific coins or notes but coins or notes of a similar denomination and amount; money paid into a fund mixes into the fund and rights to a money fund are rights to an amount, not to specific assets.

13 This may not be unintended. The role of the state in the development of money is controversial and surfaces prominently as an issue in a number of works in the general literature on the subject. The question raised is whether indeed the state played a prominent role in money's emergence, as some claim, or whether money emerged as an unintended consequence of everyday economic exchange, as neoclassical economists have argued. It is a difficult question to answer as any response must take into account the historically changing nature of money and is inevitably predicated on presumptive definitions of money and state, notions of value, and would probably need to delve into the object-related functions relating to money.

14 Currency Act 1965 s 8: "The monetary unit, or unit of currency, of Australia is the dollar."

15 The pertinent portion of law that applies is the Coinage Act of 1965, specifically s 31 USC 5103, entitled "Legal tender", which states: "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts."

16 At first, the US legislation seems promising: the section heading announces that it will deal with the issue of "Money"; however, the ensuing treatment is not theoretical.

17 Coinage Act 1971 s 2(1) (substituted by the Currency Act 1983 s 1(3)(a)). The paradox is deeper. A close reading of the Act leads to the realisation that in actual fact, there are no current English banknotes that are legal tender in Scotland and that there are actually no Scottish banknotes that are legal tender in Scotland!

18 This situation is precisely what Mann dislikes: "It thus becomes evident that the meaning of the term 'money' varies, and consequently it is necessary in each individual context to examine its meaning. No hard-and-fast rule exists.

But it would be wrong to be satisfied with this result. Whatever the meaning of money may be in an individual case, clearly the word has an ordinary general meaning which requires definition not only for the sake of theoretical classification, but also for practical purposes." (Mann, supra n 11, 4).

19 To be honest, in modern international loan agreements which provide for multicurrency clauses, not uncommon in funding agreements, this is precisely what happens. According to these provisions, amounts may be drawn down by the borrower in a number of predetermined optional currencies, which are not the currencies in which the loan contract is stipulated. In our example the loan is stipulated in yen and the debt is in yen. If it had a multicurrency clause, then the borrower might be allowed to draw down in, for example, US dollars, euros and other currencies. The borrower would need to pay interest and repay principal in the drawn currency, not in yen. Where the drawdown is only *notionally* in a non-yen currency, then the money of payment is the same as the money of account (yen). A multicurrency clause may also be drafted so that the money of account changes to the currency actually drawn down. In terms of credit risk and associated financial calculations, it is vitally important to understand which of these technical legal solutions is adopted.

20 In the case of the Chinese law of negotiable instruments, for example, the rule may be the following (the author has no expert knowledge of Chinese law). According to Art 59 of the Law of the People's Republic of China on Negotiable Instruments (1995-5-10) "When the sum on a bill of exchange is expressed in a foreign currency, the sum shall be paid in renminbi according to the market exchange rate on the day of payment. Where the parties to a bill of exchange have agreed otherwise regarding the type of currency in payment, such agreement shall be complied with." See: http:// www.pbc.gov.cn/english//detail.asp?col=6800&ID=2

21 At least in systems inspired by Roman law and common law.

22 In international contracts it used to be common for parties to protect themselves against this risk by what are known as "gold clauses". More recently, such devices as "index-linking" clauses have appeared and in domestic contracts price escalation and price revision clauses have also been used. At the end of the day, one could rightly argue that in the case of commercially sophisticated parties, protection against currency fluctuations should be a freely arrived at

decision based on commercial and economic criteria, not one automatically imposed by law.

23 A prime example would be the legislation which was in force in Russia which decreed that payment in a currency which was not legal tender was illegal. Restrictive legislation of this sort tends to be primarily the result of monetary policy and macro economic concerns, and not necessarily the result of historical legal principle.

24 English law allows this; see leading case: *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 3 All ER 801, HL, overruling *Re United Railways of Havana and Regla Warehouses Ltd, Tomkinson v First Pennsylvania Banking and Trust Co* [1961] AC 1007, [1960] 2 All ER 332, HL; and see *The Despina R* [1978] QB 396 at 431–2. New York law also allows courts to render judgment in foreign currencies (which are not, of course, legal tender in the US). Previously both systems did not permit this. Italian law allows judgment in non-legal tender (foreign currencies): Art 1279 Civil Code. In many of the jurisdictions allowing enforcement in foreign currency, delivery of the the foreign currency could be considered to have at least some of the attributes of a monetary payment, not just that of a discharge of an obligation to deliver something which is not money. A certain legal dignity is conferred on other nations' legal tender, as it were.

25 An example would be a foreign exchange forward contract where a European bank is required to deliver US dollars against euros.

26 The concept of payment may include discharge of a monetary obligation through a number of means. These might include not only delivery of cash but bank transfers, novation, set off and release.

27 If the currency involved is not legal tender, or its legal equivalent, for either the debtor or the creditor, then the whole thing may look like a barter relationship or some form of commodity exchange; on the other hand, if at least one party's indigenous currency is involved, then it may be classifiable as a sale.

28 Unpleasant at the very least because unexpected, surprising and expensive.

29 In relation to these issues, English common law at its origins appears to have drawn its inspiration from the same source as civil law systems; rather surprisingly, in some respects it may even be heir to more authentic Roman law legal traditions – in as much as it avoided the medieval glosses that moulded many modern civil law treatments of the problem.

30 Recently the *Wall Street Journal* scathingly referred to the SDR as "funny money": "The G20's Funny Money" *Wall Street Journal* 1 April 2009.

31 According to the CIA World Factbook of 2004 the following countries officially recognised and used more than one currency at the time (either as *de facto* or as *de jure* currency).
Bhutan: ngultrum (BTN) and Indian rupee (INR)
Cyprus: Greek Cypriot area: Cypriot pound (CYP) and Turkish Cypriot area: Turkish lira (TRL)
Guatemala: quetzal (GTQ) and US dollar (USD)
Guernsey: British pound (GBP); note – there is also a Guernsey pound
Jersey: British pound (GBP); note – there is also a Jersey pound
Lesotho: loti (LSL) and South African rand (ZAR)
Isle of Man: British pound (GBP); note – there is also a Manx pound
Namibia: Namibian dollar (NAD) and South African rand (ZAR)
Panama: balboa (PAB) and US dollar (USD)
Serbia and Montenegro: in Serbia the Serbian dinar (CSD) is legal tender, but the euro (EUR) is the *de facto* currency; in Montenegro and Kosovo the euro is legal tender (2004)
Tuvalu: Australian dollar (AUD); note – there is also a Tuvaluan dollar
West Bank: New Israeli shekel (ILS) and Jordanian dinar (JOD)
Source: *CIA World Factbook 2004*.
The 2008 list is equally replete with contemporary examples.
See: http://www.cia.gov/cia/publications/factbook/fields/2065.html

32 It rivalled and surpassed many domestic markets.

33 *Libyan Arab Foreign Bank v Bankers Trust Co* (1988) 1 Lloyd's Rep 259.

34 The dollar was the international reserve currency, central banks built up reserves in dollar deposits and settled their accounts with each with transfers of dollar between accounts.

35 *Libyan Arab Foreign Bank v Bankers Trust Co* (1988) 1 Lloyd's Rep 259, (1987) 2 FTLR 137.

36 *Libyan Bank*: Staughton J held that it would require overwhelming evidence before it could be asserted that the general principles applying to the ordinary banker–customer relationship did not apply to eurocurrency deposits. It would, for example, need to be proved that that different terms applied to such a deposit which deriving from established market usage and a relevant course of dealings such as to consitute legal consuetude or an implied term of the contract.

37 For preliminary discussions of the issue, see, for example, R Cranston, "The Freezing and Expropriation of Bank Deposits", in *Legal Issues of Cross Border Banking* (Bankers' Books, 1989), 93; RM Goode, *Payment Obligations in Commercial and Financial Transactions* (London, Sweet and Maxwell, 1983); EMA Kwaw, *Grey Areas in Eurocurrency Deposits and Placements* (Dartmouth, Ashgate, 1994); B Kleiner, "Foreign Exchange Claims Against Banks in Dispute" [1989] *Butterworth's Journal of International Banking and Financial Law* 204; J Dalhuisen, *Dalhuisen on International Commercial, Financial and Trade Law* (Oxford, Hart Publishing, 2000), ch 3; of course, Mann, *supra* n 11. US case-law beginning with *Wells Fargo Asia Ltd vs Citibank* NA 612 F Supp 351 (1985) may take a different view to that emerging from *Libyan Bank*.

38 Even if the transferee did not have good title.

39 Except in the case of agreed, or judicially allowed, alternative discharge or legal situations such as impossibility, *force majeure*, frustration and so on.

40 "The 'money market' which exists in financial centers rests on the fact that the participants, usually bankers, discount or finance houses, 'buy' or 'sell' large sums of foreign money from each other, although in most cases they buy or sell

credits" (Mann, *supra* n 11, 197). Equally: "the euromarkets are . . . not money markets [but] . . . accounts markets".

[41] Or, put another way, it is a discharge *in obligandi*, as it were, rather than *in solutionis.* Under a number of legal systems, for example according to English law, a "payment" may be made by any means agreed to by the parties: it need not be in money. It may be made in kind, by cheque or negotiable instrument, letter of credit or payment card. However, it may well be that in this context the use of the term "payment" is a convenient substitute for the idea of "discharge", which is a similar but not identical notion. In other jurisdictions, or for other purposes, "payment" may only be taken to indicate discharge of a monetary obligation by delivery of "money". Whatever view is taken, bank transfers seem to be problematic even as legal means of "discharge", let alone as amounting to legal "payment".

[42] See eg *Re Collings, Jones v Collings* [1933] Ch 920 and *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747, [1966] 2 All ER 414, CA (money may be paid without any currency passing).

[43] The author is not directly aware of the detail of any cases where the issue has been tested in European jurisdictions other than the UK. As we saw, the *Lybian Arab Bank* case cited above was in itself not the final word on the matter. It left open the possibility of future argument asserting the peculiarly original nature of international bank deposits and transactions. See, for example, the dicta in *Foskett v McKeown* [2000] 3 All ER 97 at 120 where an attempt is made to meet the problem head-on with the aid of new legal categories.

[44] On the European Union front, the seminal regulations relate to payment systems and cross-border payments. A principal measure in this regard would be the Payment Finality Directive (98/26/EC) on settlement finality in payment and securities settlement systems. Internationally, the UNCITRAL Model Law On Electronic Funds Transfers (1988) has been influential. Recently, the E-Money Directive (2000/46/EC) on the taking up, pursuit of and prudential supervision of the business of electronic money institutions (EMD) seeks to regulate e-money instruments.

[45] It may reveal itself to be a crucial element in the characterisation of novel instruments in any particular jursidiction. None of the directives or conventions mentioned in the previous note define the concept of money in a manner which resolves the problems indicated.

[46] Most probably, the question cannot be simply resolved by reference to legislation relating to "electronic money", which is a term which has gained recent popularity in economic and legal literature. Art 1(3) of the E-money Directive defines e-money as a "monetary value as represented by a claim on the issuer which is:
i) stored on an electronic device
ii) issued on receipt of funds of an amount not less in value than the monetary value issued
iii) accepted as means of payment by undertakings other than the issuer."
A fine definition for its purposes. It attempts (albeit not wholly successfully) to encompass within its scope smart card and server technology such as traditional e-money cards, contactless e-money cards, server-based e-money (eg PayPal), prepaid debit cards and electronic travellers cheques, electronic vouchers and the prepaid mobile network operator services (MNO services). From our point of view the crucial point here is that the items stored in the electronic memory are not considered money in themselves (in the sense of being cash). They are references to, rights in, unelectronic money sitting elsewhere. The problem raised by international bank deposits is that deposits are intuitively seen as cash. Bank money. Another difference between the nature of "bank money" and the nature of "e-money" is that while the latter is at worse a direct signifier of (claim on) the object (money), a foreign currency deposit only signifies itself (a deposit of foreign money). It is perhaps the *process* that makes it other. I suppose to make the distinction clear, one could call the latter "electronic" money (which it is indeed formally known as) and the former by the semantically resonant, but nonetheless distinct enough term of "digital" money.