INTERNATIONAL FINANCE: SPRING 2009

Materials Packet 3

ISSUES IN INTERNATIONAL SYNDICATED LOAN AGREEMENTS I

Caroline Bradley [1]

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EURODOLLARS AND LIBOR

Libor stands for "London Interbank Offered Rate" and is the rate of interest at which banks could borrow funds from other banks, in marketable size, in the London interbank market." Libor is the rate of interest which applies to eurocurrency deposits, which are deposits of currency outside the jurisdiction to which the currency belongs (originally eurodollars).[2] When the eurodollar deposit market developed, interest rates for eurodollar deposits in London were higher than domestic interest rates in the US largely because domestic regulation of interest rates in the US did not apply in London.

Milton Friedman described eurodollars as follows:

...Euro-dollars ... are deposit liabilities, denominated in dollars, of banks outside the United States. ...Funds placed with these institutions may be owned by anyone- U.S. or foreign

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[1] Professor of Law, University of Miami School of Law, PO Box 248087, Coral Gables, FL, 33124, cbradley@law.miami.edu ; http://blenderlaw.umlaw.net/ . © Caroline Bradley 2009. All rights reserved.

[2] "Formally, a eurodollar is a US dollar deposit, typically a 30-, 90- or 180-day time deposit, which is placed in a bank located outside the United States (often called a "eurobank"). Neither the nationality of the bank nor the location (or nationality) of the supplier of funds is relevant. What is relevant is the location of the bank accepting deposits. Thus, a US dollar deposit by a US manufacturing firm in a branch of a US bank in London is considered a eurodollar, while a US dollar deposit by a French company in a German bank in New York is not." BIS Quarterly Review, Sept 2004, p 68, note 2.

residents or citizens, individuals or corporations or governments. Euro-dollars have two basic characteristics: first, they are short term obligations to pay dollars; second, they are obligations of banking offices located outside the U.S....

A homely parallel to Euro-dollars is to be found in the dollar deposit liabilities of bank offices located in the city of Chicago-which could similarly be called “Chicago dollars.” Like Euro-dollars, “Chicago dollars” consist of obligations to pay dollars by a collection of banking offices located in a particular geographic area....

The location of the banks is important primarily because it affects the regulations under which the banks operate and hence the way that they can do business. Those Chicago banks that are members of the Federal Reserve System must comply with the System’s requirements about reserves, maximum interest rates payable on deposits, and so on; and in addition, of course, with the requirements of the Comptroller of the Currency if they are national banks, and of the Illinois State Banking Commission if they are state banks.

Euro-dollar banks are subject to the regulations of the relevant banking authorities in the country in which they operate. In practice, however, such banks have been subject neither to required reserves on Euro-dollar deposits nor to maximum ceilings on the rates of interest they are permitted to pay on such deposits.

The difference in regulation has played a key role in the development of the Euro-dollar market. No doubt there were minor precursors, but the initial substantial Euro-dollar deposits in the post-World War II period originated with the Russians, who wanted dollar balances but recalled that their dollar holdings in the U.S. had been impounded by the Alien Property Custodian in World War II. Hence they wanted dollar claims not subject to U.S. governmental control.

The most important regulation that has stimulated the development of the Euro-dollar market has been Regulation Q, under which the Federal Reserve has fixed maximum interest rates that member banks could pay on time deposits. Whenever these ceilings became effective, Euro-dollar deposits, paying a higher interest rate, became more attractive than U.S. deposits, and the Euro-dollar market expanded.

A third major force has been the direct and indirect exchange controls imposed by the U.S. for “balance-of-payments” purposes - the interest-equalization tax, the “voluntary” controls on bank lending abroad and on foreign investment, and, finally, the compulsory controls instituted by President Johnson in January 1968.[3]

An article in the BIS Quarterly Bulletin for September 2004[4] says:

The geopolitical environment during the cold war and the regulation of US domestic banks in the 1960s and 1970s led oil-producing countries to search for a home outside the United States for their US dollar deposits. A long history as a global trade centre, coupled with a loosening of regulations on offshore transactions in the late 1950s, allowed London to emerge as the repository for these dollars. Over the past 30 years, US dollar deposits outside the United

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[3] Milton Friedman, The Eurodollar Market: Some First Principles, Selected papers No. 34, Graduate School of Business, University of Chicago, *available at* http://www.chicagogsb.edu/faculty/selectedpapers/sp34.pdf .

[4] http://www.bis.org/publ/qtrpdf/r_qt0409g.pdf

States, or “eurodollars”, have grown exponentially, with London remaining at the centre of this market.
This growth in eurodollar deposits has been a function of the greater efficiency of eurobanks relative to banks in the United States. Because eurobanks face fewer regulations than their domestic counterparts (eg reserve requirements), they can operate at lower spreads and hence offer more competitive deposit and loan interest rates. With these lower operating costs, eurobanks have been able to attract deposits that would otherwise be placed in US domestic banks. As a result, the eurodollar market serves as an arena for the global recycling of funds, whereby eurobanks not only manage their own US dollar positions vis-à-vis other currencies, but ultimately place them in the hands of the global borrowers best able to use them.

The BIS noted a decline in the recycling rate of eurodollars in London - rather than remaining in the interbank market in London eurodollars are increasingly being lent to non-bank borrowers, mainly in the US.[5]

In the past Libor was not one fixed rate of interest, but could vary to reflect the different costs which different banks might incur in borrowing money in the interbank market. Loan agreements used to specify a process for calculating Libor for a particular loan, which would involve specifying which banks would be involved in quoting rates for Libor for different interest periods under the loan. Libor is supposed to reflect the lenders’ cost of funds (the borrower under the loan agreement will pay Libor plus a margin where the margin is the lenders’ profit on the loan). The use of Libor assumes that the lending banks will be funding their loan commitments from the interbank market rather than from deposits. Thus it is important that the rate quoted actually reflects the lenders’ cost of funds. It is worth noting that the rates at which banks actually lend money to each other during any day will vary.

A bank which seeks to borrow money in the interbank market will need to pay a level of interest which reflects both prevailing market conditions and the lender’s assessment of the borrowing bank’s financial condition. Weaker banks would expect to pay higher interest rates. So a weak bank lender under a loan agreement which relied on strong banks to set Libor could find that the loan was unprofitable for it.

Libor is now a standardised rate of interest as the British Bankers’ Association (BBA) developed a mechanism for fixing Libor for different currencies, and its rates are carried by various information providers (Reuters compiles Libor and publishes it through a number of data vendors, including Bloomberg and Thomson Financial, and a reference to the “screen rate” refers to these systems as the source for the rate).[6] You

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[5] Libor has become an alternative to Prime Rate, which is the interest rate banks charge for short-term loans to their most creditworthy customers where there is little risk to the lender.

[6] *See* http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=225&a=1416

can also find Libor (for US $) quoted in the financial pages of the newspapers.[7] The BBA relies on Contributor Panels, which are groups of banks who quote rates for different currencies.

BBA identifies the banks which compose the contributor panels. As of May 2008, the US dollar panel was: Bank of America, Bank of Tokyo-Mitsubishi UFJ Ltd, Barclays Bank plc, Citibank NA, Credit Suisse, Deutsche Bank AG, HBOS, HSBC, JP Morgan Chase, Lloyds TSB Bank plc, Rabobank, Royal Bank of Canada, The Norinchukin Bank, The Royal Bank of Scotland Group, UBS AG, and West LB AG.[8] In 2008 commentators began to criticise the arrangements for fixing BBA Libor, because, although it was clear that banks were reluctant to lend to each other, BBA Libor did not increase to reflect this fact.[9] People speculated that banks quoting as part of the BBA's contributor panels were unwilling to reveal through the quotes they submitted to the Libor fixing process that other banks had lost confidence in them and were raising the rates they were demanding to lend money. If contributor banks were submitting inaccurate quotes then Libor quoted by the BBA would also be inaccurate as a reflection of actual rates of interest lenders might be expected to pay. The BBA responded to these concerns by reviewing its procedures and by strengthening the governance arrangements for the Libor fixing process. A consultative paper published in June of 2008[10] was followed by a paper describing the new arrangements in November 2008.[11] The June paper described some of the issues as follows:

Transparency has long been one of the key attractions of LIBOR. Other indices either keep their contributors confidential (H15) or the bank is asked to contribute the rate at which it considers a hypothetical bank would borrow (EURIBOR). LIBOR contributors on the other hand provide the rate at which they believe they could borrow should they propose so to do. The issue has been raised as to whether this has the potential to stigmatise contributions and therefore the BBA proposes to explore options for avoiding any stigma whilst maintaining

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[7] Libor is increasingly used as the basis for the interest rate in adjustable rate mortgages in the US domestic market.

[8] http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=1569&a=13777&artpage=all.In February 2009, HBOS was replaced by Societe Generale because of its acquisition by Lloyds. See http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=227&a=15287 .

[9] *See, e.g.*, http://uk.reuters.com/article/businessNews/idUKL2984225820080529?sp=true.

[10] BBA, Understanding the Construction and Operation of BBA LIBOR - Strengthening for the Future (Jun. 10, 2008) *available at* http://www.bba.org.uk/content/1/c6/01/38/99/BBA_LIBOR_strengthening_paper.pdf .

[11] See BBA, LIBOR Governance and Scrutiny - Proposals agreed by the FX & MM Committee (Nov. 17, 2008) *available at* http://www.bba.org.uk/content/1/c6/01/50/87/LIBOR_paper_-_FINAL.pdf .

transparency...
BBA LIBOR is by far the most widely referenced interest rate index in the world. Its importance goes beyond that of inter bank lending and touches everyone from large international conglomerates to small borrowers. It is central in interest rate swaps and the great majority of floating rate securities and loans relate to LIBOR. Independent research indicates that around $350 trillion of swaps and $10 trillion of loans are indexed to BBA LIBOR. It is the basis for settlement of interest rate contracts on the world's major futures and options exchanges. It is written into standard derivative and loan documentation such as the ISDA terms and is also used for an increasing range of retail products...
LIBOR is owned by the BBA which is a not for profit organisation funded primarily by subscriptions from its voluntary members. The data for the LIBOR fixes is compiled and calculated by Reuters for the BBA. The contributing banks for each LIBOR currency are selected on objective criteria and may or may not be members of the BBA. Those who are members they pay an annual standard subscription to the Association. There is no levy charged for any bank which contributes to or participates in the LIBOR fix...
LIBOR has an unbroken back-history stretching back to 1985 and it has enjoyed an enviable reputation since its inception.[12]

The new arrangements involve a committee, the Foreign Exchange and Money Markets Committee (FX & MM Committee), with two sub-committees, one of which is responsible for fixing Libor, and the other of which is responsible for oversight. There are to be new disciplinary procedures. In contrast to past practice the names of the firms which are represented on the committee are to be disclosed, and the firms will be chosen to reflect a range of different interests:

Currently Committee members sit in their own right as individuals, and membership is not publicly disclosed. However there is justifiable interest from the market in the make-up of the Committee, as they wish to see that the body is independent and appropriately constituted...
In future, therefore, committee members will sit as individuals representing their firms, and will be expected to act in the best interests of the LIBOR benchmark and the markets it serves. The committee will be expanded to include:
A representative of a (currently) non-contributing US bank that is active in the money markets
A representative of a (currently) non-contributing European bank that is active in the money markets
One representative from Liffe and one from the Chicago Mercantile Exchange (CME)
Two "rate takers": one from the fund management industry and one from the Association of Corporate Treasurers...
The BBA will contact the above and present a list of names and titles for consideration by the Committee...
Once the Committee has reached its complement, the names of all firms represented will be released, but not names of the individual members. This will be accompanied by a statement

[12] The paper explains that "H15 is the yield in the three month Euro Dollar deposit rate published daily by the Fed. The Fed's measure of USD Euro Dollar rates is based on the yield observed within the Euro Dollar deposit market and the H15 values had tended to be at the high end of the traded range."

which describes the capacity in which members serve...
The BBA is subject to a regular independent audit of practices and processes and in future the FX & MM Committee and LIBOR processes will be included in this audit.[13]

These changes to the governance arrangements for the Libor fixing process are similar to recent changes to exchange governance arrangements (in the inclusion of representation of a wider range of interests).

For the euro there is an interest rate called Euribor (Euro Interbank Offered Rate) which is "the rate at which euro interbank term deposits within the euro zone are offered by one prime bank to another prime bank."[14] Euribor is sponsored by the European Banking Federation (FBE)[15] and The Financial Markets Association (ACI)[16] and, like BBA Libor, is fixed by a panel of banks. The Euribor Code of Conduct specifies the rules that apply to Euribor and panel banks.[17]

Consider how the loan agreement addresses issues associated with reliance on funding in the interbank market.

GOVERNING LAW AND ENFORCEMENT

Compare the governing law and jurisdiction clauses in the loan agreement with the governing law and jurisdiction clauses in the EMCA Model Clauses in Packet 2.

The parties to a loan agreement governed by New York or by English law would expect a New York or English court to give effect to the choice of law and jurisdiction clauses in the agreement.

CHOICE OF LAW

The EU has adopted a Regulation to govern the proper law applicable to

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[13] LIBOR Governance and Scrutiny at p. 6.

[14] http://www.euribor.org/

[15] http://www.fbe.be/

[16] http://www.aciforex.com/

[17] It can be found at http://www.euribor.org/html/content/euribor_code.html

contracts - the **Rome Regulation**.[18] This Regulation will come into force in December 2009 and supercedes an earlier EU Convention - the Rome Convention of 1980. Although the UK originally opted out of the Rome Regulation it recently decided to opt in.[19]

The UK's **Contracts (Applicable Law) Act 1990**[20] gives legal effect to the Rome Convention in the UK. EU Courts apply the Rome Convention (an EU Convention) provisions even where the law that applies is that of a non-party or if the parties are not resident or established in the EU. The **Rome Convention** contains the following provisions:

Article 3 Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.
3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".
4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4 Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.
2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract

[18] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ No L 177/6 (Jul. 4, 2008) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF

[19] *See* Ministry of Justice, Rome I - should the UK opt in? Response to Consultation (Jan. 2009) at http://www.justice.gov.uk/docs/rome-i-consultation-govt-response.pdf. The consultation document is available at http://www.justice.gov.uk/docs/cp0508.pdf .

[20] http://www.hmso.gov.uk/acts/acts1990/Ukpga_19900036_en_1.htm

is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated...

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 7 Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 8 Material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 9 Formal validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.

3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.

4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention

governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10 Scope of the applicable law

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11 Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 12 Voluntary assignment

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13 Subrogation

1. Where a person ("the creditor") has a contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14 Burden of proof, etc.
1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.
2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Article 15 Exclusion of renvoi
The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16 Ordre public
The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

Article 17 No retrospective effect
This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18 Uniform interpretation
In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

Article 19 States with more than one legal system
1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.
2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20 Precedence of Community law
This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts.

Article 21 Relationship with other conventions
This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

In January 2003 the EU Commission issued a Green Paper on whether the Rome Convention should be converted into an EU regulation and, if so, whether it should be amended.[21] A number of financial market participants and organisations commented on the Green Paper.[22] ISDA (the International Swap Dealers Association) said:[23]

The arguments against converting the Rome Convention into a Community instrument would include the fact that the Rome Convention has served the markets reasonably well since it first came into effect. Since it is a "known" element of the legal framework within which the European financial markets currently operate, it is arguably better to preserve it in its current form than to risk the uncertainty that might accompany a conversion to a Community instrument. This is particularly so where, as discussed elsewhere in the Green Paper, substantive amendments, which might be of uncertain effect, to various aspects of the Rome Convention would most likely be made as part of the conversion process.
The arguments for converting the Rome Convention into a Community instrument would include (1) the benefit of having a consistent European legislation framework for private international law, following the conversion of the Brussels Convention of 1968 to a Community instrument, (2) the benefit of having a regime common to all EU member states rather than the current somewhat heterogeneous Rome Convention regime resulting, among other things, from reservations made by certain member countries, and (3) the benefit of having the European Court of Justice as the final single arbiter of the meaning of the Community instrument (with, therefore, hopefully, a unifying effect on jurisprudence on the Community instrument in the national courts), as opposed to the current situation, where the First Protocol on the Interpretation by the Court of Justice of the European Communities has never come into effect.

On the issue of references to mandatory requirements in the Convention ISDA said:

...we do believe that a carefully thought-through clarification of the meaning of the terms "mandatory provisions" and "mandatory rules" would be beneficial for parties to cross-border financial contracts and their advisers. To do this properly would require detailed consultation with national legal experts. In framing this clarification, the necessity of preserving freedom of contract for cross-border financial and commercial counterparties should be borne firmly in

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[21] *See* Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654(01), Jan 14, 2003. The Brussels Convention on Jurisdiction and the Enforcement of Judgments was converted into EU Regulation 44/2001, OJ No. L 12/1 (Jan. 16, 2001).

[22] *See* http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm for links to comments.

[23] http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/doc/international_swaps_derivates_association_en.pdf.

mind, as well as the desirability of reinforcing legal certainty (and minimising the risk of legitimate expectations being defeated) by restricting as far as possible the potential interference of mandatory rules developed for other contexts (for example, the consumer) in otherwise legitimate contractual arrangements between sophisticated financial and commercial counterparties.

This invocation of the idea of legal certainty is very common in lobbying on rules that affect financial businesses. Do you think that parties to a contract should be able to provide that the contract alone regulates their relationship and that no other rules should apply (the mandatory rules question)? Why?

In December 2005 the EU Commission published a proposed Regulation to supersede the Rome Convention.[24] The proposed regulation stated that the governing law of a contract could be international principles of contract law:

Proposed Art 3(2): The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.

Although this language is quite general, the Explanatory Memorandum suggested that it is not intended to refer to *lex mercatoria*:

The form of words used would authorise the choice of the UNIDROIT principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the lex mercatoria, which is not precise enough, or private codifications not adequately recognised by the international community. Like Article 7(2) of the Vienna Convention on the international sale of goods, the text shows what action should be taken when certain aspects of the law of contract are not expressly settled by the relevant body of non-State law.[25]

How does the form of words used achieve this result? Why would the drafters seek to limit the use of international contract law principles in this way?

The version of the Regulation which was adopted does not contain this provision, and does not explicitly seem to address this issue. Article 3 of the Rome I Regulation as

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[24] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) COM(2005) 650 (Dec. 15, 2005) at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf (Proposed Rome I Regulation).

[25] Proposed Rome I Regulation, Explanatory Memorandum at p. 5

adopted provides:

Rome I Regulation Article 3
Freedom of choice
1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.
5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Note that this provision is very similar to Art. 3 of the Convention. The reference in the Convention to "mandatory rules" has been replaced by a reference to "provisions of .. law... which cannot be derogated from by agreement". And there is an additional reference to provisions of Community law which cannot be derogated from by agreement. The change in language is designed to align this measure with a separate Regulation on the law applicable to non-contractual obligations (Rome II).[26]

On the mandatory provisions question the **Proposed Rome I Regulation** stated in Art. 8:

1. Mandatory rules are rules the respect for which is regarded as crucial by a country for safeguarding its political, social or economic organisation to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory.
3. Effect may be given to the mandatory rules of the law of another country with which the

[26] *See* Ministry of Justice, Response to Consultation, note 19 above, at 18 ("First, no substantial change was ever intended between the rule in the Regulation and the rule in the Rome Convention. The change in the wording to Article 3.3 of Rome I was made to align the position with that of Rome II.")

situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties.

The explanatory memorandum stated that it is “essential in a genuine European justice area for the courts to be able to have regard to another Member State's mandatory provisions where there is a close connection with the case and where a court action has already been brought by the claimant.”

Is this approach to mandatory rules consistent with legal certainty?

The Rome I Regulation addresses the issue of mandatory provisions in Art 9:

Rome I Regulation Article 9
Overriding mandatory provisions
1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

The recitals to the Regulation state that “Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of "overriding mandatory provisions" should be distinguished from the expression "provisions which cannot be derogated from by agreement" and should be construed more restrictively.”

The Rome I Regulation thus envisages three types of situation where a law other than that chosen by the parties to govern their relationship might be applied by a court:

1. laws, which cannot be derogated from by agreement, of the country with which the contract would be regarded as being connected apart from the choice (because all other elements relevant to the situation are in that country);
2. provisions of Community law (where appropriate as implemented in the Member State of the forum) which cannot be derogated from by agreement where the parties have chosen a governing law other than the law of a Member State but all other

elements relevant to the situation are in one or more Member States;[27] and
3. overriding mandatory provisions of the forum or place of performance.

The Rome I Regulation does, therefore, seem to raise some issues of legal (un)certainty.

Article 4, on the applicable law where there is no choice, is being amended:

Rome I Regulation Article 4
Applicable law in the absence of choice
1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3... the law governing the contract shall be determined as follows:
(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC,[28] in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.
2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that

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[27] Presumably this would apply to a choice of the law of a state which is not a Member State and to the choice of international principles of contract law.

[28] This is Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, OJ. No. L 145/1 (Apr. 30, 2004) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:145:0001:0044:EN:PDF .

other country shall apply.
4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Identifying the proper law in the absence of a choice of law clause may be complex in the context of transactions where performance is to be carried out in many different jurisdictions. And even more so where there are multiple contracts. In ***Marconi Communications International Ltd*** **v** ***PT Pan Indonesian Bank Ltd TBK***[29] the English Court of Appeal considered the application of the Rome Convention to a letter of credit transaction. Letters of credit are complex because they involve a number of separate contracts which are all designed to achieve one purpose. Marconi sued PT Pan Indonesian Bank (PTPI) for breach of contract in respect of a failure to honour its obligations as confirmer of a letter of credit. Marconi had agreed to supply telephone equipment and services to an Indonesian company (under a contract expressed to be governed by English law) for payment by letter of credit to be established through Standard Chartered Bank (SCB) in London.[30] The letter of credit which gave rise to the litigation was issued by Hastin Bank, an Indonesian Bank and was to be confirmed by PTPI. The letter of credit contained no choice of law clause. Marconi drew drafts and sent them with the supporting documentation to PTPI which forwarded them to Hastin Bank. Hastin rejected the documentation as not conforming to the requirements of the letter of credit and PTPI also rejected them. Hastin then became insolvent. Marconi received payment through its credit insurer and then sued PTPI for breach of contract on the credit insurer's behalf.

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[29] [2005] EWCA Civ 422 (Court of Appeal).

[30] See http://www.standardchartered.com/ve/cib/trade_import/issu_confirm_03.html :"At Standard Chartered, our extensive resources and wealth of trade expertise enable us to offer you a swift, convenient and effective Confirmed Letter of Credit Service. A Confirmed Export Letter of Credit can help you mitigate the risks of dealing with foreign counter-parties, especially if you have not traded with them before, or they are located in a high-risk area of the world. Standard Chartered will confirm the Letter of Credit, absorbing the bank and country risks associated with the transaction. In return, you simply provide us with all the relevant, compliant documents called for under the terms of the Letter of Credit."

The Court of Appeal discussed the application of the Rome Convention as follows:

[39] It is common ground that the question of the governing law must be determined by reference to [Art 4 of] the Rome Convention[31]
[40] 'The performance which is characteristic of the contract' is the obligation incumbent on one of the parties which is peculiar to the type of contract in issue or which marks the nature of the contract..
[41] The question of the weight to be accorded to the presumption under art 4(2), as against other features of the contract and its surrounding circumstances which indicate a closer connection with a country other than that which is the place of business of the party which is to effect the performance characteristic of the contract, gives rise to considerations of some complexity in relation to letter of credit transactions. That is because they involve various contractual relationships which may give rise to a 'wholly undesirable multiplicity of potentially conflicting laws': see the Bank of Baroda case... Prior to the introduction of the Rome Convention into English law by the 1990 Act, questions of governing law were determined by the well-known principle that the contract should be governed by the system of law with which it had its closest and most real connection. As stated, that test was effectively the same as the test referred to in paras (1) and (5) of art 4, untrammelled by the necessity to identify a 'characteristic performance' for the purposes of the presumption articulated in art 4(2). As a general rule, in applying the common law test, considerable weight was given to the law of the place of performance over the places of residence or business of either party.
[42] This was well illustrated in the court's approach to the duties of an issuing or confirming banker towards the seller of the goods in connection with a letter of credit: see Offshore International SA v Banco Central SA ....In that case, a standby letter of credit was issued by a Spanish bank and advised (but not confirmed) by a New York bank payable in New York. The court decided that the governing law was the law of New York, as the place where the letter of credit was opened, the documents were to be presented and payment was to be made, rather than the law of Spain, the law of the country where the issuing bank was situated. Ackner J emphasised the difficulties for an advising bank if it had to consider its obligations under a foreign law and emphasised the difficulty which would arise if the advising bank had confirmed the letter of credit.
[43] That decision was approved and followed by the Court of Appeal in Power Curber International Ltd v National Bank of Kuwait.. where there was a difference between the place where the advising bank was situated (Florida), the place where the credit was payable (North Carolina), and the place where the issuing bank had its place of business (Kuwait). The court held that the contract had its closest and most real connection with North Carolina, being the law of the place where the issuing bank's obligation under the credit fell due... It is clear to us that .. cases established that, at common law, the place with which the contract between the issuing bank and the beneficiary embodied in the credit is most closely connected is the place at which the documents will be presented and at which authority has been given to make payments of sums due or to accept drafts drawn under the credit.
[44] It might appear at first sight that the application of art 4 of the Rome Convention would lead to a different result given the emphasis of art 4(2) which requires the court to apply, at least

[31] See p 7 above.

initially, a presumption to the effect that the contract is most closely connected with the country where the party (an issuing or confirming bank) which is to effect the performance which is characteristic of the contract (ie payment against documents) has its principal place of business. However, by art 4(5) the presumption in art 4(2) falls to be disapplied 'if it appears from the circumstances as a whole that the contract is more closely connected with another country'. In this connection, the Court of Appeal has held that the presumption should only be disregarded in circumstances which demonstrate 'a preponderance of contrary connecting factors' justifying such a course: see Land Rover Exports Ltd v Samcrete Egypt Engineers and Contractors...

[45] The most recent review of the authorities in this area is to be found in a decision of the Inner House of the Court of Session in Scotland, Caledonia Subsea Ltd v Microperi SRL ... In considering the proper application of art 4 of the convention in a context far removed from letter of credit transactions, Lord President Cullen expressed agreement with the position as stated in the Samcrete case concluding..:

'... I consider that the presumption under para 2 should not be "disregarded" unless the outcome of the comparative exercise referred to in para 5-which, unlike para 2, may involve difficulty and uncertainty-demonstrates a clear preponderance of factors in favour of another country.'...

[49] The view is widely expressed among current textbook writers that, in the case of letters of credit, the presumption will usually be displaced where the documents are to be presented to, and payments made by, an advising bank in another jurisdiction and that the Offshore and Power Curber cases would be decided the same way today under the Rome Convention as they were under the common law..

[50] That was indeed the view of Mance J in Bank of Baroda v Vysya Bank Ltd ... In that case, an Indian buyer had agreed to purchase a consignment of Latvian steel through its London office. The buyer instructed Vysya, its bank in India, to issue a credit in favour of the seller beneficiary. The credit was confirmed by the Bank of Baroda's London office. The seller presented the documents stipulated under the credit to Bank of Baroda and was paid. The Bank of Baroda then sent the documents to Vysya in India claiming reimbursement. When Vysya refused to pay, the Bank of Baroda issued proceedings in England seeking reimbursement. The Bank of Baroda sought leave to issue the writ and serve it out of the jurisdiction on the grounds, inter alia, that its contract with Vysya was governed by English law. In dealing with that question under art 4 of the Rome Convention, Mance J held that under a contract between an issuing bank and a confirming bank the performance which is characteristic of the contract is the addition by the confirming bank of its confirmation of the credit and its honouring of the obligations thereby accepted in relation to the beneficiary. That being so, if the presumption in art 4(2) were applied, the contract between the issuing bank and the confirming bank would be governed by English law being the law of the place of business through which the Bank of Baroda was to effect its performance.

[51] It was argued for Vysya that the presumption in favour of English law should be disregarded pursuant to art 4(5) on the grounds that it appeared from the circumstances as a whole that the contract between the Bank of Baroda and Vysya Bank was more closely connected with India. Mance J considered the law applicable to the other potentially relevant contractual relationships arising pursuant to the letter of credit, noting that, under art 4, the beneficiary's contract with the issuing bank (Vysya) would be governed by Indian law if the presumption in art 4(2) were applied because the only place of business of Vysya was in India.

However, if that was correct it would mean that the obligations arising under one and the same credit would be governed by two different systems of law, depending on whether one had regard to the position of the confirming bank (Bank of Baroda) or the issuing bank (Vysya). Mance J avoided this undesirable result by holding that, in relation to the beneficiary's contract with Vysya, the presumption under art 4(2) was displaced by art 4(5) with the result that, for the purposes of his decision, the contract between the beneficiary and the issuing bank was also governed by English law. In my view he was right in holding as he did.
[52] He said...:

> 'In my judgment this is a situation where it would be quite wrong to stop at art. 4(2). The basic principle is that the governing law is that of the country with which the contract is most closely connected (art. 4(1)). Art. 4(2) is, as stated in Professors Giuliano and Lagarde's report, intended to give "specific form and objectivity" to that concept. In the present case the application of art. 4(2) would lead to an irregular and subjective position where the governing law of a letter of credit would vary according to whether one was looking at the position of the confirming or the issuing bank. It is of great importance to both beneficiaries and banks concerned in the issue and operation of international letters of credit that there should be clarity and simplicity in such matters. Article 4(5) provides the answer. The Rome Convention was not intended to confuse legal relationships or to disrupt normal expectations in the way which is implicit in Vysya's submissions. Under art. 4(5) the presumptions in art. 4(2), (3) and (4) are to be "... disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country." I accept that the presumptions are to be applied unless there is valid reason, looking at the circumstances as a whole, not to do so. But I note and consider that there is force in the comment in Dicey and Morris on The Conflict of Laws..
>
> "Inevitably the solution of individual cases will depend on the facts, but in principle it is submitted that the presumption may be most easily rebutted in those cases where the place of performance differs from the place of business of the party whose performance is characteristic of the contract."
>
> The present situation provides in my judgment a classic demonstration of the need for and appropriateness of art. 4(5). I conclude that English law applies to the contract between Vysya and [the beneficiary]. The fact that the credit was to be confirmed by Bank of Baroda's City of London branch highlights the need for art. 4(5) and its applicability in this case. But I should not be taken as suggesting that the conclusion would be any different if the credit had been an unconfirmed credit to be opened and advised on Vysya's behalf in London through National Westminster or Bank of Baroda's City branch available for negotiation here. I agree with the editors of Dicey and Morris that the application of the law of the place of performance would in such a case still be likely to result, by application of art. 4(5), as it did applying common law principles...where the "very great inconvenience" of any other conclusion in the case of an unconfirmed credit was the direct subject of Mr. Justice Ackner's comments which I have already cited. I therefore conclude that the letter of credit was governed by English law as between the beneficiary and each of the banks. On this basis, it would be wholly anomalous if English law were not also to govern the contract between Vysya

> and Bank of Baroda and in my opinion it does. As between Bank of Baroda and Vysya the application of the presumption arising under art. 4(2) accords with good sense and sound policy and there is therefore no reason to depart from it.'
> ..

[53] In this case, the judge followed the reasoning of Mance J... He noted the different circumstances in the Bank of Baroda case, namely that there the court was applying art 4 to ascertain the governing law of the letter of credit in the context of a claim by the confirming bank under its contract with the issuing bank in relation to which the performance characteristic was the addition and honouring of the confirmation of the credit in favour of the beneficiary which took place in London. However, he did not consider that to be a distinction which should lead to a different conclusion as to the governing law as between the beneficiary and each of the banks, given the intended as well as the actual role of SCB under the L/C.
[54] David Steel J[32] stated:

> '[24] The position in the present case is of course that SCB did not confirm the credit. Does this affect the position bearing in mind that: (i) SCB advised Marconi both of the issuance of the credit (by their letter dated 27 March) and of its confirmation (by their letter dated 1 April), both as required under the credit; (ii) the credit was available by negotiation and SCB were contemplated by the credit as the (or one of the) negotiating banks. Although SCB did not in the event negotiate the credit, it acted as collecting bank in checking and forwarding the documents and requesting payment to their own London account; (iii) Panin Bank undertook to reimburse SCB if SCB negotiated the documents.
> [25] In short, it was contemplated that the credit would be communicated in this country and become effective here, that the documents would be presented here and that payment would be here. It does not seem to me to be a matter of great significance in considering the application of art 4 taken as a whole that SCB did not add its confirmation. The availability of SCB as negotiating bank would give rise to the same closeness of connection with England. The performance characteristic in these circumstances would remain the provision of the banking service in the form of payment on presentation of non-discrepant documents. Given the availability of negotiation in that form, it would be contrary to the requirement of avoiding the governing law being dependent on the mode of negotiation chosen to contemplate that a different law would govern in the event that negotiation did not take place.
> [26] Thus, whilst art 4(2) might still lead to the presumption that the contract is most closely [connected] with Indonesia (being the country where the party who was to effect performance which was characteristic of the contract was situated) there is a good arguable case in my judgment that the application of art 4(5) would lead to a disregard of that presumption since the circumstances as a whole demonstrate that the contract was more closely connected with England.'

We consider that the judge was right in the conclusion to which he came.
[55] It was and is common ground between the parties that the correct approach for the

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[32] The judge at first instance in this case.

purposes of identifying the governing law is to look at how the contract was intended by its terms to operate at the time it was made, rather than to look at what in fact occurred. That is what the judge did in coming to his conclusions. He dealt with the matter on the basis that, under the terms of the contract, it was anticipated that vis-à-vis the issuing bank (Hastin) and the confirming bank (Panin), the beneficiary (Marconi) would deal with, and be entitled to receive, payment from SCB as advising and negotiating bank making payment to Marconi in England and itself receiving reimbursement here. Further, it was and is common ground that under a letter of credit it is desirable that the same system of law should govern the coexisting contracts between (a) the issuing bank and the beneficiary, (b) the confirming bank and the beneficiary, (c) the issuing bank and the confirming bank: see the Bank of Baroda case and Bank of Credit and Commerce Hong Kong Ltd (in liq) v Sonali Bank [1995] 1 Lloyd's Rep 227 at 237. Since the instant letter of credit was a negotiation credit, it is also relevant to consider the contracts between the issuing/confirming banks and the negotiating bank.
[56] In his argument for Panin Bank, Mr Glennie QC has not challenged the approach of Mance J in the Bank of Baroda case in applying art 4(5) to the letter of credit in the circumstances of the case before him, but submits that on the facts of that case there was a crucial difference, namely that, in addition to being the advising bank, the Bank of Baroda was also the confirming bank (through its London office) and thus the contract with which the court was immediately concerned ie that between the confirming bank and the issuing bank was governed by English law, whether by applying the presumption under art 4(2) or on wider examination under art 4(5). It was thus necessary, in order to avoid the governing law varying as between the confirming bank/issuing bank contract and the contract between the beneficiary and the issuing bank, that the latter should also be governed by English law rather than Indian law, which would have been the position on application of the art 4(2) presumption.
[57] Mr Glennie submits that the judge was in error when he said that it was not 'a matter of great significance in considering the application of art 4 taken as a whole that SCB did not add its confirmation'. He suggests that, in holding that the position of SCB as advising and negotiating bank gave the same closeness of connection with England as if SCB had been the confirming bank, the judge overlooked (or at any rate failed to give weight to) the fact that Panin Bank was the confirming bank under the credit.
[58] Mr Glennie submits that cases such as the Bank of Baroda case and the Sonali Bank case demonstrate that under a letter of credit it is the contracts between the beneficiary and the issuing and confirming banks which are central to the transaction and not that between the beneficiary and the advising/negotiating bank. The contractual relationship with the advising bank is ancillary to the main transaction, even when that bank is also the negotiating bank which, by negotiating the drafts, puts itself into the position of holder in due course for the purpose of obtaining reimbursement from the issuing or confirming bank.
[59] Mr Glennie accepts that the intention of the parties, reflected in the terms of the L/C, were that Marconi should receive payment in London by negotiation of Panin Bank's draft. However, he points out that Marconi would be paid by SCB under a separate contract between Marconi and SCB pursuant to which SCB negotiated the drafts. If Hastin Bank or Panin Bank dishonoured the terms of the undertaking in the L/C to pay Panin Bank's drafts on maturity, then the claim pursuant to that undertaking would be that of SCB on its own account and not Marconi. Mr Glennie submits that the judge should have recognised the L/C for what it was, namely a credit issued by Hastin and confirmed by Panin, of which Marconi (or if the draft was negotiated, SCB) were beneficiaries. On that basis, the three critical contractual relationships

under the L/C to which I have referred would, on application of the art 4(2) presumption, have been governed by Indonesian law. That is because the acts of characteristic performance of the contract between the beneficiary (Marconi) and both the issuing bank (Hastin) and the confirming bank (Panin), namely payment under the L/C, were those of an Indonesian bank and the contract between the issuing and the confirming bank was a contract between two Indonesian banks. Thus, application of the presumption in art 4(2) to all three contracts would render Indonesian law the governing law and the 'wholly anomalous' position adverted to in the final paragraph of the quotation from Mance J's judgment in the Bank of Baroda case (see [52], above) would not arise. That being so, Mr Glennie submits that to hold that the circumstances as a whole render the L/C more closely connected with another country was counter-intuitive and commercially unrealistic.

[60] We do not accept that submission.

[61] The presumption contained in art 4(2) is a blanket provision which falls to be applied across the entire field of contract law. It assumes the ability to identify a single party charged with the (single) performance characteristic of the contract. A letter of credit as such is not susceptible of such treatment. It is the source of a number of autonomous bilateral contracts arising successively between the parties and/or banks involved, each of which, considered separately, has a separate characteristic performance and therefore potentially a different governing law, albeit that a conclusion as to the law governing one contract may be the same in respect of another. Thus it is misleading to speak of the governing law in respect of a letter of credit. It is desirable but not essential that each of the contractual relationships arising in the course of the transaction have the same governing law.

[62] The task of the court is to reach a conclusion as to the governing law of the contract with which it is immediately concerned by application of art 4 of the convention in the circumstances of the case. Here it is the contract between the beneficiary and the confirming bank. In doing so, it is in our view important for the court to bear in mind the essential nature and commercial purpose of a letter of credit transaction in the international sale of goods, namely to provide the seller/beneficiary with the right to receive payment against compliant documents in a particular country, usually that in which the seller carries on business. That was of course the position under the sale contract in this case. However, so universal is international practice and understanding in relation to documentary credits governed by the UCP[33] that it is not necessary and, bearing in mind the autonomy of the letter of credit (see UCP art 3) it is probably not appropriate, for reference to be made to the contract of sale to support that proposition.

[63] In the context of the overall purpose of a letter of credit transaction, when considering the contracts arising between the seller/beneficiary and the issuing or confirming bank, the geographical location of the factors which, absent the presumption contained in art 4(2), are of most obvious significance when considering the closest connection with a particular country, are not the location of the central administration or place of business of either of those banks but the place where the documents necessary to procure payment to the seller/beneficiary are to be presented and checked, and the place where payment to the seller/beneficiary is to be made against those documents. I would also observe that, whereas the place where the contract is made may have jurisdictional significance, in these days of electronic communication it is of little significance so far as 'close connection' is concerned. While frequently the confirming bank will be the corresponding/advising bank, it is not necessarily so, as this case

[33] International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits.

demonstrates. Nor does it affect the essential nature, structure and effect of the transaction as governed by the UCP. In either case, the confirming bank, by adding its confirmation, simply assumes by separate engagement, obligations to the same effect as those of the issuing bank so far as the beneficiary is concerned: see UCP art 9(a)(iv) and (b)(iv).

[64] By being 'available for negotiation', underwritten by an undertaking to honour drafts properly drawn, the terms of the letter of credit operate to empower the seller to negotiate his drafts in order to obtain payment and as an invitation and authority to the negotiating bank to give value for the seller's draft against the promise of the issuing/confirming bank to pay in accordance with the terms of the credit on presentation of the documents: see UPC art 10(d). Such negotiation constitutes final payment to the seller/beneficiary against presentation of documents, the later presentation by the negotiating bank to the issuing/confirming bank being the machinery of its reimbursement: see art 10(d). This is so whether the confirming bank is itself the corresponding and/or advising bank through whom the issuing bank deals with the beneficiary in his own country or is located in a different country. While the former will frequently be the case, the latter may also occur, as here. In either case, although the confirming bank, on adding its confirmation to the already issued letter of credit, enters into a distinct engagement with the beneficiary, it is (as already stated) an engagement to the same effect as that of the issuing bank, and there is good reason for the governing law to be the same.

[65] This also fits well with the view expressed in Jack, Malek and Quest Documentary Credits (3rd edn, 2001) pp 406-407 (para 13.34) where it is stated that, so far as the contract between the negotiating bank and the issuing bank is concerned,

> where the credit is available by negotiation, in the sense that the credit provides for the advising bank to negotiate the documents, the governing law will be the place where the advising bank is situated...

[66] In the instant case, as found by the judge, there was valid reason and commercial logic why, rather than simply applying the presumption in art 4(2) of the convention, art 4(5) should be applied to the contracts between Marconi as seller/beneficiary and Hastin Bank and Panin Bank as issuing and confirming banks respectively, in circumstances where the L/C was opened in London through SCB and contemplated payment of the beneficiary in sterling in London by SCB as negotiating bank authorised to make payment to Marconi against the conforming documents specified in the credit. In those circumstances, not only was the contemplated place of payment England but, for the purposes of negotiation, the documents would be submitted and checked in England before such payment was made. Upon that basis there was similarly good reason to apply art 4(5) to any putative contract between the advising/negotiating bank and the confirming bank.

[67] In those circumstances, the only relevant contract of those mentioned at [55], above in respect of which it could be said that there was no preponderance of connecting circumstances present to justify application of art 4(5), so displacing the art 4(2) presumption, was that between Hastin Bank and Panin Bank as the issuing and confirming banks. However, when confirmation of a credit has been made by a bank and communicated to a seller/beneficiary who relies upon it, the right of the confirming bank to reimbursement by the issuing bank is merely consequential upon the payment earlier made and the conformity of the documents earlier examined under the contract of the confirming bank with the seller/beneficiary for whose benefit the letter of credit was established. To hold that the governing law of the contract between the seller/beneficiary and the issuing/confirming banks should give way to what would

otherwise be the governing law of a contract by which the confirming party has a right to indemnity or reimbursement from the issuing bank would be to allow the tail to wag the dog.
[68] Accordingly, we consider that the judge came to the right conclusion for essentially the right reasons and we dismiss the appeal...

This case illustrates how complex issues of governing law can be where there are multiple financial transactions involving parties in different jurisdictions. Does the case say anything about whether the idea of "performance characteristic of the contract" is useful in this type of situation?

The following case arises out of a US freeze on payments to Libya. It illustrates some of the uncertainties which may impact international financial transactions and which banks have to be aware of and plan for. It also examines choice of law issues in the context of the eurodollar, and allows us to think about some payment systems issues. What does Staughton say was the proper law ? Do you agree with him? Do you agree with his reactions to the testimony of the expert witnesses?

Libyan Arab Foreign Bank **v** ***Bankers Trust*** [1989] Q B 728 (Staughton J)

The plaintiffs are a Libyan corporation, wholly owned by the Central Bank of Libya. They carry on what is described as an offshore banking business, in the sense that they do not engage in domestic banking within Libya. I shall call them "the Libyan Bank." The defendants are a New York corporation with their head office there. They no doubt have a number of branches in various parts of the world; but I am concerned with one in particular, their branch in London. I shall refer to them as "Bankers Trust," and when it is necessary to refer to particular offices as "Bankers Trust London" or "Bankers Trust New York."

In January 1986 the Libyan Bank had an account with Bankers Trust London, denominated in United States dollars. That was a call account, which meant that no cheque book was provided, interest was payable on the balance standing to the credit of the account at rates which varied from time to time, and some minimal period of notice might be required before instructions relating to the account had to be complied with. The suggestion in this case is that instructions would have to be given before noon if they were to be carried out that day. In English practice it would, I think be described as a species of deposit account. The amount standing to the credit of that account at the close of business on 8 January 1986 was U.S.$131,506,389.93. There may be a small element of subsequent adjustment in that figure. But the point is not material.

The Libyan Bank also had an account with Bankers Trust New York, again denominated in United States dollars. This was a demand account. No interest was paid on the balance, and no significant period of notice was required before instructions had to be complied with. But there was not, so far as I am aware, a cheque book. In England it would have been a current account. The amount standing to the credit of that account at the close of business on 8 January 1986 was U.S.$251,129,084.53.

Relations between Libya and the United States in January 1986 were not good. At 8.06 p.m. New York time on 7 January the President of the United States of America issued an executive order, which had the force of law with immediate effect. It provided, so far as

material:
"Section 1. The following are prohibited, except to the extent provided in regulations which may hereafter be issued pursuant to this Order: ... (f) The grant or extension of credits or loans by any United States person to the Government of Libya, its instrumentalities and controlled entities."
That order did not in itself have any great effect on the events with which this case is concerned. But there followed it at 4.10 p.m. New York time on 8 January a second order, reading as follows:
"I, Ronald Reagan, President of the United States, hereby order blocked all property and interests in property of the Government of Libya, its agencies, instrumentalities and controlled entities and the Central Bank of Libya that are in the United States that hereafter come within the United States or that are or hereafter come within the possession or control of U.S. persons including overseas branches of U.S. persons. The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to employ all powers granted to me by the International Emergency Economic Powers Act 50 U.S.C. 1701 et seq. to carry out the provisions of this Order. This Order is effective immediately and shall be transmitted to the Congress and published in the Federal Register.
Ronald Reagan
The White House
8 January 1986"

It is not in dispute that Bankers Trust are a United States person; or that Bankers Trust London are an overseas branch of a United States person; or that the Libyan Bank are an agency, instrumentality or controlled entity of the Government of Libya. Consequently by the law of and prevailing in the State of New York (which I shall refer to as New York law for the sake of brevity) it was illegal at and after 4.10 p.m. on 8 January 1986 for Bankers Trust to make any payment or transfer of funds to or to the order of the Libyan Bank in New York, either by way of debit to the Libyan Bank's account or as the grant of credit or a loan. Similarly it was illegal, by the law of New York or of any other American state, for Bankers Trust to make any such payment or transfer of funds in London or anywhere else.

The United Kingdom Parliament did not enact any similar legislation. No doubt there were reasons of high policy for that forbearance; but with them I am not concerned. It is sufficient to say that nothing in English domestic law prohibited such a transaction. So the main issues in this case are concerned with the rules of conflict of laws, which determine when and to what extent the law of New York is given effect in our courts, and with the contractual obligations of banks. In a word, Bankers Trust say that they cannot, or at any rate are not obliged to, transfer a sum as large as U.S.$100m. or more without using the payment machinery that is available in New York; consequently they have a defence to the Libyan Bank's claim, because performance of this contract would have required them to commit an illegal act in New York. Alternatively they say that their contract with the Libyan Bank is governed by the law of New York, so that performance is for the time being illegal by the proper law of the contract.

The Libyan Bank's claims
These are as follows (using a slightly different system of numbering from that adopted in the pleadings and in argument):

(1) The first claim is for the balance of U.S.$131,506,389.93 standing to the credit of the London account at the close of business on 8 January 1986. It is said that this sum is due to the Libyan Bank, and can be claimed on a cause of action in debt. Alternatively it is said that Bankers Trust ought to have responded to demands for U.S.$131m. that were made by the Libyan Bank in various different ways after 8 January, and are liable in damages.
(2) If they are right on the first claim, the Libyan Bank further say that one or other of three sums ought to have been transferred from the New York account to the London account on 7 and 8 January, thus increasing the amount which they are entitled to recover. These are: (i) U.S.$165,200,000 on 7 January, or (ii) U.S.$6,700,000 on 8 January, or (iii) U.S.$161,400,000 on 8 January. Indeed it is said that the sum of U.S.$6,700,000 was in fact transferred to London on 8 January, with the consequence that the Libyan Bank are in any event entitled to recover that additional amount.
(3) Largely but not entirely as an alternative to the second claim, the Libyan Bank say that they gave a number of payment instructions to Bankers Trust New York for execution on 8 January; those instructions could and should have been executed before 4.10 p.m. on that day, but were not. Consequently the Libyan Bank claim damages in the sum of U.S.$226,147,213.88.
(4) It is said that Bankers Trust, in breach of a duty of confidence which they owed to the Libyan Bank, disclosed information to the Federal Reserve Bank of New York on 7 or 8 January, and thereby caused damage to the Libyan Bank.
(5) Alternatively the Libyan Bank say that their contract with Bankers Trust has been frustrated, with the consequence that the Libyan Bank are entitled to the sums claimed under (1) and (2) above by virtue of the Law Reform (Frustrated Contracts) Act 1943 or as a restitutionary remedy at common law.
(6) Lastly there is a claim which is quite independent of the events of 7 and 8 January 1986 and President Reagan's executive orders. It is said that during the period from April 1984 to November 1985 Bankers Trust operated a system of transfers between the New York account and the London account, which was not in accordance with their contract with the Libyan Bank. In consequence the Libyan Bank were deprived of interest for one day or three days on a succession of sums during that period. It is said that the loss suffered is of the order of $2m. Bankers Trust do not deny that, initially, the system of transfers which they operated during this period failed to accord with their contract. But they say that, by the doctrine of account stated or estoppel, the Libyan Bank are precluded from asserting this claim.
The issues thus raised, or at any rate those that arise under paragraph (1) above, are of great interest and some difficulty. Similar problems occurred a few years ago in connection with the freeze on Iranian assets by executive order of 14 November 1979, and litigation was commenced. But before any of those actions could come to trial the freeze was lifted. This time the problems have to be resolved.

History of the banking relationship
This can be considered in three stages. The first stage was from 1972 to 15 December 1980.

The Libyan Bank came into existence in June 1972. A correspondent relationship was established between the Libyan Bank and Bankers Trust. Initially an account was opened for that purpose with the Paris branch of Bankers Trust. But in April 1973 that account was closed, and an account opened with the London branch. It was described as a 7-day notice account. However, any requirement that notice of that length should be given before debits were allowed on the London account was not enforced. In this period the Libyan Bank did not wish to have

any account with Bankers Trust New York. Transfers for the credit of the Libyan Bank used regularly to arrive at Bankers Trust New York, in accordance with the system most often used for transferring large dollar amounts, which I shall describe later. But they were dealt with by an instruction from Bankers Trust New York to Bankers Trust London to credit the account of the Libyan Bank there. Indeed the Libyan Bank insisted on that from time to time. Thus on 14 July 1973 they said in a telex to New York: "We also request immediate transfer of any funds you may receive in future for our favour to your London office." And on 17 July 1973 to London: "When we have agreed to have the account of Libyan Arab Foreign Bank with Bankers Trust I have made it very clear that no balance at all should be kept in New York and should be transferred immediately to our call account which started in Paris and now with you in London."

Certainly one motive for that attitude, and in 1973 possibly the only motive, was that dollar credit balances outside the United States earned a higher rate of interest than was obtainable in the United States. That is all that Eurodollars are - a credit in dollars outside the United States, whether in Europe or elsewhere. (It may be that one should add to this definition "at a bank" or "at an institution.") The interest rate is higher owing to the terms of the requirement imposed by the Federal Reserve Board that banks should maintain an amount equal to a proportion of the deposits they receive on deposit interest-free with the Federal Reserve system. That requirement is less demanding in connection with deposits received by overseas branches.

In fact Bankers Trust New York had operated an account in New York, for the handling of transactions by the Libyan Bank. But that account was closed on 17 December 1973 in consequence of the above and other protests by the Libyan Bank.

There followed a long period of discussion and negotiation. Bankers Trust were dissatisfied because the London, so-called 7-days' notice, account was used as a current account. Large numbers of transactions occurred on it, but interest was paid on the balance. This was not thought to be profitable for Bankers Trust. Furthermore, transfers to or from the account would commonly be made through New York, with a risk of delay and the possibility of error. On 23 November 1977 Mr. Ronai of Bankers Trust New York wrote to the Libyan Bank as follows:

"... I am writing to outline our proposal for clearing up the operational difficulties encountered in your dollar-clearing activity through Bankers Trust in New York.

"I feel that the problems stem from the number of intermediate steps required to effect a large number of transfers to and from your London Call account via New York. In order to simplify this situation, my proposal is to set up a fully-managed account relationship with Libyan Arab Foreign Bank. This should provide you with several major benefits, among which are:

- more timely information for yourselves
- simplification of transactions
- greater ease in researching possible errors
- the ability to tailor the system to your requirements.

"The basic elements of a managed account consist of a current account in New York and a call account in London with Bankers Trust Co. The current account will be used for your daily dollar-clearing activity; the call account should be considered as an investment of liquid funds. An explanation of the operation of your managed account follows.

"On a daily basis, all transactions concerning the demand account are reviewed, and the balance is 'managed' so that it does not exceed or fall below a predetermined target or 'peg' balance. Excess funds will be credited to your call account, or your current account will be

funded from your call account, as the case may be."

In 1980 that proposal was more actively pursued. At first it was suggested by Bankers Trust that the current account should be in London. But by the time of a meeting in New York on 7 July it was again proposed that there should be a demand account there. Following that meeting Bankers Trust wrote from London to the Libyan Bank with details of the proposed managed account system:

"We will establish a 'peg' (or target) balance for the demand account of U.S.$750,000. That amount is intended to compensate Bankers Trust Co. for the services which we expect to provide, and is subject to periodic renegotiation as appropriate, for example when our costs increase, when interest rates decline significantly or when our level of servicing is materially changed. Each morning our account management team will review the demand account's closing book balance from the previous business day. If that balance is in excess of the 'peg,' they will transfer in multiples of U.S.$100,000 the excess amount to your call account in London with value the previous business day.

"Similarly, if the demand account balance is below the U.S.$750,000 peg, they will transfer funds back from your call account with value the previous business day. ... As you can appreciate, our account management team must closely follow the balance in your call account. Given time zone differences with London, all entries to your call account must be passed by that team in New York, and all your instructions to effect payments or foreign exchange settlements must be directed to our money transfer department in New York."

The figure of U.S.$750,000 as the peg balance was later agreed at U.S.$500,000.

There was some discussion of political risk at the New York meeting. I am confident that political risk was at any rate in the minds of both parties, seeing that the freeze on Iranian assets had occurred only eight months previously. Mr. Abduljawad, then deputy chairman, is recorded as saying: "Placing at call is not an effort to avoid political risk, which he believes to be unavoidable." Whilst I accept that record as accurate, I also accept Mr. Abduljawad's oral evidence that "political risk is always being taken into consideration." Mr. Van Voorhees, who was among those attending the meeting on behalf of Bankers Trust, accepted that the Iranian crisis was at the back of everyone's mind in 1980.

A further meeting took place in Paris on 28 October 1980 between Mr. Abduljawad and Mr. Van Voorhees. At that meeting too no complete agreement was reached, so there was no new agreement or variation of the existing agreement. But important progress was made. Mr. Van Voorhees explained in plain terms that all the Libyan Bank's transactions would have to pass through New York. According to Mr. Van Voorhees, Mr. Abduljawad at first objected to that requirement, but later agreed to it. Mr. Abduljawad's evidence was that he did not reject it and equally did not agree to it. I do not need to resolve that conflict. It is plain to me that one of the terms which Bankers Trust were putting forward for the new arrangement was that all transactions should pass through New York; whether or not it was accepted at that stage is immaterial.

There followed a meeting in Tripoli and correspondence between the parties, and agreement was finally reached by 11 December 1980. Thus the managed account system was agreed on. Bankers Trust New York would open a demand account for the Libyan Bank, with a peg balance of U.S.$500,000. Transfers between that account and the call account in London would be made, as the need arose, in multiples of U.S.$100,000. The need for a transfer would be determined each morning by examining the closing balance of the New York account for the previous business day; if appropriate a transfer to or from London would be made with value

the previous business day - in other words, it would take effect from that date for interest purposes.

It was, as I find, a term of that arrangement that all the Libyan Bank's transactions should pass through New York. Although not mentioned in the correspondence by which agreement was ultimately reached, this had plainly been a requirement of Bankers Trust throughout the later stages of the negotiations, and I conclude that it was tacitly accepted by the Libyan Bank. It was virtually an essential feature of the system: Bankers Trust New York would know about and rely on the credit balance in London in deciding what payments could be made from New York; they might be exposed to risk if the balance in London could be reduced without their knowledge. It was argued that such a term is not to be found in the pleadings of Bankers Trust; but in my judgment it is, in paragraph 3(4)(v) of the re-re-amended points of defence. There remains an important question whether the managed account arrangement was irrevocable, or whether it could be determined. I shall consider that later.

The second stage ran from December 1980 to November 1985. Before very long Bankers Trust took the view that the remuneration which they received from the relationship, in the form of an interest-free balance of between U.S.$500,000 and U.S.$599,999 in New York, was insufficient reward for their services. On 15 March 1983 they proposed an increase in the peg balance to $1.5m. Negotiations continued for a time but without success. By 15 March 1984 Bankers Trust had formed the view that the Libyan Bank would not agree to an increase in the peg balance; so, on 3 April 1984, they decided unilaterally on a different method of increasing the profitability of the relationship for Bankers Trust; and it was put into effect on 17 April.

The new method required a consideration of the balance on the New York account at 2 p.m. each day. If it exceeded the peg balance of U.S.$500,000 the excess was transferred in multiples of U.S.$100,000 to the London account with value that day. Consideration was also given on the following morning to the balance at the close of the previous day. If it was less than the peg balance, a transfer of the appropriate amount was made from London to New York on the next day, with value the previous business day; if it was more than the peg balance there was, it seems, a transfer to London with value the same day. The effect of the change was that the Libyan Bank lost one day's interest whenever (i) credits received after 2 p.m. exceeded payments made after 2 p.m., and (ii) the closing balance for the day would under the existing arrangement have required a transfer (or a further transfer if one had been made at 2 p.m.) to be made with value that day. If a weekend intervened, three days interest might be lost. I am not altogether sure that I have stated the effect of the change correctly; but precision as to the details is not essential.

Bankers Trust did not tell the Libyan Bank about this change. Indeed an internal memorandum of Bankers Trust dated 14 August 1984 wondered whether Libya (possibly referring to the Libyan Bank) would notice the drop in interest earnings. Although the effect was on any view substantial, I am satisfied that the Libyan Bank did not in fact appreciate what was happening until mid-1985; and they complained about it to Bankers Trust in October 1985. I am also satisfied that the Libyan Bank could have detected, if they had looked at their statements from Bankers Trust with a fair degree of diligence, that they were not receiving the full benefit by way of interest to which they were entitled. Indeed, they did, as I have said, eventually detect that. But I am not convinced - if it matters - that they could have divined precisely what system Bankers Trust were now operating.

The third stage began on 27 November 1985, with a telex from Bankers Trust which

recorded the agreement of the Libyan Bank to a new arrangement. This telex is important, and I must set out part of it:
"As discussed with you during our last meeting in your office in Tripoli, we have changed the method of investment from same day by means of next day back valuation, to actual same day with investment cut off time of 2 p.m. New York time. ... In this regard, those credits which are received after our 2 p.m. New York time cut off which result in excess balances are invested with next day value. This you will see from observing your account. For your information, the way our same day investment system works, is as follows: each day, at 2 p.m. the balance position of your account is determined and any credits received up to that time, less payments and less the peg balance, are immediately invested. An example of this investment system can be seen for instance by comparing both statements of your demand and call accounts for 26 and 30 September 1985 which indicate same day investment on 26 September for U.S.$33.7 million which is reflected on your London call account statement on 27 September with value 26 September and on 30 September for U.S.$181.3 million which is reflected on your London call account statement on 1 October with value 30 September."

That was not in substance any different from the system which Bankers Trust had been operating since April 1984 without informing the Libyan Bank. It was now accepted by them.

7 and 8 January 1986

At 2 p.m. on 7 January the balance to the credit of the New York account was U.S. $165,728,000. (For present purposes I use figures rounded down to the nearest U.S.$1,000, save where greater accuracy is desirable.) Subject to two points which I shall consider later, a transfer of $165.2m. should then have been made to London. Mr. Fabien Arnell, an account manager of Bankers Trust New York, says somewhat laconically in his statement:
"On 7 January 1986 I instructed the managed account clerk not to make a 2 p.m. investment. I cannot now recall the precise reason why I gave that instruction."

During the rest of that day there were substantial transfers out of the New York account, with the result that it would have been overdrawn to the extent of $157,925,000 if the 2 p.m. transfer had been made. There would then have had to be a recall of U.S.$158,500,000 from London on 8 January, with value the previous business day, to restore the peg balance. As no 2 p.m. transfer had been made, the closing balance was in fact U.S.$7,275,000 in credit.

On the morning of 8 January there was an amount of $6,700,000 available to transfer to London. The same amount would have been left as a net credit to the London account if $165.2m. had been transferred at 2 p.m. on 7 January and $158.5m. recalled on 8 January with value the previous day. An instruction for the transfer of U.S.$6,700,000 was prepared. But in the event the computer which kept the accounts in New York was not ordered to effect this transfer, nor was the London branch informed of it.

At 2 p.m. on 8 January the balance to the credit of the New York account was U.S.$161,997,000. After deducting the peg balance of U.S.$500,000 there was a sum of U.S.$161,400,000 available to transfer to London. No transfer was made. Those figures assume, as was the fact, that U.S.$6,700,000 had not been transferred to London in respect of the excess opening balance on that day.

Bankers Trust New York had received payment instructions totalling U.S. $347,147,213.03 for execution on 8 January. All of them had been received by 8.44 a.m. New York time. None of them were executed, for reasons which I shall later explain. (In case it is thought that not even the combined London and New York accounts could have sustained such

payments, I should mention that substantial credits were received in New York during 8 January for the account of the Libyan Bank. If all the payment instructions had been implemented, there would still at the end of the day have been a net balance due to the Libyan Bank on the total of the two accounts)....

Next I turn to the Civil Evidence Act statement of Mr. Brittain, the chairman of Bankers Trust. Late in the afternoon of 7 January he received a telephone call from Mr. Corrigan, the president of the Federal Reserve Bank of New York. Mr. Corrigan asked that Bankers Trust should pay particular attention on the next day to movement of funds on the various Libyan accounts held by Bankers Trust, and report anything unusual to him.

Late in the morning of the next day Mr. Brittain informed the New York Fed. (as it is sometimes called) that "it looked like the Libyans were taking their money out of the various accounts." (So far as the Libyan Bank were concerned, it will be remembered that they had already given instructions for payments totalling over U.S.$347m. on that day.) Later Mr. Brittain learnt that sufficient funds were coming in to cover the payment instructions; he telephoned Mr. Corrigan and told him that the earlier report had been a false alarm. Mr. Corrigan asked Mr. Brittain not to make any payments out of the accounts for the time being, and said that he would revert later.

That assurance was repeated several times during the early afternoon. Mr. Brittain's statement continues:

"Finally I telephoned Mr. Corrigan at about 3.30 p.m. and told him that we now had sufficient funds to cover the payments out of the various Libyan accounts and were going to make them. Mr. Corrigan's response to this was, 'You'd better call Baker' (by which he meant the Secretary of the United States Treasury, Mr. James A. Baker III). I said that I would release the payments and then speak to Mr. Baker. Mr. Corrigan's reply to this was. 'You'd better call Baker first'."

Mr. Brittain was delayed for some 20 minutes talking to Mr. Baker and to an assistant secretary of the Treasury on the telephone. Then at approximately 4.10 to 4.15 p.m. Mr. Baker said: "The President has signed the order, you can't make the transfers."

Mr. Brittain adds in his statement that this was the first occasion on which he became aware that an order freezing the assets was contemplated. In a note made a few weeks after 8 January he adds: "That is how naive I was." I am afraid that I can but agree with Mr. Brittain's description of himself. It seems to me that a reasonable banker on the afternoon of 8 January would have realised, in the light of the first executive order made on the previous day, the requests of Mr. Corrigan, and particularly his saying "You'd better call Baker first," that a ban on payments was a distinct possibility.

There is other evidence as to Mr. Brittain's telephone conversations. First, Mr. Blenk was in Mr. Brittain's office and heard what was said by him. There was not, it seems, any reference by name to Libyan Arab Foreign Bank, but merely to "the Libyans," which meant some six Libyan entities (including the Libyan Bank) which had accounts with Bankers Trust. Secondly, Mr. Sandberg, a senior vice-president of the Federal Reserve Bank of New York, heard Mr. Corrigan's end of the conversations. He accepted in evidence that the New York Fed. probably knew which Libyan banks held accounts with Bankers Trust.

The Federal Reserve Board Regulations

Considerable emphasis was placed on these Regulations. But in my judgment they are not determinative of anything in this case.

Regulation D imposes a reserve requirement equal to 12 per cent. of the amount of

deposits held by banks in the United States. The reserve must be held either in the form of vault cash or as an interest-free deposit with a Federal Reserve Bank. Regulation D accordingly imposes a constraint on the rate of interest which a bank in the United States can offer to depositors. But by section 204 (c)(5) it does not apply "to any deposit that is payable only at an office located outside the United States." That is further defined in section 204.2(t) as a deposit as to which the depositor is entitled "to demand payment only outside the United States." Bankers Trust did not include the Libyan Bank's London account in the deposits for which they maintained a reserve of 12 per cent. in accordance with Regulation D.

There are three possible conclusions which I might draw from that evidence. They are (i) that the sum standing to the credit of the London account was payable only at an office located outside the United States; or (ii) that section 204(c)(5) bears some other meaning than that which it appears to have in plain English; or (iii) that Bankers Trust casually disregarded Regulation D. I have already rejected the first solution, and have found on the evidence of Mr. Van Voorhees and the documents that after December 1980 all operations on the London account were, by express agreement, to be conducted through New York. Consideration of Regulation D and what Bankers Trust did about it does not cause me to have any doubt on that point.

It follows that either section 204(c)(5) does not mean what it appears to say, or else Bankers Trust disregarded it. I do not need to decide which of those alternatives is correct for the purposes of this case. But it does seem in fact that section 204(c)(5) has a somewhat surprising meaning. That appears from the Memorandum of Law of the Federal Reserve Bank of New York ..as amicus curiae in Wells Fargo Asia Ltd. v. Citibank N.A. (1985) 612 F.Supp. 351:

"The location where the depositor has legal right to demand payment is a distinct concept from the location where the deposit is settled. The fact that settlement of United States dollar deposit liabilities takes place in the United States between United States domiciliaries is not determinative of where the deposit is legally payable. Virtually all United States larger-dollar transactions between parties located outside the United States must be settled in the United States. The Clearing House Interbank Payments System or C.H.I.P.S., operated by the New York Clearing House Association for some 140 banks, handles at least U.S.$400 billion in transfers each day, and it is assumed that perhaps 90 per cent. of these payments are in settlement of offshore transactions. If that fact alone were relevant to where a deposit is legally payable, the exemption in Regulation D would almost never apply to foreign-branch deposits denominated in United States dollars. Clearly, the exemption is not limited to deposits denominated in a foreign currency and is available to foreign branches of United States banks that book deposits denominated in United States dollars."

If there were not some such interpretation the whole Eurodollar market might well be thrown into disarray, or even disappear altogether. In many if not most cases it would be impossible for banks outside the United States to offer the higher interest rates which are a feature of that market.

Whether that doctrine would apply in a case such as the present, where there was an express term that all operations in the London account should be conducted through New York, is something which I need not decide. It would seem to be a generous interpretation which equates that to "payable only at an office located outside the United States." But it does not affect the result in this case.

Nor do I need to mention Regulation Q, F.D.I.C. Insurance or the 3 per cent. reserve

requirement for a bank's Euro-currency liabilities.

The demands made

On 28 April 1986 the Libyan Bank sent a telex to Bankers Trust London in these terms: "We hereby instruct you to pay to us at 10.30 a.m. U.K. time on Thursday 1 May 1986 out of our U.S. dollar account number 025-13828 at Bankers Trust London the sum of U.S. dollars one hundred and thirty one million. We make demand accordingly. This sum is to be paid to us in London at the said time and date either by a negotiable banker's draft in such amount (U.S.$131,000,000.00) drawn on Bankers Trust London payable in London to ourselves (Libyan Arab Foreign Bank) or to our order. Alternatively we will accept payment in cash although we would prefer to be provided with a banker's draft as aforesaid."

On the same day a demand in similar terms was made for oe161m., on the basis that this amount should have been transferred from the New York account to the London account at 2 p.m. on 8 January 1986.

Neither demand was complied with. Bankers Trust replied that it would be unlawful (sc. by New York or any other United States law) for them to pay in London. That was factually correct. The question is whether it was relevant. Bankers Trust also denied that the U.S.$161m. transfer should have been made on 8 January.

The action 1986 L. No. 1567 was then started by the Libyan Bank against Bankers Trust. In correspondence between the parties' solicitors various other methods of payment were discussed. In addition the Libyan Bank's solicitors by letter dated 30 July 1986 said that, in so far as notice was required to terminate the managed account arrangement, (1) notice had been given by the Libyan Bank's telex of 28 April 1986 or (2) notice was then given by the solicitors in their letter.

Finally, there was a further demand made in a telex from the Libyan Bank to Bankers Trust on 23 December 1986:

"We now hereby further demand that you pay to us within seven days from receipt of this telex in London, England, the said sums of U.S.$131,000,000 - and U.S.$161,000,000 - respectively, either by the means set out in our April demands or by any other commercially recognised method of transferring funds, which will result in our receiving unconditional payment in London within the said seven-day period.

"In particular (but without prejudice to the foregoing) the said sums of U.S.$131,000,000 - and U.S.$161,000,000 - (or either of them) may be transferred in compliance with these demands by any such commercially recognised method to the U.B.A.F. Bank Ltd. London for the credit of our dollar account number 0000104-416. We reiterate, however that our demands are for us to receive unconditional payment in London within the said seven-day period. If therefore, a transfer or clearing procedure is employed by you to comply with our demands, such procedure must be such that funds or credits said to represent any part of the debt which you owe to us in London are not, in the result, frozen or otherwise impeded in the United States. We would not object to your exercising your right to pay us in sterling, and, if so, our sterling account number at the above bank is 0000103-919."....

(1) The U.S.$131 million claim

(a) Conflict of laws - the connecting factor

There is no dispute as to the general principles involved. Performance of a contract is excused if (i) it has become illegal by the proper law of the contract, or (ii) it necessarily involves

doing an act which is unlawful by the law of the place where the act has to be done. I need cite no authority for that proposition (least of all my own decision in Euro-Diam Ltd. v. Bathurst [1987] 2 W.L.R. 1368, 1385) since it is well established and was not challenged. Equally it was not suggested that New York law is relevant because it is the national law of Bankers Trust, or because payment in London would expose Bankers Trust to sanctions under the United States legislation, save that Mr. Sumption for Bankers Trust desires to keep the point open in case this dispute reaches the House of Lords.

There may, however, be a difficulty in ascertaining when performance of the contract "necessarily involves" doing an illegal act in another country. In Toprak Mahsulleri Ofisi v. Finagrain Compagnie Commerciale Agricole et Financiere S.A. [1979] 2 Lloyd's Rep. 98, Turkish buyers of wheat undertook to open a letter of credit "with and confirmed by a first class United States or West European bank." The buyers were unable to obtain exchange control permission from the Turkish Ministry of Finance to open a letter of credit, and maintained that it was impossible for them to open a letter of credit without exporting money from Turkey. It was held that this was no answer to a claim for damages for nonperformance of the contract. Lord Denning M.R. said, at p. 114:

"In this particular case the place of performance was not Turkey. Illegality by the law of Turkey is no answer whatever to this claim. The letter of credit had to be a confirmed letter of credit, confirmed by a first-class West European or U.S. bank. The sellers were not concerned with the machinery by which the Turkish state enterprise provided that letter of credit at all. The place of performance was not Turkey.

"This case is really governed by the later case of Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft [1939] 2 K.B. 678 where bills of exchange were to be given and cover was to be provided in London, but at the same time there was a letter saying, 'We have to get permission from Hungary.' It was said that because of the illegality by Hungarian law in obtaining it, that would be an answer to the case. But Branson J. and the Court of Appeal held that the proper law of the contract was English law; and, since the contract was to be performed in England, it was enforceable in the English courts even though its performance might involve a breach by the defendants of the law of Hungary.

"That case has been quoted in all the authorities as now settling the law. ... The only way that Mr. Johnson (for the Turkish state enterprise) could seek to escape from that principle was by saying - '... Although there was no term, express or implied, in the contract that anything had to be done in Turkey as a term of the contract, nevertheless it was contemplated by both parties. It was contemplated by both parties that the Turkish buyers would have to go through the whole sequence in Turkey of getting exchange control permission, and all other like things: and, if the contemplated method of performance became illegal, that would be an answer. Equally, if it became impossible, that would be a frustration.'

"I am afraid that those arguments do not carry the day. It seems to me in this contract, where the letter of credit had to be a confirmed letter of credit - confirmed by a West European or U.S. bank - the sellers are not in the least concerned as to the method by which the Turkish buyers are to provide that letter of credit. Any troubles or difficulties in Turkey are extraneous to the matter and do not afford any defence to an English contract ..."

From that case I conclude that it is immaterial whether one party has to equip himself for performance by an illegal act in another country. What matters is whether performance itself necessarily involves such an act. The Turkish buyers might have had money anywhere in the world which they could use to open a letter of credit with a United States or West European

bank. In fact it would seem that they only had money in Turkey, or at any rate needed to comply with Turkish exchange control regulations if they were to use any money they may have had outsideTurkey. But that was no defence, as money or a permit was only needed to equip themselves for performance, and not for performance itself.

Mr. Sumption took the same route as Mr. Johnson did in the Toprak case. He argued that the court could look at the method of performance which the parties had contemplated, and relied on Regazzoni v. K.C. Sethia (1944) Ltd. [1958] A.C. 301. (Mercifully he refrained from citing Foster v. Driscoll [1929] 1 K.B. 470.) In Regazzoni's case the plaintiff had agreed to buy 500,000 jute bags from the defendants c.i.f. Genoa. It was, of course, open to the defendants as a matter of law to ship the goods to Genoa from anywhere in the world. But in practice the goods had to be obtained from India, both parties knew that this was intended and they also knew that the plaintiff intended to re-export the goods to South Africa. It was illegal by Indian law, again as both parties knew, to export goods from India destined to South Africa directly or indirectly. The plaintiff's claim failed.

I am relieved from the task of distinguishing between the Toprak principle and Regazzoni's case by a most helpful analysis of Robert Goff J. in the Toprak case itself at first instance which I gratefully adopt. He there held [1979] 2 Lloyd's Rep. 98, 107 that there were two related but distinct principles. The principle of Regazzoni's case was derived from the judgment of Sankey L.J. in Foster v. Driscoll, at pp. 521-522:

"An English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally."

Even if that principle can be applied to supervening illegality as opposed to illegality ab initio (a point which I would regard as open to question), it does not apply in this case. At no stage was it the real object and intention of the Libyan Bank that any illegal act should be performed in New York. That was not suggested in argument or in the course of the evidence. This case accordingly raises only the other principle, that performance is excused if it necessarily involves doing an act which is unlawful by the law of the place where the act has to be done.

Some difficulty may still be encountered in the application of that principle. For example, if payment in dollar bills in London was required by the contract, it would very probably have been necessary for Bankers Trust to obtain such a large quantity from the Federal Reserve Bank of New York, and ship it to England. That, Mr. Sumption accepts, would not have been an act which performance necessarily involved; it would merely have been an act by Bankers Trust to equip themselves for performance, as in the Toprak case. By contrast, if the contract required Bankers Trust to hand over a banker's draft to the Libyan Bank in London, Mr. Sumption argues that an illegal act in New York would necessarily be involved, since it is very likely that the obligation represented by the draft would ultimately be honoured in New York. I must return to this problem later.

(b) The proper law of the contract

As a general rule the contract between a bank and its customer is governed by the law of the place where the account is kept, in the absence of agreement to the contrary. Again there was no challenge to that as a general rule; the fact that no appellate decision was cited to

support it may mean that it is generally accepted....

That rule accords with the principle, to be found in the judgment of Atkin L.J. in N. Joachimson v. Swiss Bank Corporation [1921] 3 K.B. 110, 127, and other authorities, that a bank's promise to repay is to repay at the branch of the bank where the account is kept.

In the age of the computer it may not be strictly accurate to speak of the branch where the account is kept. Banks no longer have books in which they write entries; they have terminals by which they give instructions; and the computer itself with its magnetic tape, floppy disc or some other device may be physically located elsewhere. Nevertheless it should not be difficult to decide where an account is kept for this purpose, and it is not in the present case. The actual entries on the London account were, as I understand it, made in London, albeit on instructions from New York after December 1980. At all events I have no doubt that the London account was at all material times "kept" in London.

Mr. Sumption was prepared to accept that the proper law governing the London account was English law from 1973 to December 1980. But he submitted that a fundamental change then took place, when the managed account arrangement was made. I agree that this was an important change, and demands reconsideration of the proper law from that date. That the proper law of a contract may be altered appears from Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1970] A.C. 583, per Lord Reid at p. 603, and per Lord Wilberforce at p. 615.

Mr. Cresswell for the Libyan Bank submits that there then arose two separate contracts, of which one related to the London account and remained governed by English law; alternatively he says that there was one contract, again governed by English law; or that it had two proper laws, one English law and the other the law of New York. Mr. Sumption submits that there was from December 1980 one contract only, governed by New York law.

Each side has relied on a number of points in support of its contentions. I do not set them out, for they are fairly evenly balanced, and in my view do little or nothing to diminish the importance of the general rule, that the proper law of a bank's contract is the law of the place where the account is kept. Political risk must commonly be an important factor to those who deposit large sums of money with banks; the popularity of Swiss bank accounts with some people is due to the banking laws of the Cantons of Switzerland. And I have already found, on the evidence of Bankers Trust, that the Iranian crisis was at the back of everyone's mind in 1980. Whatever considerations did or did not influence the parties to this case, I believe that banks generally and their customers normally intend the local law to apply. So I would require solid grounds for holding that the general rule does not apply, and there do not appear to me to be such grounds in this case.

I have, then, to choose between the first and third of Mr. Cresswell's arguments - two separate contracts or one contract with two proper laws. It would be unfortunate if the result of this case depended on the seemingly unimportant point whether there was one contract or two. But if it matters, I find the notion of two separate contracts artificial and unattractive. The device of a collateral contract has from time to time been adopted in the law, generally to overcome some formal requirement such as the ci-devant parole evidence rule, or perhaps to avoid the payment of purchase tax, and at times for other purposes. No doubt it has achieved justice, but at some cost to logic and consistency. In my judgment, the true view is that after December 1980 there was one contract, governed in part by the law of England and in part by the law of New York. It is possible, although unusual, for a contract to have a split proper law, as Mr. Sumption accepted: see Dicey & Morris The Conflict of Laws, 11th ed. (1987), p. 1163 and

Chitty on Contracts, 25th ed. (1983), para. 2081. Article 4 of the E.E.C. Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (Official Journal 1980 No. L.266, p. 1) (as I write not yet in force) provides:
"1. To the extent that the law applicable to the contract has not been chosen in accordance with article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country."

That such a solution is not necessarily unacceptable to businessmen is shown by one of the Australian printed forms of charterparty, which adopts it.

Mr. Sumption argues that difficulty and uncertainty would arise if one part of the contract was governed by English law and another by New York law. I do not see that this would be so, or that any difficulty which arose would be insuperable.

There is high authority that branches of banks should be treated as separate from the head office. See for example Reg. v. Grossman (1981) 73 Cr.App.R. 302, where Lord Denning M.R. said, at p. 308:
"The branch of Barclays Bank in Douglas, Isle of Man, should be considered as a different entity separate from the head office in London."

That notion, of course, has its limits. A judgment lawfully obtained in respect of the obligation of a branch would be enforceable in England against the assets of the head office. (That may not always be the case in America.) As with the theory that the premises of a diplomatic mission do not form part of the territory of the receiving state, I would say that it is true for some purposes that a branch office of a bank is treated as a separate entity from the head office.

This reasoning would support Mr. Cresswell's argument that there were two separate contracts, in respect of the London account and the New York account. It also lends some support to the conclusion that if, as in my preferred solution, there was only one contract, it was governed in part by English law and in part by New York law. I hold that the rights and obligations of the parties in respect of the London account were governed by English law.

If I had not reached that conclusion, and if the managed account arrangement was brought to an end as suggested by the Libyan Bank's solicitors in their letter of 30 July 1986, I would have had to consider whether the London account then ceased to be governed by New York law and became governed by English law once more.

(c) The nature of a bank's obligations

It is elementary, or hornbook law to use an American expression, that the customer does not own any money in a bank. He has a personal and not a real right. Students are taught at an early stage of their studies in the law that it is incorrect to speak of "all my money in the bank." See Foley v. Hill (1848) 2 H.L.Cas. 28, 36, where Lord Cottenham said:
"Money, when paid into a bank, ceases altogether to be the money of the principal ... it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it ... The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with as he pleases. ..."

Naturally the bank does not retain all the money it receives as cash in its vaults; if it did, there would be no point or profit in being a banker. What the bank does is to have available a sufficient sum in cash to meet all demands that are expected to be made on any particular day.

I mention these simple points in order to clarify the real problem, which is what the

obligation of a bank is. There are passages in the experts' reports which appear inconsistent with what I have said. Thus Dr. Marcia Stigum, who gave evidence for Bankers Trust, wrote: "Dollars deposited and dollars lent in wholesale Eurodollar transactions never leave the United States." That statement no doubt makes sense to an economist. For a lawyer it is meaningless.

The obligation of a bank is not, I think, a debt pure and simple, such that the customer can sue for it without warning. Thus in Richardson v. Richardson [1927] P. 228, Hill J. said, at p. 232-233:

"Certain contractual obligations of a bank and its customer, in the absence of special agreement, are well ascertained. They include these implied terms, as stated by Atkin L.J. in Joachimson v. Swiss Bank Corporation [1921] 3 K.B. 110, 127: (a) the promise of the bank to repay is to repay at the branch of the bank where the account is kept, and (b) the bank is not to be called upon to pay until payment is demanded at the branch at which the account is kept. ... If a demand is made at the branch where the account is kept and payment is refused, the position is altered. Undoubtedly the bank is then liable to be sued wherever it can be served."

That in itself is, in my judgment, an answer to one of the ways in which the Libyan Bank put their claim. They cannot sue on a cause of action in debt without more. They must allege a demand made which Bankers Trust were obliged to comply with. Or, to put the point in another way, English law currently recognises that an obligation to pay money can be frustrated: see Ralli Brothers v. Compa ia Naviera Sota y Aznar [1920] 2 K.B. 287, and contrast the view expressed by Dr. F. A. Mann in The Legal Aspect of Money, 4th ed. (1982), pp. 66, 421.

What is the customer entitled to demand? In answering that question one must, I think, distinguish between services which a bank is obliged to provide if asked, and services which many bankers habitually do, but are not bound to, provide. For a private customer with a current account I would include in the first category the delivery of cash in legal tender over the bank's counter and the honouring of cheques drawn by the customer. Other services, such as standing orders, direct debits, banker's drafts, letters of credit, automatic cash tills and foreign currency for travel abroad, may be in the second category of services which the bank is not bound to but usually will supply on demand. I need not decide that point. The answer may depend on the circumstances of a particular case.

The problem in this case does not arise from the current account of a private customer. There was a correspondent relationship between the two banks, and a call account in London credited with very large sums denominated in United States dollars. The class of demands to which Bankers Trust were obliged to respond may be very different, and must be considered afresh.

It is not, in my judgment, right to assume that the obligation of such a bank is to make payment, and then to look at the charterparty cases in order to discover what "payment" is. In The Brimnes [1975] Q.B. 929, 948, Edmund Davies L.J. said:

"Clause 5 required payment to be made 'in New York in cash in United States currency. ...' The owners' contention, however, that the tendering of the commercial equivalent of cash would suffice found favour with Brandon J. In particular, he concluded that any transfer of funds to M.G.T. for the credit of the owners' account so as to give them the unconditional right to the immediate use of the funds transferred was good payment. In my judgment, that was clearly right. ..."

That was followed in Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corporation of Liberia [1976] Q.B. 835 (reversed on another point [1977] A.C. 850).

Those cases show, first that the word "cash" in a charterparty does not comprise only

pound notes or dollar bills (for the avoidance of doubt, I should say that it has that narrower meaning in this judgment), and secondly that shipping people and banks regard some instruments as the equivalent of cash. Amongst those instruments are a banker's draft and a banker's payment.

(d) Means of transfer

The credit balance of the Libyan Bank with Bankers Trust constituted a personal right, a chose in action. At bottom there are only two means by which the fruits of that right could have been made available to the Libyan Bank. The first is by delivery of cash, whether dollar bills or any other currency, to or to the order of the Libyan Bank. The second is the procuring of an account transfer. (I leave out of account the delivery of chattels, such as gold, silver or works of art, since nobody has suggested that Bankers Trust were obliged to adopt that method. The same applies to other kinds of property, such as land.)

An account transfer means the process by which some other person or institution comes to owe money to the Libyan Bank or their nominee, and the obligation of Bankers Trust is extinguished or reduced pro tanto. "Transfer" may be a somewhat misleading word, since the original obligation is not assigned (notwithstanding dicta in one American case which speak of assignment); a new obligation by a new debtor is created.

Any account transfer must ultimately be achieved by means of two accounts held by different beneficiaries with the same institution. In a simple case the beneficiaries can be the immediate parties to the transfer. If Bankers Trust held an account with the A bank which was in credit to the extent of at least $131m., and the Libyan Bank also held an account at the A bank, it would require only book entries to achieve an account transfer. But still no property is actually transferred. The obligation of Bankers Trust is extinguished, and the obligation of A bank to Bankers Trust extinguished or reduced; the obligation of A bank to the Libyan Bank is increased by the like amount.

On occasion a method of account transfer which is even simpler may be used. If X Ltd. also hold an account with Bankers Trust London, and the Libyan Bank desire to benefit X Ltd., they instruct Bankers Trust to transfer $131m. to the account of X Ltd. The obligation of Bankers Trust to the Libyan Bank is extinguished once they decide to comply with the instruction, and their obligation to X Ltd. is increased by the like amount. That method of account transfer featured in Momm v. Barclays Bank International Ltd. [1977] Q.B. 790.

In a complex transaction at the other end of the scale there may be more than one tier of intermediaries, ending with a Federal Reserve Bank in the United States. Thus the payer may have an account with B bank in London, which has an account with C bank in New York; the payee has an account with E bank in London, which has an account with D bank in New York. Both C bank and D bank have accounts with the Federal Reserve Bank in New York. When an account transfer is effected the obligations of the New York Fed. to C bank, of C bank to B bank, and of B bank to the payer are reduced; the obligations of the New York Fed. to D bank, of D bank to E bank, and of E bank to the payee are increased. That is, in essence, how the Clearing House Interbank Payments System (C.H.I.P.S.) works, by which a large proportion of transfers of substantial dollar amounts are made.

I shall call the three methods which I have described a correspondent bank transfer, an in-house transfer and a complex account transfer. There are variations which do not precisely fit any of the three, but the principle is the same in all cases. Sooner or later, if cash is not used, there must be an in-house transfer at an institution which holds accounts for two beneficiaries,

so that the credit balance of one can be increased and that of the other reduced. In the example of a complex account transfer which I have given that institution is the New York Fed., which holds accounts for C bank and D bank.

Evidence was given by Professor Scott of a method which, at first sight, did not involve an in-house transfer at any institution. That was where different Federal Reserve Banks were used. However, the Professor assured me that an in-house transfer was involved, although it was too complicated to explain. That invitation to abstain from further inquiry was gratefully accepted.

Thus far I have been assuming that only one transaction affecting any of the parties takes place on a given day. But manifestly that is unlikely to be the case; there may be thousands, or tens of thousands. One purpose of a clearing system between banks must be to set off transfers against others, not only between the same parties but also between all other parties to the clearing system. Thus C bank and D bank, in my example of a complex account transfer, may have made many transactions between themselves on the same day. Only the net balance of them all will be credited to one by the New York Fed. and debited to the other at the end. So the identity of the sum which the payer wished to pay to the payee may be entirely lost in one sense. The net balance may be the other way, and a sum be credited to C bank and debited to D bank instead of vice versa. Or, by a somewhat improbable coincidence, the net balance may be nil.

There are two further complications. The first is that set-off occurs not only between C bank and D bank, but between all other participants to the clearing system. An amount which would otherwise fall to be debited to C bank and credited to D bank may be reduced (i) because F bank has made transfers on that day to C bank, or (ii) because D bank has made transfers on that day to G bank.

Secondly, an intermediate clearing system may be used, such as London dollar clearing. If the chain of transmission on each side reaches a bank that is a member of the London dollar clearing, and if the item in question is eligible for that clearing system, it may be put through it. Then it will go to make up the net credit or debit balances that are due between all the members at the end of the day - and they in turn are settled in New York.

(e) Particular forms of transfer

I set out below those which have been canvassed in this case, and discuss the extent to which they involve activity in the United States.

(i) In-house transfer at Bankers Trust London

This is quite simple, as has been explained. It involves no action in the United States. But it cannot take place unless the Libyan Bank are able to nominate some beneficiary who also has an account with Bankers Trust London.

(ii) Correspondent bank transfer

Again, this is relatively simple and involves no action in the United States. But for it to be effective in this case a bank must be found outside the United States where two conditions are satisfied: the first is that Bankers Trust have a credit balance there of U.S.$131m. or more the second, that an account is also held there for the Libyan Bank or for some beneficiary whom they nominate.

(iii) C.H.I.P.S. or Fedwire

These are two methods of complex account transfer which are used for a high proportion of large dollar transactions. They can only be completed in the United States.

(iv) Banker's draft on London

A banker's draft is, in effect, a promissory note, by which the banker promises to pay to or to the order of the named beneficiary. When the beneficiary receives the draft he can negotiate it, or hand it to another bank for collection. If he negotiates the draft the beneficiary's part in the transaction ends. He has received all that he bargained for, and so far as he is concerned no action in New York is required. Hence the view which emerges in the shipping cases that a banker's draft is as good as cash. But there still remains for the bank the task of honouring the draft when it is presented. The issuing bank, by debiting the customer's account and issuing a draft, has substituted one personal obligation for another. It still has to discharge the obligation represented by the draft. That it may do, in theory at any rate, by another of the means of transfer that are under discussion - in-house transfer, correspondent bank transfer, C.H.I.P.S., Fedwire, London dollar clearing, cash. So in one sense a banker's draft does not solve the problem; it merely postpones it. One cannot tell whether action is required in the United States until one knows how the draft is to be honoured.

There would be a further problem for the Libyan Bank if they received a draft from Bankers Trust. While the freeze was still operative the draft would in practice be difficult or impossible to negotiate, since nobody would want an instrument made by an American bank which on its face contained a promise to pay to or to the order of the Libyan Bank. That, as it seems to me, would be the case whether the draft was drawn on London or New York. If instead of negotiating the draft the Libyan Bank presented it to another bank for collection, the problem would have been postponed rather than solved for both parties. The Libyan Bank would receive no credit until the draft had been honoured; and Bankers Trust would have to use another means of transfer in order to honour it.

(v) Banker's payment

This is an instrument issued by one bank in favour of another bank. As the shipping cases show, it too is treated as the equivalent of cash in the ordinary way, so that the receiving bank might well allow the customer who presented it to draw against it forthwith. I am not sure whether that would happen in present circumstances, if the receiving bank knew that the banker's payment was issued for the account of the Libyan Bank.

Apart from the possibility of negotiation, which does not arise with a banker's payment, the same problem remains as with a banker's draft. It has to be cleared or honoured (whichever is the right word) by one of the other means of transfer under discussion. Normally the document will specify a clearing system which is to be used.

(vi) London dollar clearing

It may not be right to describe this as a means of transfer in itself, but rather as a method of settling liabilities which arise when other means of transfer are used, such as a banker's draft or banker's payment, or indeed a cheque. Bankers Trust are not themselves members of London dollar clearing, but use it through Lloyds Bank Plc.

Suppose H bank, also a member of the clearing, presented a banker's draft issued by Bankers Trust to or to the order of the Libyan Bank for U.S. $131m. At the end of the day net debits and credits of all the members of the clearing would be calculated - and settled by transfers in New York. As already explained, there would not necessarily be a transfer there of U.S. $131m. or any sum by Lloyds Bank or their New York correspondent to the New York correspondent of H bank. But somewhere in the calculation of the sum that would be transferred by some bank in New York to some other bank in New York the U.S. $131m. would be found.

That is the first aspect of the transaction which requires action in New York. But thus far only the liabilities of the clearing members between themselves have been settled. What of the liabilities of the banks that have used the clearing but are not members? Bankers Trust owe Lloyds Bank U.S. $131m. That sum will go into a calculation of all the credits and debits between Bankers Trust and Lloyds Bank on that day; the net balance will be settled by a transfer in New York between Bankers Trust New York and Lloyds Bank or their New York correspondent.

Since I have assumed that H bank are a member of the London dollar clearing, no similar transfer is required in their case. They have already received credit for U.S.$131m. in the clearing process and the transfers which settled the balances which emerged from it.

There is another aspect of the London dollar clearing which featured a great deal in the evidence. This is that a rule, at the time unwritten, excluded from the clearing "cheques drawn for principal amounts of interbank Eurocurrency transactions." The system is described in the Child report, where it is said that "by mutual consent 'wholesale' interbank foreign exchange deals and Eurodollar settlements are excluded." That in turn raises a question as to the meaning of "wholesale." Bankers Trust argue that it includes transactions on interest-bearing call accounts between banks, at any rate if they are for large amounts. The Libyan Bank say that it refers only to transactions for time deposits traded between the dealing rooms of banks.

I prefer the evidence of Bankers Trust on this point. The reason for the exclusion appears to be that the introduction of a very large sum by one participant into the clearing system would impose an excessive credit risk. The average value of transactions passing through the system is U.S. $50,000, and the vast majority of items are of the order of U.S. $10,000. It is not normally used for transactions over U.S. $30m.; indeed, there were not many transactions in millions. I find that a transfer of U.S. $131m. by Bankers Trust to or to the order of the Libyan Bank would not, in the circumstances of this case, be eligible for London dollar clearing.

(vii) Other clearing systems outside the United States

Apart from the last point about eligibility, it seems to me that much the same considerations must apply to the other three systems discussed - Euroclear, Cedel and Tokyo dollar clearing. Although the identity of a particular transaction will be difficult or impossible to trace in the net credits or debits which emerge at the end of the clearing, these debits and credits must ultimately be settled in the United States. (The word "ultimately" constantly recurs and is of importance in this case, as was stressed in the course of the evidence.)

But whether that be so or not, there are other points relevant to the use of these systems. Euroclear in Brussels is a system run through Morgan Guaranty Trust Co. for clearing securities transactions and payments in respect of such transactions. If it so happened that Bankers Trust had a credit of U.S. $131m. in the system, it could arrange for that sum to be transferred to the Libyan Bank or any nominee of the Libyan Bank which had an account with Euroclear. That would be a species of correspondent transfer. Alternatively, it could order the transfer to be made anywhere else - but that would involve action in New York.

Cedel, in Luxembourg, is similar to Euroclear in all respects that are material.

The Tokyo dollar clearing system is run by Chase Manhattan Bank at its Tokyo branch. Bankers Trust did not have an account with the system. If they had done, and had used it to pay U.S. $131m. to the Libyan Bank, they would have had to reimburse Chase Manhattan via New York.

(viii) Certificates of deposit

These are issued by banks for large dollar sums, and may be negotiable. Once again they raise the problem that one personal obligation of Bankers Trust would be substituted for another, and the substituted obligation still has to be honoured by some means at maturity. Furthermore, the terms of the certificate would be subject to agreement between the parties, in particular as to its maturity date and interest rate.

(ix) Cash - dollar bills

I am told that the largest notes in circulation are now for U.S. $100, those for U.S. $500 having been withdrawn. Hence there would be formidable counting and security operations involved in paying U.S. $131m. by dollar bills. Bankers Trust would not have anything like that amount in their vault in London. Nor, on balance, do I consider that they would be likely to be able to obtain such an amount in Europe. It could be obtained from a Federal Reserve Bank and sent to London by aeroplane, although several different shipments would be made to reduce the risk. The operation would take some time - up to seven days.

Banks would seek to charge for this service, as insurance and other costs would be involved, and they would suffer a loss of interest from the time when cash was withdrawn from the Federal Reserve Bank to the time when it was handed over the counter and the customer's account debited - assuming that the customer had an interest-bearing account. I cannot myself see any basis on which a bank would be entitled to charge, although there might be a right to suspend payment of interest. If a bank chooses, as all banks do for their own purposes, not to maintain a sum equal to all its liabilities in the form of cash in its vaults, it must bear the expense involved in obtaining cash when a demand is made which it is obliged to meet. If a customer demanded U.S. $1,000 or U.S. $10,000 in cash, I do not see how a charge could be made. When the sum is very much larger it is an important question - which I shall consider later - whether the bank is obliged to meet a demand for cash at all. If it is so obliged, there is not, in my opinion, any right to charge for fulfilling its obligation.

As I have already mentioned, it is accepted that there would be no breach of New York law by Bankers Trust in obtaining such an amount of cash in New York and despatching it to their London office.

(x) Cash - sterling

There would be no difficulty for Bankers Trust in obtaining sterling notes from the Bank of England equivalent in value to U.S. $131m., although, once again, there would be counting and security problems. Bankers Trust would have to reimburse the Bank of England, or the correspondent through whom it obtained the notes, and this would probably be done by a transfer of dollars in New York. But, again, it was not argued that such a transfer would infringe New York law.

(f) Termination of the managed account arrangement

Those means of transfer are all irrelevant so long as the managed account arrangement subsists; for I have found it to be a term of that arrangement that all the Libyan Bank's transactions should pass through New York. Apart from some minor teething problems at the start in 1980, that term was observed. The only entries on the London call account were credits from, or debits to, the New York demand account. It was the New York account that was used to make payments to, or receive credits from, others with whom the Libyan Bank had business relations. If the arrangement still exists, the London account can only be used to transfer a credit to New York, which would be of no benefit whatever to the Libyan Bank.

In my judgment, the Libyan Bank was entitled unilaterally to determine the managed

account arrangement on reasonable notice, which did not need to be more than 24 hours (Saturday, Sundays and non-banking days excepted). The important feature of the arrangement from the point of view of Bankers Trust was that their operators could make payments in New York, on occasion giving rise to an overdraft in New York, safe in the knowledge that there was a credit balance in London which they could call upon and which would not disappear. If it were determined, Bankers Trust New York would be entitled to refuse to make payments which would put the account there into overdraft. For the Libyan Bank an important feature was that they obtained both the speed and efficiency with which current account payments could be made in New York, and the advantage of an account in London bearing interest at Eurodollar rates. If the arrangement were determined and the Libyan Bank began once again to use the London account as if it were a current account, Bankers Trust would be entitled (again on notice) to reduce the rate of interest payable on that account, or to decline to pay interest altogether.

I find nothing surprising in the notion that one party to a banking contract should be able to alter some existing arrangement unilaterally. Some terms, such as those relating to a time deposit, cannot be altered. But the ordinary customer can alter the bank's mandate, for example by revoking the authority of signatories and substituting others, or by cancelling standing orders or direct debits; he can transfer sums between current and deposit account; and he can determine his relationship with the bank entirely. So too the bank can ask the customer to take his affairs elsewhere. In this case it does not seem to me at all plausible that each party was locked into the managed account arrangement for all time unless the other agreed to its determination, or the entire banking relationship were ended. I accept Mr. Cresswell's submission that the arrangement was in the nature of instructions or a mandate which the Libyan Bank could determine by notice. For that matter, I consider that Bankers Trust would also have been entitled to determine it on reasonable notice - which would have been somewhat longer than 24 hours in their case. I hold that the arrangement was determined, implicitly by the Libyan Bank's telex of 28 April 1986, and if that were wrong, then expressly by their solicitors' letter of 30 July 1986.

What, then, was the position after determination? The New York account remained, as it always had been, a demand account. Subject to New York law, Bankers Trust were obliged to make transfers in accordance with the Libyan Bank's instructions to the extent of the credit balance, but they were not obliged to allow an overdraft - even a daylight overdraft, as it is called when payments in the course of a day exceed the credit balance but the situation is restored by further credits before the day ends. The London account remained an interest-bearing account from which Bankers Trust were obliged to make transfers on the instructions of the Libyan Bank, provided that no infringement of United States law in the United States was involved. If Bankers Trust became dissatisfied with the frequency of such transfers, they were, as I have said, entitled on notice to reduce the rate of interest or bring the account to an end. And if I had not held that the rights and obligations of the parties in respect of the London account were governed by English law at all times, I would have been inclined to hold that they were once more governed by English law when the managed account arrangement was determined, although there is clearly some difficulty in recognising a unilateral right to change the system of law governing part of the relations between the parties.

(g) Implied term and usage

It is said in paragraph 4(2) of the re-re-amended points of defence that there was an

implied term that transfer of funds from the London account, whether or not effected through the New York account

"would be effected by instructing a transfer to be made by the defendants' New York Head Office through a United States clearing system to the credit of an account with a bank or a branch of a bank in the United States nominated or procured to be nominated by or on behalf of the plaintiffs for that purpose."

In other words, of the various forms of transfer which I have mentioned, only C.H.I.P.S. or Fedwire were permitted. That term is said to be implied (i) from the usage of the international market in Eurodollars, and (ii) from the course of dealing between the parties since 1980.

Mr. Cresswell submits that such an implied term is implausible on the ground that the foundation of the Eurodollar market is that deposits are not affected by the Federal Reserve requirement which I have mentioned. There may be some force in that. But I prefer to consider the affirmative case for the implication of such a term.

As to usage, I was referred to General Reinsurance Corporation v. Forsakringsaktiebolaget Fennia Patria [1983] Q.B. 856, and particularly the judgment of Slade L.J., at p. 874G:

"There is, however, the world of difference between a course of conduct which is frequently, or even habitually, followed in a particular commercial community as a matter of grace and a course which is habitually followed, because it is considered that the parties concerned have a legally binding right to demand it."

So I must inquire whether it is considered in the international Eurodollar market that creditors have a right to demand payment by C.H.I.P.S. or Fedwire and by no other means.

In Drexel Burnham Lambert International N.V. v. El Nasr [1986] 1 Lloyd's Rep. 356, 365, I cited and followed earlier authority that

"It had been laid down over and over again that the way to prove a custom was to show an established course of business, at first contested but ultimately acquiesced in."

There is no such evidence in this case. Mr. Sumption protests that that is not the only way to prove a usage, though it may be the best way. Of course he is right. So I must consider whether the usage has been proved by other means.

The expert evidence in this case has been immensely helpful in enabling me to understand what happens in the Eurodollar market and how different forms of operation work. But as evidence establishing a usage, or negativing one, it has achieved very little. In that it is similar to many other commercial cases of today. With monotonous regularity parties on the summons for directions apply for leave to call expert evidence of the practice of bankers, or of underwriters, or of insurance brokers, or of others engaged in the market concerned. All too often the evidence shows merely that the expert called by one party believes the contract to mean one thing, and the expert for the other believes that it means something different. But, as I have said, I do not seek to disparage expert evidence which enables the court to understand the market concerned.

The high point of Bankers Trust's case on this issue lies in the expert report of Dr. Stigum from which I quote some brief extracts:

"The usages and practices that apply to wholesale Eurodollar accounts are moreover, well understood by all wholesale participants in the Eurodollar market ... Cash transactions are a feature of only an insignificant portion of total Eurodollar deposits, namely those held by small retail accounts. At the wholesale level, the Eurodollar market is understood by all participants to be a strictly non-cash market. ... All wholesale Eurodollar transactions (these occurring not just

in London, but in other centres around the world as well) must, unless they involve a movement of funds from one account at a given bank to another account at that same bank, be cleared in the United States. The reason for this custom and usage is that the ultimate effect of the clearing of a wholesale, Eurodollar transaction is to remove dollars from the reserve account of one bank at the Fed. to the reserve account of another bank at the Fed."

Even as it stands, that passage does not support the implied term pleaded, that transfers would be made "through a United States clearing system." However, it is fair to say that in the particulars of usage there were added by amendment to the points of defence the words "save where book transfers fall to be made between accounts at the same branch" - which would allow, as Dr. Stigum apparently does, both an in-house transfer and a correspondent bank transfer.

Dr. Stigum is an economist and not a banker. I did not find her oral evidence impressive. On the other hand, Mr. Osbourne, who was until 1985 an assistant general manager of Barclays Bank, did seem to me an impressive witness, whose evidence was very sound on most points. His views were inconsistent with the usage alleged, at any rate in the case of an account such as that of the Libyan Bank with Bankers Trust London.

Furthermore, the supposed usage was inconsistent with the course of dealing between the parties, to which I now turn. It is, of course, true that from December 1980 to January 1986 all transactions by the Libyan Bank were carried out in New York. That is not in itself proof of a course of dealing, since, as I have found, there was an express term to that effect - until the managed account arrangement was brought to an end. What happened between 1973 and December 1980? Fortunately the parties agreed to treat one month as a suitable sample. That was December 1979, in which there were 497 transactions....

The vast majority of those transactions (402) were, as the suggested implied term required, through a United States clearing system. If one adds the in-house transfers of one kind or another in Bankers Trust, as Dr. Stigum's custom permits, the total reaches 488. But there were 9 transactions in that month alone (London bank drafts and a London banker's payment) which were not permitted, either by the implied terms which Bankers Trust allege or by Dr. Stigum's custom and usage, although they may very well have been for relatively small amounts.

I find difficulty in seeing how course of dealing by itself could support a negative implied term of the kind alleged. The phrase is often used to elucidate a contract or to add a term to it. But if course of dealing is to eliminate some right which the contract would otherwise confer, I would require evidence to show, not merely that the right had never been exercised, but also that the parties recognised that as between themselves no such right existed. In other words, there must be evidence establishing as between the parties what would be a usage if it applied to the market as a whole. But whether that be so or not, I find no implied term such as Bankers Trust allege to be established either by usage, or by course of dealing, or by both.

There was a great deal of evidence as to which Eurodollar transactions could be described as "wholesale" and which as "retail." I am inclined to think that the answer depends on the purpose for which the description is used. I have found that a payment of U.S. $131m. by Bankers Trust to the Libyan Bank would be excluded from London dollar clearing. In that context it may, perhaps, be described as wholesale. But I have also found that no usage applies to the Libyan Bank's account. I do not exclude the possibility that some usage applies to time deposits traded between the dealing rooms of banks. If the word "wholesale" is applied to that class of business, the Libyan Bank's account is not within it.

(h) Obligations in respect of the London account

Having considered and rejected the two methods by which Bankers Trust seek to limit their obligations in respect of the London account - that is, an express term from the managed account arrangement still subsisting, or an implied term - I have to determine what those obligations were. What sort of demands were the Libyan Bank entitled to make and Bankers Trust bound to comply with? As I said, earlier, it is necessary to distinguish between services which a bank is obliged to provide if asked, and services which many bankers do provide but are not obliged to.

Dr. F. A. Mann in his book The Legal Aspect of Money, 4th ed. (1982), pp. 193-194, discusses this question in the context of the Eurodollar market. I have given careful attention to the whole passage. His conclusion is:

"The banks, institutions or multinational companies which hold such deposits, frequently of enormous size, and which deal in them are said to buy and sell money such as dollars. In law it is likely, however, that they deal in credits, so that a bank which has a large amount of dollars standing to the credit of its account with another (European) bank probably does not and cannot expect it to be 'paid' or discharged otherwise than through the medium of a credit to an account with another bank. In the case of dollars it seems to be the rule (and therefore possibly a term of the contract) that such credit should be effected through the Clearing House Interbank Payments System (C.H.I.P.S.) in New York. ... In short, as economists have said, the Eurodollar market is a mere account market rather than a money market."

Dr. Mann cites Marcia Stigum's book, The Money Market (1978) and finds some support for his view - which he describes as tentative - in an English case which has not been relied on before me. The passage in question appeared for the first time in the 1982 edition of Dr. Mann's book after the litigation about the Iranian bank freeze.

I am reluctant to disagree with such a great authority on money in English law, but feel bound to do so. There is one passage, at p. 194, which appears to me to be an indication of economic rather than legal reasoning:

"it could often be a national disaster if the creditor bank were entitled to payment, for in the last resort this might mean the sale of a vast amount of dollars and the purchase of an equally large sum of sterling so as to upset the exchange rates."

But if a person owes a large sum of money, it does not seem to me to be a sound defence in law for him to say that it will be a national disaster if he has to pay. Countries which feel that their exchange rates are at risk can resort to exchange control if they wish.

Furthermore, the term suggested by Dr. Mann - that all payments should be made through C.H.I.P.S. - is negatived by the evidence in this case. It may for all I know be the rule for time deposits traded between the dealing rooms of banks, but I am not concerned with such a case here.

R. M. Goode, in Payment Obligations in Commercial and Financial Transactions (1983), p. 120, writes:

"Would an English court have declared the Executive Order effective to prevent the Iranian Government from claiming repayment in London of a dollar deposit maintained with a London bank? At first blush no, as it is unlikely that an English court would accord extra-territorial effect to the United States Executive Order. However, the argument on the United States side (which initially appeared to have claimed extra-territorial effect for the Order) was that in the Eurocurrency market it is well understood that deposits cannot be withdrawn in cash but are

settled by an inter-bank transfer through the clearing system and Central Bank of the country whose currency is involved. So in the case of Eurodollar deposits payment was due in, or at any rate through, New York, and the Executive Order thereby validly prevented payment abroad of blocked Iranian deposits, not because the order was extraterritorial in operation but because it prohibited the taking of steps within the United States (i.e. through C.H.I.P.S. in New York) to implement instructions for the transfer of a dollar deposit located outside the United States."

That was published in 1983. I have not accepted the argument which Professor Goode refers to, that it is well understood that deposits cannot be withdrawn in cash. I find that there was no implied term to that effect.

I now turn again to the forms of transfer discussed in subsection (e) of this judgment, in order to consider in relation to each whether it was a form of transfer which the Libyan Bank were entitled to demand, whether it has in fact been demanded, and whether it would necessarily involve any action in New York.

(i) In-house transfer at Bankers Trust London
(ii) Correspondent bank transfer

I consider that each of these was a form of transfer which the Libyan Bank were entitled to demand as of right. But I find that no demand has in terms been made for a transfer by either method. This may well be because, in the case of an in-house transfer, there is no other institution with an account at Bankers Trust London which the Libyan Bank wish to benefit; and in the case of a correspondent bank transfer, the Libyan Bank have been unable to nominate a bank outside the United States which holds accounts both for Bankers Trust and also for the Libyan Bank or some beneficiary whom they wish to nominate. It is not shown that U.B.A.F. Bank Ltd. (referred to in the telex of 23 December 1986) fulfilled this requirement.

As to action in New York, none would have been required in respect of an in-house transfer at Bankers Trust London. Whether any would have been required in the case of a correspondent bank transfer depends on whether the correspondent bank in question did or did not already owe Bankers Trust U.S. $131m. or more. On the evidence, it is at the least unlikely that any bank outside New York could be found owing Bankers Trust U.S. $131m.

(iii) C.H.I.P.S. or Fedwire

There is no doubt that the Libyan Bank were entitled to demand such a transfer. But they did not demand it. Such a transfer would have required action in the United States which was illegal there. The only doubt which I have felt on that point is as to whether the ultimate entries on the books of a Federal Reserve bank would have been so remote from the underlying transaction - being perhaps between different parties, for a different sum, and even in the opposite direction to the underlying transaction - that they would not be unlawful. Professor Felsenfeld, who gave evidence on behalf of the Libyan Bank, was inclined to think that such a transaction would be unlawful, and so was Mr. Knake. Professor Scott took a different view. Whichever be correct, I am convinced that some illegal action in the United States would be required by a C.H.I.P.S. or Fedwire transfer.

(iv) Banker's draft on London
(v) Banker's payment

Bankers Trust did not in practice issue banker's drafts on their London office. Instead they would provide a cheque drawn on Lloyds Bank Plc. That does not seem to me a point of

much importance. I consider that Bankers Trust were obliged to provide such instruments to the Libyan Bank if asked to do so, subject to one important proviso - that the instruments were eligible for London dollar clearing. If they were not, then there was no such obligation, since in normal times and in the absence of legislation it would be simpler to use C.H.I.P.S. or Fedwire in the first place.

A banker's draft was demanded in the telex of 28 April 1986; and a banker's payment was within the description "any other commercially recognised method of transferring funds" demanded by the telex of 23 December 1986. But since, as I have found, an instrument for U.S. $131m. would not have been eligible for London dollar clearing in the circumstances of this case, Bankers Trust were not obliged to comply with that aspect of the demands.

It was argued that Bankers Trust might still have made interest payments through the London dollar clearing, since the exclusion is only of the principal amount of inter-bank Eurocurrency transactions. There are, in my judgment, three answers to that point. First, it is not relied on in the points of claim; secondly, there was no demand for interest payments as such; thirdly, the interest due had been capitalised once credited to the account. Indeed, if that were not so it would be impossible, or very difficult, to say how much of the U.S. $131m. was interest.

That makes it unnecessary to answer the question, which I regard as particularly difficult, whether the issue of a banker's draft or banker's payment by Bankers Trust to the Libyan Bank would necessarily involve illegal action in New York. Even if the instrument were cleared through London dollar clearing, action in New York would, as I have already mentioned, ultimately be required. (The same is true, in all likelihood, if one of the other clearing systems outside the United States had been used.) Although the identification of a particular payment would be even more difficult than in the case of a straight C.H.I.P.S. transfer, I am inclined to believe that Bankers Trust would have a second defence to a claim based on failure to issue such an instrument, on the ground that performance of their obligation would necessarily involve illegal action in New York. However, Mr. Sumption appeared at one stage to accept that the issue of a draft drawn on London would not, or might not, involve illegal action in New York.

I need not consider problems as to the worth of a banker's draft or banker's payment to the Libyan Bank in present circumstances or the damages they would have suffered by not obtaining one.

(vi) London dollar clearing

(vii) Other clearing systems outside the United States

In effect these have already been considered. Bankers Trust were not obliged to issue an instrument with a view to its being passed through London dollar clearing if it was not eligible; and an instrument for U.S. $131m. in this case would have been disqualified.

The other clearing systems give rise to similar problems. There is no evidence that Bankers Trust had an existing credit of U.S. $131m. with Euroclear or Cedel arising from a transaction in securities, and they were under no obligation to acquire one. Nor were they obliged to become participants in the Tokyo dollar clearing. If they had done so, the issue of an instrument to be cleared in Tokyo would, as with London dollar clearing, have necessarily involved action that was illegal in the United States.

(viii) Certificates of deposit

The issue of these comes in my judgment into the class of service which banks

habitually do provide but are not obliged to. If for no other reason, that is because agreement is involved, as to the maturity of the instrument and the interest rate. It cannot be that a customer is entitled to demand any maturity and any interest rate that he chooses. Nor would a reasonable maturity and a reasonable interest rate provide a practical solution.

In addition there would again be the problem whether a certificate of deposit could be honoured at maturity without infringing the law of the United States; and whether the Libyan Bank had suffered any damage by not obtaining one.

(ix) Cash - dollar bills

Of course it is highly unlikely that anyone would want to receive a sum as large as U.S. $131m. in dollar bills, at all events unless they were engaged in laundering the proceeds of crime. Mr. Osbourne said in his report:

"As to the demand for payment in cash, I regard this simply as the assertion of a customer's inalienable right. In practice, of course, where such a large sum is demanded in this manner, fulfilment of the theoretical right is unlikely, in my experience, to be achieved. sensible banker will seek to persuade his customer to accept payment in some more convenient form, and I have yet to encounter an incident of this nature where an acceptable compromise was not reached, even where the sum was demanded in sterling."

I would substitute "fundamental" for "inalienable"; but in all other respects that passage accords with what, in my judgment, is the law. One can compare operations in futures in the commodity markets: everybody knows that contracts will be settled by the payment of differences, and not by the delivery of copper, wheat or sugar as the case may be; but an obligation to deliver and accept the appropriate commodity, in the absence of settlement by some other means, remains the legal basis of these transactions. So in my view every obligation in monetary terms is to be fulfilled, either by the delivery of cash, or by some other operation which the creditor demands and which the debtor is either obliged to, or is content to, perform. There may be a term agreed that the customer is not entitled to demand cash; but I have rejected the argument that there was any subsisting express term, or any implied term, to that effect. Mr. Sumption argued that an obligation to pay on demand leaves very little time for performance, and that U.S. $131m. could not be expected to be obtainable in that interval. The answer is that either a somewhat longer period must be allowed to obtain so large a sum, or that Bankers Trust would be in breach because, like any other banker they choose, for their own purposes, not to have it readily available in London.

Demand was in fact made for cash in this case, and it was not complied with. It has not been argued that the delivery of such a sum in cash in London would involve any illegal action in New York. Accordingly I would hold Bankers Trust liable on that ground.

(x) Cash - sterling

Dicey & Morris, The Conflict of Laws, 11th ed. state in Rule 210, at p. 1453:

"If a sum of money expressed in a foreign currency is payable in England, it may be paid either in units of the money of account or in sterling at the rate of exchange at which units of the foreign legal tender can, on the day when the money is paid, be bought in London ..."

See also Chitty on Contracts, 25th ed., para. 2105:

"Where a debtor owes a creditor a debt expressed in foreign currency ... the general rule is that the debtor may choose whether to pay in the foreign currency in question or in sterling."

Mr. Sumption argues that there is no such rule, at any rate since the decision in

Miliangos v. George Frank (Textiles) Ltd. [1976] A.C. 443, that the judgment of an English court does not have to be given in sterling.

Since the Miliangos decision the rule in Dicey & Morris, or rather an earlier version of it, has been approved obiter by Mocatta J. in Barclays Bank International Ltd. v. Levin Brothers (Bradford) Ltd. [1977] Q.B. 270, 278. It must be admitted that the foundations of the rule appear to be somewhat shaky, and the reasoning upon which it has been supported open to criticism. Furthermore, in George Veflings Rederi A/S v. President of India [1979] 1 W.L.R. 59, Lord Denning M.R. said, at p. 63:

"I see no reason to think that demurrage was payable in sterling. So far as demurrage was concerned, the money of account was U.S. dollars and the money of payment was also U.S. dollars ... When you find, as here, that the demurrage is to be calculated in U.S. dollars and that there is no provision for it to be paid in sterling, then it is a reasonable inference that the money is payable in U.S. dollars."

The rule in Dicey & Morris had been cited in the court below in that case; and it would appear at first sight that the Master of the Rolls disagreed with it. However, his conclusion evidently was that by implication the contract provided that demurrage should be paid only in U.S. dollars. In other words, the parties had contracted out of the rule. Furthermore, in that case a payment in sterling had in fact been made. The issue was not whether the charterer was entitled to pay in sterling, but how much credit should be given for the payment which he had made.

The pendulum swung the other way in In re Lines Brothers Ltd.[1983] Ch. 1. Both the Barclays Bank case and the George Veflings case were cited in argument. Oliver L.J., speaking of the argument of counsel for the creditors, said, at p. 25:

"Now his argument has an engaging - indeed an almost unanswerable - logic about it once one accepts his major premise, but it is here that I find myself unable to follow him, for what, as it seems to me, he is seeking to do is to attribute to the Miliangoscase a greater force than it has in fact. In effect what he seeks to do is to suggest that because Miliangos establishes that a creditor in foreign currency is owed foreign currency, it follows that the debtor is a debtor in foreign currency alone and cannot obtain his discharge by anything but a foreign currency payment. But this is to stand Miliangos on its head. What Miliangos is concerned with is not how the debtor is to be compelled to pay in the currency of the debt but the measure of his liability in sterling when, ex hypothesi, he has not paid and is unwilling to pay in the currency of the debt."

That, as it seems to me, is authority of the Court of Appeal that the Miliangos case does not affect the question whether a foreign currency debtor has a choice between payment in sterling and payment in foreign currency. I should follow the dicta of Oliver L.J. and Mocatta J., and the passages cited from Dicey & Morris, The Conflict of Laws, 11th ed. and Chitty on Contracts, 25th ed. That is also Dr. Mann's preferred solution and has the support of the Law Commission.

Still it may be agreed, expressly or by implication, that the debtor shall not be entitled to pay in sterling. There is no subsisting express term to that effect in the present case. Nor do I consider that such a term should be implied, in the present context of a banking contract where the obligation of Bankers Trust is to respond to demands of the Libyan Bank.

It remains to be considered whether there is a true or business option (see Chitty, para. 1387), such that payment in dollars is the primary or basic obligation but the debtor may choose to pay in sterling if it suits him to do so. Or are there alternative methods of performance, with

the consequence described by Lord Devlin in Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries and Food [1963] A.C. 691, 730:
"Where there is no option in the business sense, the consequence of damming one channel is simply that the flow of duty is diverted into the others and the freedom of choice thus restricted."

No other authority was cited on the point, and I feel that the material on which to decide it is somewhat meagre. Given that a foreign currency debtor is entitled to choose between discharging his obligations in foreign currency or sterling, I consider that he should not be entitled to choose the route which is blocked and then claim that his obligation is discharged or suspended. I prefer the view that he must perform in one way or the other; so long as both routes are available he may choose; but if one is blocked, his obligation is to perform in the other.

A further complication arises from the fact that a bank's obligation is to respond to a demand, and there are or may be various different kinds of demand which a customer is entitled to make. When the general doctrine of Dicey & Morris, The Conflict of Laws, is considered in the context of a bank account such as that of the Libyan Bank, and there is (as I have held) no express or implied term that the obligation must be discharged only in dollars, I hold that the customer is entitled to demand payment in sterling if payment cannot be made in dollars. (I need not decide whether payment in sterling could be demanded if it was still possible to pay in dollars.) In this case there was an alternative demand for sterling in the telex of 23 December 1986; and it is not suggested that this would have involved any illegal activity in New York. I am not sure that it was a demand specifically for sterling notes, rather than an account transfer in sterling. But if the Libyan Bank were entitled to demand sterling, no separate point arises as to the manner in which it should be provided. So if I had not held that payment should have been made in cash in United States dollars, I would have held that it should have been made in sterling.

(2) The claim that a further sum should have been transferred from New York

This arises in three different ways on the facts. First it is said that U.S. $165.2m. should have been transferred to London at 2 p.m. on 7 January 1986.

Bankers Trust have two answers to this claim. First they say that instructions had been received and were pending for further payments to be made on 7 January after 2 p.m., which exceeded the amount then standing to the credit of the New York account (and, for that matter, the London account as well). It was only because further receipts also occurred after 2 p.m. that the New York account ended the day with a credit balance of U.S. $7.275m., and the London account remained untouched.

Secondly, Bankers Trust say that, if they were obliged to make a transfer to London on 7 January, they could lawfully have postponed it until after 8.06 p.m. New York time, when the first Presidential order came into force. Thereafter, they say, the transfer would have been illegal because it would have left the New York account overdrawn and would have constituted the grant of credit or a loan to the Libyan Bank.

In my judgment both those arguments fail. The telex of 27 November 1986, from which I have already quoted, contained this passage:

Each day, at 2 p.m., the balance position of your account is determined and any credits received up to that time, less payments and less the peg balance, are immediately invested."

It is said that "payments" there are not confined to payments actually made, and include payments for which instructions were pending. In view of the precision with which the time of 2 p.m. is stated, and the word "immediately," I do not consider that to be right. Mr. Sumption argued that "immediately" is coloured (one might say contradicted) by the illustration given in the telex; but I do not agree. The argument that Bankers Trust were entitled to delay the transfer until after 8.06 p.m. also fails, for the same reason, and it is unnecessary to decide whether it would have been a breach of the first Presidential order to allow an overdraft in New York which was less than the credit balance in London. They would certainly have been entitled in any event not to make payments which exceeded the net credit balance of the two accounts. But after credits which were received during the afternoon there was no need to do that.

Mr. Sumption also argued that the passage in the telex set out above was merely an illustration of how the arrangement would work, and not part of the revised terms of the managed account arrangement. That argument I also reject.

Some attention was paid to the course of dealing on these points. Mr. Blackburn's evidence showed that there was no consistency in the treatment of unprocessed payments; sometimes they were taken into account in deciding whether a 2 p.m. transfer should be made, and at other times they were ignored. As to the actual timing of the transfer, it was always booked in New York on the same day, and in London on the following day with one day's back value. The important feature to my mind is that, so long as there was no legislative interference, it did not make any difference to the parties whether the actual transfer was made at 2 p.m. or at any time up to midnight. Banking hours in London had already ended. Nor did it necessarily make a difference whether unprocessed payments were taken into account; if they were not, and a debit balance in New York resulted at the end of the day, Bankers Trust would recall an appropriate amount next morning from London, with one day's back value. It was only when the Presidential orders came to be made that timing became important. Bankers Trust were, as I hold, in breach of contract in failing to transfer U.S. $165.2m. to London at 2 p.m. on 7 January.

If they had done so, they would have been entitled to recall U.S. $158.5m. from London next morning, so that the net loss to the London account was only U.S. $6.7m. Mr. Cresswell argues that, in practice, Bankers Trust only recalled sums from the London account late in the day, and therefore after 4.10 p.m. when the second Presidential order came into effect; a transfer from London would thereafter have been illegal. In point of fact that may well be correct. But I have no doubt at all that, if there had been a large overdraft on the New York account on the morning of 8 January 1986, Bankers Trust would on that particular day have recalled the appropriate sum from London with the utmost despatch.

No transfer to London having in fact been made on 7 January, and no recall the next morning, U.S. $6.7m. should then have been transferred, as the amount by which the New York balance exceeded the peg of U.S.$500,000. The only issue of potential importance here is whether the transfer was actually made. Although preparations were made for effecting the transfer, I am satisfied that it was countermanded and did not take effect. There is no need for me to decide precisely when the transfer ought to have been made, since that is subsumed in the next point.

The Libyan Bank's third complaint under this head is that, no transfers between New York and London having in fact been made at 2 p.m. on 7 January or in the morning of 8 January, the balance in New York at 2 p.m. on 8 January was U.S. $161,997,000. It is said that a sum of U.S. $161.4m. should then have been transferred to London. In answer to that Bankers Trust rely on points that are the same as, or similar to, those raised in respect of 2

p.m. on 7 January: they say that they were entitled to take pending payment instructions into account; and that they were entitled to delay payment until after 4.10 p.m. when the second Presidential order had been made, which certainly prohibited such a transfer. I reject both arguments for the reasons already given, based on the telex of 27 November 1985. It is true that if the pending payment instructions were to be executed in the afternoon, there were grounds for apprehension that the New York account would become overdrawn, which might be a breach of the first Presidential order; and even that the total of both accounts would be overdrawn, which would plainly be a breach of that order. The solution for Bankers Trust was not to execute those pending instructions unless and until further credits were received in New York. Some were in fact received - the New York account ended the day in credit to the extent of U.S. $251,129,000. Payment instructions for that day totalled U.S. $347,147,213.03, and none of them were in fact executed. So on any view the New York account would have been overdrawn if all had been executed, and that much more overdrawn if in addition U.S. $161.4m. had been transferred to London at 2 p.m. But the net total of the two accounts would still have been a credit balance. If Bankers Trust took the view that an overdraft on the New York account would itself be a breach of the Presidential order, and if they were right, the solution as I have said was to execute the pending instructions only as and when credits received permitted them to do so.

Accordingly I hold that (i) Bankers Trust were in breach of contract in failing to transfer U.S. $165.2m. to London at 2 p.m. on 7 January; (ii) if they had done that, they could and would have recalled U.S. $158.5m. from London in the morning of 8 January; but, (iii) on the assumption that both those steps had been taken, there would have been a further breach in failing to transfer U.S. $154.7m. to London at 2 p.m. on 8 January. (I trust that the calculation of this last figure is not too obscure. The 2 p.m. transfer on 8 January should have been U.S. $161.4m. if neither of the previous transfers had been made - as in fact they were not. If they had both been made, the figure would have been reduced to U.S. $154.7m.)

The balance resulting from those three figures is a net loss to the London account of U.S. $161.4m. I hold that this must be added to the Libyan Bank's first claim, as an additional sum for which that claim would have succeeded but for breaches of contract by Bankers Trust. It is said that this loss is not recoverable, because it arose from a new intervening act and is too remote. In the circumstances as they were on 7 and 8 January I have no hesitation in rejecting that argument.

(3) Failure to comply with payment instructions

As pleaded, the Libyan Bank's case is that their payment instructions on 8 January 1986 ought to have been honoured to the extent of U.S. $226,147,213.88, and were not. That figure is calculated in Mr. Blackburn's exhibit C.8. It assumes (i) a transfer of U.S. $6.7m. to London on the morning of 8 January, (ii) no 2 p.m. transfer on 7 or 8 January, and (iii) that the New York account is not allowed to become overdrawn at any time. So for this purpose the Libyan Bank are content to accept that an overdraft on the New York account alone would be a breach of the first Presidential order. Or else they are assuming the success of their claim (1) for U.S. $131m., in which case the maximum for which claim (3) can succeed is the figure stated above.

I have to approach it on a different assumption, in the light of my conclusions hitherto. If a net total of U.S. $161.4m. had been transferred to London by 2 p.m. on 8 January, the payments that could have been made before 4.10 p.m. would have totalled some U.S. $89m. I am satisfied that in the ordinary way those payments would have been made before 4.10 p.m.

The last credit that day was received at 3.03 p.m., which would have left sufficient time for the processing of payment instructions, and C.H.I.P.S. normally closed at 4.30 p.m., although on this occasion it was extended first to 5 p.m. and then to 5.30 p.m. I am also satisfied that the reason no payments were made was apprehension that this might be unwelcome to the Federal Reserve Bank of New York or the Treasury if a freeze were imminent. Nevertheless I do not consider that there was any breach of contract by Bankers Trust in not making any payments before 4.10 p.m., when it became illegal for them to carry out their instructions. There obligation was to make the payments that day, and not at any particular time in the day. Mr. Cresswell submitted that there was an implied term that Bankers Trust would not act on the instructions of a third party. I do not see why that should be so. Provided that they were not in breach of any obligation as to acting on the instructions of their customer, it does not seem to me to matter whether they acted on their own initiative or at the suggestion of somebody else.

In any case, if failure to make the payments had been a breach of contract it would have caused the Libyan Bank no loss. One might suppose that all or at any rate most of the payments were designed to discharge liabilities of the Libyan Bank or to create new obligations owed to the Libyan Bank, although it is always a possibility that some of them may have been ordered for no consideration in favour of causes which the Libyan Bank desired to support. But the Libyan Bank have expressly declined to put forward a case that they have had to or will have to make the payments from other sources, or that they have not obtained credits from others which otherwise they would have obtained. They prefer to take their stand on the point that they now have a credit balance which is frozen in New York, which they would not have had if the payments had been made. As a matter of law that does not seem to me a sufficient allegation of loss. Nor do I think that any case of injury to the Libyan Bank's reputation has been made out.

Claim (3) therefore fails, on two grounds.

(4) Breach of duty of confidence

The facts as I have found them are that in the morning of 8 January 1986 Mr. Brittain of Bankers Trust told the Federal Reserve Bank of New York that "it looked like the Libyans were taking their funds out of the various accounts." Later he told Mr. Corrigan that this earlier report had been a false alarm - meaning, I suppose, that funds were coming in to replace payments that had been ordered. There was no mention of Libyan Arab Foreign Bank by name. But the New York Fed. probably knew which Libyan banks held accounts with Bankers Trust.

Neither side suggests that New York law as to the duty of confidence owed by a banker to his customer is any different from English law. Nor is it argued that the information was given under compulsion of law. But Bankers Trust say that they were entitled to act as they did (a) because their own interests required them to do so, (b) because the Libyan Bank must be taken impliedly to have consented, or (c) pursuant to a higher public duty. In that connection I was referred to Tournier v. National Provincial and Union Bank of England [1924] 1 K.B. 461. There Bankes L.J. included, at p. 473: "where there is a duty to the public to disclose" among the exceptions to a banker's duty of confidence.

Scrutton and Atkin L.JJ. on the other hand spoke of the duty to prevent fraud or crime, at pp. 481 and 486.

I do not accept that disclosure was required in Bankers Trust's own interests, in the sense of the first exception relied upon; or that there was implied consent by the Libyan Bank. But I have more difficulty over the point about higher public duty. In England there is statutory

power in section 4(3) of the Bank of England Act 1946 and section 16 of the Banking Act 1979 for the Bank of England to obtain information from banks. It was not argued that I should presume a similar legal power in the New York Fed. in relation to banks in New York. But presuming (as I must) that New York law on this point is the same as English law, it seems to me that the Federal Reserve Board, as the central banking system in the United States, may have a public duty to perform in obtaining information from banks. I accept the argument that higher public duty is one of the exceptions to a banker's duty of confidence, and I am prepared to reach a tentative conclusion that the exception applied in this case.

I need not reach a final conclusion on that point, because I am convinced that any breach of confidence there may have been caused the Libyan Bank no loss. It is not suggested, and there is no evidence to show, that the second Presidential order would not have been made when it was but for the information passed by Mr. Brittain to the New York Fed. What is suggested is that, if that information had not been passed, the payments would have been made before 4.10 p.m. I am not convinced as to that. Suppose that Mr. Brittain had talked to the New York Fed. in a way that involved no breach of confidence - for example by asking whether he could lawfully make a large payment in the light of the first Presidential order; the result would in all probability have been exactly the same. Any breach of confidence was incidental. It did not of itself cause the payments not to be made. And even if it did, I have held in section (3) above that the Libyan Bank have not established any loss by reason of the fact that the payments were not made.
Claim (4) also fails.

(5) Frustration

This claim is pleaded as an alternative ground for awarding the Libyan Bank the relief sought under claims (1) and (2). Since I have held that those two claims succeed, I can deal briefly with the topic of frustration.

Section 1 of the Law Reform (Frustrated Contracts) Act 1943 provides:
"(1) Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract ... (2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged ... shall, in the case of sums so paid, be recoverable from him ..."

It is said that the U.S. $131m. credit in the London account, and the additional amount of U.S. $161.4m. which should have been transferred to the London account, are the balance of sums paid in the past by the Libyan Bank to Bankers Trust; that the contract between them has become impossible of performance or been frustrated, by reason of the Presidential order prohibiting repayment; and that consequently those sums are recoverable from Bankers Trust under section 1 of the Act or at common law.

So paradoxical an argument requires scrutiny. The first answer to it is in my judgment that the obligation of Bankers Trust was suspended but not discharged: Arab Bank Ltd. v. Barclays Bank (Dominion Colonial & Overseas) Ltd. [1954] A.C. 495, and see also the observations made in the Court of Appeal in that case [1953] 2 Q.B. 527. Mr. Cresswell seeks to distinguish that case on the ground that special rules apply to the outbreak of war. That is no doubt true to some extent; but I see no ground for holding that war has a different effect on the obligations of a banker from any other kind of supervening illegality for present purposes. Accordingly I would hold that the contract as a whole has not become impossible of

performance or been otherwise frustrated; or at any rate that the parties have not been altogether discharged from further performance.

A second answer is, I think, that payments made by the Libyan Bank to Bankers Trust were not paid "in pursuance of the contract." There was no obligation on the Libyan Bank to deposit sums with Bankers Trust. So these were not payments comprised within section 1 of the Act.

As to the alternative restitutionary remedy at common law, the consideration given by Bankers Trust has not wholly failed. They are still obliged to repay one day, and meanwhile to credit interest to the account.

If it had been material, I would have held that claim (5) failed.

(6) Failure to make transfers in due time between April 1984 and November 1985

Logically this claim might have been considered first, since it is not at all concerned with the freeze but with events that occurred earlier.

The facts are that from December 1980 onwards under the managed account arrangement Bankers Trust were obliged to review the New York account every morning, and transfer the excess of U.S. $500,000 in multiples of U.S. $100,000 to the interest-bearing call account in London with value the previous day. What they in fact did from April 1984 onwards was to review the account at 2 p.m., and make a transfer to London if appropriate on the basis of that review with value that day. Bankers Trust did not lose by the change, since a further transfer from London with that day's value was made if operations between 2 p.m. and the close of business diminished the New York account below U.S. $500,000. If, on the other hand, those operations increased the closing balance above U.S. $599,999, the Libyan Bank did lose, because they did not obtain that day's value in their London interest-bearing account for the excess, but only the next business day's value. They would lose interest for one day, or for three days if a week-end intervened.

The change was made unilaterally by Bankers Trust, after they had unsuccessfully tried to persuade the Libyan Bank to agree to an increase in the peg balance, and without informing the Libyan Bank. Later, in November 1985, it is accepted that the Libyan Bank did agree to it prospectively. It has not been suggested that the change was anything other than a breach of contract at the time when it first occurred in April 1984; nor that there would be any defence to the claim in English law. But it is said that, under New York law, the Libyan Bank are precluded from relying upon the breach by their failure to complain about entries in their bank statements, or by the doctrine of account stated, or by an estoppel.

I have found that the Libyan Bank did not in fact appreciate what was happening until mid-1985; but they could have detected earlier that they were not receiving the full benefit by way of interest to which they were entitled, if they had looked at their bank statements with a fair degree of diligence.

I am prepared to assume that New York law does govern this aspect of the relations between the parties, if and to the extent that I have not already held that it does.

Evidence of New York law on this topic was given by Professor Felsenfeld on behalf of the Libyan Bank and Mr. Knake on behalf of Bankers Trust. Professor Felsenfeld's opinion was that failure by the Libyan Bank to comment on the bank statements would not excuse Bankers Trust for an intentional, negligent or culpable act on their part; that Bankers Trust would have to establish that they relied on the conduct of the Libyan Bank and acted on it to their detriment;

and that they could not disclaim responsibility for their own good faith or their duty to exercise ordinary care. There was not a great deal of dispute as to those propositions, and to the extent that there was I prefer the evidence of Professor Felsenfeld. But the real question here was as to the facts. The Professor was asked this question in re-examination:
"Suppose a bank goes to its customer and tries to alter the basis on which interest is charged so as to improve the return to the bank and the customer refuses to agree to the new arrangement that the bank proposes, and that subsequently the bank introduces another arrangement in the hope that the customer won't spot it. Is the bank acting bona fide in that way, or not?"
and the Professor answered: "I think you have described a rather flagrant example of bad faith." Mr. Knake was not wholly prepared to accept that; but I am. He was asked this question by me at the conclusion of his evidence:
"I have just one question for you, Mr. Knake, and it is on that same topic. We have been talking about duty of care. For the present, although my view may be changed, I have difficulty in seeing how there was any lack of care on the part of Bankers Trust. It seems to me they acted with great care. It is more a case of deliberate and calculated breach. If that be right what is your view on the account stated argument?" (An agreed correction has been made to the transcript.)
Mr. Knake answered:
"If that were to be your Lordship's finding then I would agree that under those circumstances if in fact they were, that is, Libyan Arab Foreign Bank were deceived, then I would have to agree with that, the absence of an account stated under those circumstances."

The facts as I have found them amount in substance to what was put to Professor Felsenfeld and Mr. Knake. Bankers Trust have no defence to this claim under New York law.

It is fair to add that in correspondence Bankers Trust alleged that they were only doing what other bankers habitually did. There was some modest support for that in the evidence of Mr. Blenk. But it has not been relied on before me as justification in law for the action of Bankers Trust.

The Libyan Bank are entitled to damages to be assessed in respect of this claim. There was mention in Mr. Cresswell's penultimate speech of another way of putting the claim - that on some days (other than 7 and 8 January) not even a 2 p.m. transfer was made when it should have been. I did not understand that to be one of the complaints on which the Libyan Bank came to court, and I have not considered or ruled upon it.

Conclusion

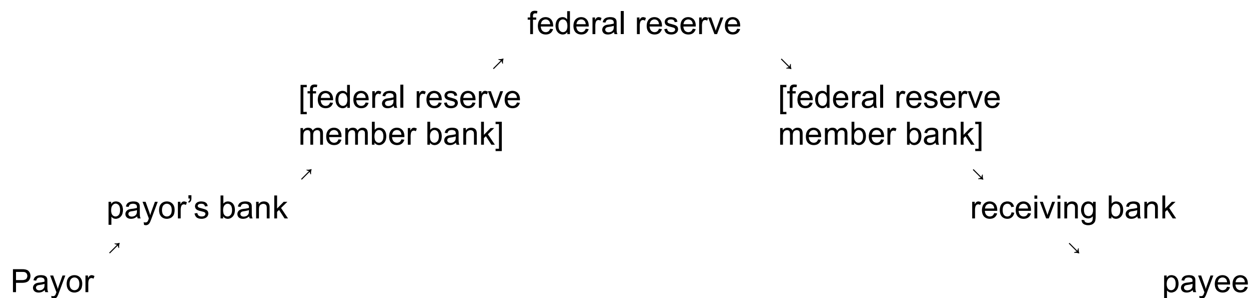
The Libyan Bank are entitled to recover U.S. $131m. on claim (1) and U.S. $161m. (the amount of their demand) on claim (2). Claims (3) and (4) fail. Claim (5) would have failed if it had been material. On claim (6) the Libyan Bank must have judgment for damages to be assessed.

Postscript

In August of this year there were 20 working days. Fourteen of them were entirely consumed in the preparation of this judgment. In those circumstances it is a shade disappointing to read in the press and elsewhere that High Court judges do no work at all in August or September and have excessively long holidays.

The decision suggests that there are a number of options for clearing US dollar

payments. Fedwire is a real-time gross settlement system for settling payments in US dollars.[34] The payor instructs her bank to make the payment which must pass through the federal reserve system using banks which are members of that system. If the payor's bank and or payee's bank are not members they must involve correspondent banks which are members in the transaction.



CHIPS[35] is a real time net settlement system. In Fedwire all payments are made without taking account of other payments, so if Bank A must make $100 million payments to Bank B in any one day and Bank B must make $50 million payments to Bank A each transfers the gross amount. In a net system the participants may be able to transfer only the net amount. A net system has greater liquidity than a gross system, but may have greater risk, so CHIPS has complex systems for minimizing risk.

Should the illegality in the US have excused Bankers' Trust's failure to pay Libyan Arab Bank? What do you think of Staughton's split proper law? Why was Staughton so sceptical about some of the expert evidence?

CHOICE OF JURISDICTION

Courts may decline to exercise jurisdiction on the basis of forum non conveniens. They may also decide to seek to restrain proceedings abroad. In both types of case courts will likely consider what is the appropriate forum for resolution of a particular dispute. The following two cases show the English House of Lords and a federal district court in New York addressing the issue of what significance to attach to a choice of jurisdiction clause in litigation arising out of the same facts. The cases illustrate that there may be a risk that courts will not give effect to contracting parties' choice of jurisdiction. Does this risk concern you? Are there ways of limiting the risk?

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[34] See, e.g., http://www.federalreserve.gov/PaymentSystems/FedWire/ NB. Target is the real time gross settlement system for euro. You can find information on Target here: http://www.ecb.int/paym/html/index.en.html .

[35] *See* http://www.chips.org

The New York Court decided that it had jurisdiction in the case on the basis that the forum selection clauses were procured by fraud (compare page 75 below.)

ARMCO v North Atlantic Insurance Co. [36]

Allen G. Schwartz, District Judge:
This action was filed by plaintiff Armco Inc. ("Armco") and four of its subsidiaries to recover funds allegedly obtained fraudulently from them by defendants. Plaintiffs assert causes of action for common law fraud, conversion, breach of fiduciary duty, and violation of the Federal Racketeer Influenced and Corrupt Organizations Act. Before the Court are motions by certain of the defendants to dismiss on grounds of (i) lack of personal jurisdiction, (ii) improper venue, and (iii) forum non conveniens. For the reasons set forth below, the motion is DENIED.

FACTUAL BACKGROUND
Plaintiff Armco, the direct or indirect parent of its co-plaintiffs, is incorporated under the laws of the State of Ohio with its principal place of business in Pittsburgh, Pennsylvania... Plaintiff Armco Financial Services Corporation ("AFSC") is a corporation existing under the laws of the State of Delaware, with its principal place of business in Middletown, Ohio... AFSC owned the majority of Armco's finance leasing and insurance businesses during the period relevant to this case... Plaintiff Armco Financial Services International Limited ("AFSIL") is a corporation existing under the laws of the State of Delaware, with its principal place of business in Middletown, Ohio... AFSIL owned part of a group of insurance subsidiaries now called the North Atlantic Group during the period relevant to this case. .. Plaintiff Armco Pacific Limited ("APL") is a corporation existing under the laws of Singapore with its principal place of business in Singapore... APL was engaged in the business of finance and leasing during the period relevant to this case... Plaintiff Northwestern National Insurance Company ("Northwestern") is a corporation existing under the laws of the State of Wisconsin, with its principal place of business in Middletown, Ohio... Northwestern was engaged in the insurance and reinsurance business during the relevant period.
In 1990, Armco sought to dispose of a group of insurance subsidiaries which are now known as the North Atlantic Group (the "Group")... Armco became interested in selling the North Atlantic Group, in a management buy-out, to defendants David W. Atkins and Roger T. Donohue, who were then the Managing Director and Chairman, respectively, of the Group... The sale of the Group was negotiated, on behalf of Armco, by two individuals who were then Armco executives, and who are also defendants in this action: Patrick H. Rossi and Larry L. Stinson. Rossi and Stinson currently reside in Ohio.... Atkins resides in England, and Donohue, a citizen of the United Kingdom, resides in Singapore...
At the time of the negotiation of the management buy-out, the Group was in "run-off" status... This meant that no new policies were being issued by the insurance subsidiaries in the Group,.and the business of the Group consisted solely of paying out claims on pre-existing.insurance contracts as they became due... The sale of the Group therefore was expected to involve a financial transfer from the Armco companies to the Group, which would then be acquired by Atkins and Donohue for nominal consideration... After the sale, the Group

[36] 68 F. Supp. 2d 330 (SDNY 1999).

would pay off the claims on its insurance policies with the funds initially contributed by Armco and its affiliates...

According to plaintiffs, Atkins, Donohue, Rossi, and Stinson (collectively, the "Individual Defendants") secretly agreed prior to the sale of the Group that Rossi and Stinson would become joint owners of the Group with Atkins and Donohue after the management buy-out...

Defendant Wingfield Limited ("Wingfield"), a corporation existing under the laws of Jersey, Channel Islands, and with its principal place of business in Jersey, was the acquisition vehicle used by Donohue and Atkins to purchase the North Atlantic Group from Armco... Plaintiffs allege that Wingfield was secretly owned also by Rossi and Stinson...

The sale of the Group was completed on September 3, 1991 upon the execution of a contract of sale (the "Sale Contract") in the New York City offices of Armco's attorneys... The Sale Contract consisted principally of Wingfield's purchase of CI Services Holding Limited ("CISHL"), which held the assets of the North Atlantic Group, from plaintiff AFSIL and another Armco affiliate... CISHL, also a defendant in this action, is incorporated and has its principal place of business in Jersey... As part of the agreement between the parties, Armco affiliates contributed over $ 40 million to CISHL. ..The Sale Contract also contained a forum selection clause providing that all disputes arising out of the transaction would be resolved by the courts of England...

Plaintiffs assert that the Sale Contract was not the product of an arms-length negotiation but rather part of a wide-ranging conspiracy to defraud Armco and its affiliates out of millions of dollars... Plaintiffs assert that, because their representatives Rossi and Stinson were secret partners of the purchasers, the terms of the Sale Contract were biased in favor of the purchasers at the expense of plaintiffs... Specifically, plaintiffs allege that the Sale Contract resulted in Armco's making an excessive contribution to the Group, permitting the defendants to enrich themselves at plaintiffs' expense.

In addition to the fraudulent inducement of the sale agreement, plaintiffs allege that defendants engaged in further fraud after the transfer of the Group to their control. According to plaintiffs, the Individual Defendants, acting in concert with the principal insurance subsidiary of the Group, now called North Atlantic Insurance Company ("NAIC"), further increased the available assets of the Group by fraudulently withdrawing funds from two trust funds that NAIC had previously established in favor of plaintiff Northwestern...Defendant NAIC is an insurance company existing under the laws of the United Kingdom with its principal place of business in England...

Plaintiffs allege that defendants completed their scheme by diverting funds from the Group to themselves... Defendants allegedly accomplished this by means of excessive "acquisition fees," "dividends," "commissions," and "consulting fees," paid either to the Individual Defendants themselves or to corporate entities they controlled... Plaintiffs allege that more than $ 16 million was fraudulently obtained by defendants from the Group between 1991 and 1997...

Other corporate entities allegedly controlled by the Individual Defendants and used in furtherance of the alleged fraud are (i) defendant International Trustee and Receivership Services, Inc. ("ITRS"), a corporation organized under the laws of the State of Ohio with its last known principal place of business in Ohio, and which was controlled by defendant Rossi in connection with the alleged fraud;.. (ii) defendant International Run-Off Services, Inc. ("International Run-Off"), a corporation existing under the laws of the State of Ohio with its last known principal place of business in Ohio, and which was controlled by defendant Stinson in connection with the alleged fraud...; and (iii) defendant NPV, a corporation existing under the laws of Nevis, with its principal place of business in Singapore..

The immense fraud was exposed, according to the complaint, because the diversion of funds from the Group eventually led to the insolvency of NAIC in 1997... Atkins had resigned from the Group in 1995, and subsequent to the initiation of the NAIC insolvency proceeding, the other Individual Defendants transferred funds to NAIC which plaintiffs allege represent monies fraudulently obtained by them from Armco and its affiliates...
Plaintiffs commenced the present action to recover the funds that they allege were taken under false pretenses by the Individual Defendants and corporate entities they controlled... The Amended Complaint states claims arising under the common law doctrines of fraud, conversion, and breach of fiduciary duty, as well as under the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). Because defendant NAIC is in provisional liquidation, this action was originally filed as an adversary proceeding in the bankruptcy court. Upon the motion of NAIC, however, the bankruptcy court dismissed the claims against NAIC on the grounds that they were barred by the court's previously issued injunction. Plaintiffs moved this Court to withdraw the reference of the action to the bankruptcy court, and, NAIC having been dismissed from the case, this Court granted the motion on February 3, 1999...
While the appeal from the bankruptcy court's order dismissing the claims against NAIC was pending, NAIC entered into a settlement with plaintiffs. Defendant Atkins has also settled with plaintiffs and agreed to come to New York to testify on their behalf. A consent judgment between plaintiffs and Atkins was entered by this Court on August 24, 1999...
The case is now before the Court upon the motion to dismiss on various grounds made by Rossi, Stinson, Wingfield, ITRS, International Run-off, and CISHL (the "Moving Defendants").

DISCUSSION
Moving Defendants seek dismissal of this action on three grounds: (1) lack of personal jurisdiction, (2) improper venue, and (3) forum non conveniens, each of which is separately addressed below....

II. IMPROPER VENUE
Moving Defendants assert that the forum selection clause in the Sale Contract (the "Forum Selection Clause" or "Clause") prohibits plaintiffs from maintaining this action in New York. Plaintiffs respond that the Forum Selection Clause does not apply to the present action. If the district court concludes that a valid forum selection clause exists, it "must enforce the forum-selection provision absent a clear showing [by the party opposing enforcement] that enforcement would be 'unjust' or that the clause is 'invalid for such reasons as fraud or overreaching.'" Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V., 145 F.3d 505, 510 (2d Cir. 1998)... However, on this motion, the "party seeking to avoid enforcement of [a forum selection clause is] entitled to have the facts viewed in the light most favorable to it, and no disputed fact should be resolved against that party until it has had an opportunity to be heard." New Moon Shipping Co., Ltd., v. Man B & W Diesel AG, 121 F.3d 24, 29 (2d Cir. 1997). Plaintiffs contend that the Forum Selection Clause (i) is not applicable to the instant litigation because the claims asserted in the complaint do not fall within the Clause's scope; (ii) is unenforceable because it was induced by fraud; and (iii) is unenforceable in the context of this litigation because only one Moving Defendant and two plaintiffs were parties to the Sale Contract containing the Clause. Applying the relevant standards, and viewing the facts in the light most favorable to plaintiffs, the Court concludes that plaintiffs have made a prima facie showing that the Forum Selection Clause does not apply to this action.

A. THE SCOPE OF THE FORUM SELECTION CLAUSE DOES NOT ENCOMPASS THIS ACTION, WHICH INVOLVES ALLEGATIONS OF A PRE-CONTRACT SCHEME TO DEFRAUD PLAINTIFFS.

The Court finds that the allegations of a wide-ranging conspiracy to defraud plaintiffs are not claims that fall under the scope of the Forum Selection Clause contained in the Sale Contract. "The applicability of a forum selection clause is governed by 'objective consideration of the language' of the clause." Anselmo v. Univision Station Group, Inc., 1993 U.S. Dist. LEXIS 428...(S.D.N.Y. Jan. 15, 1993) ... The Forum Selection Clause in the Sale Contract provides that the parties irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which may arise out of or in connection with this Agreement... Because this action did not "arise out of or in connection with" the Sale Agreement, the Forum Selection Clause is inapplicable.

This action is not one that "arose out of" the Sale Contract. Plaintiffs are not suing for breach of the Sale Contract, alleging any lack of performance required by the Sale Contract, or disputing either party's rights or obligations under the Sale Contract. Rather, plaintiffs allege in the complaint a series of fraudulent activities that included the negotiation and execution of the subject Sale Contract. This action arose out of the alleged wide ranging fraud, including numerous acts committed before the execution of the Sale Contract.

The Court also concludes that this action did not arise "in connection" with the Sale Contract, but rather should be viewed independently of that contract. The Court reaches this conclusion, to a significant extent, because plaintiffs allege the existence of a large scale scheme to defraud that included numerous pre-contract activities by defendants, and properly assert a cause of action arising out of that fraud. The conclusion of the court in Anselmo supports this view...The Anselmo court was required to interpret a forum selection clause with language covering claims "relating to" the underlying agreement. Id. That court found the "relating to" language to be "broad enough to encompass claims not explicitly grounded in the Agreement . . . . [and enforceable if the] claims [asserted in the complaint] grow out of the contractual relationship, or if 'the gist' of those claims is a breach of that relationship." .. The court concluded, however, that "plaintiff's tort claim . . . did not 'relate to' the Agreement because the tort grew out of events which preceded the Agreement."..

Here, plaintiffs assert tort claims that also allegedly grew out of events and acts by defendants preceding the execution of the contract. Plaintiffs allege that the Individual Defendants, together with their corporate entities, were engaged in a broad scheme to defraud plaintiffs out of vast sums of money. Part of the alleged scheme involved, for example, the creation of Wingfield as a vehicle for defendants' fraudulent activities, and the misrepresentation to plaintiffs that Wingfield was owned solely by Atkins and Donohue, when it was in fact allegedly also owned by plaintiffs' representatives Rossi and Stinson... These allegations pre-date the signing and negotiation of the sale agreement, and do not arise from its terms.

The "gist" of plaintiffs' claims is not the breach of a contractual relationship, but the series of acts by defendants resulting in the fraud... In addition to the fact that plaintiffs base their fraud claims on numerous pre-contract activities by defendants, plaintiffs' cause of action for breach of fiduciary duty is also not based on the terms or relationships embodied in the Sale Contract. Plaintiffs allege that Rossi and Stinson, by acting as plaintiffs' principal representatives during the negotiation of the Sale Contract, had an affirmative duty to disclose their interest in Wingfield, and are therefore liable to plaintiffs for their breach of this duty... This cause of action does not arise out of the Sale Contract itself, but rather out of the course of Rossi's and

Stinson's representation of plaintiffs' interests during the negotiation of the contract. The relationship upon which this claim is based is between Armco, Rossi and Stinson--not between the parties to the Sale Contract.

Further support for the Court's conclusion that the Forum Selection Clause is inapplicable to this case is derived from the fact that an English court involved in related Armco litigation has made expressly the same finding. The English court, in Donohue v. Armco ...Queen's Bench Division (July 16, 1999) (Hon. Mr. Justice Aikens) (hereinafter referred to as the "English Decision"), was presented with the issue as to whether it should grant a petition to enjoin the present litigation (referred to by the court as the "NY Proceedings") on the basis of the Forum Selection Clause contained in the Sale Contract. The English court refused to issue an injunction, concluding, inter alia, that the claims raised in the NY Proceedings based on a pre-existing conspiracy to defraud Armco are not claims that "arise out of" [the Sale Agreement] . . .. They "arise out of" the agreement to conspire against Armco and to defraud it... WMW Machinery, Inc. v. Werkzeugmaschinenhandel Gmbh Im Aufbau, 960 F. Supp. 734 (S.D.N.Y. 1997) illustrates the contrasts between the current action and one where the tort claims did in fact arise out of a contractual relationship. The WMW Machinery court was faced with the question as to whether the plaintiff's tort claims should be subject to a forum selection clause that was contained in a contract between the parties. The contract gave the plaintiff the exclusive rights to distribute machinery in North America, and the plaintiff had purchased large quantities of machine tools under the contract... When the defendant held up shipment of plaintiff's goods, plaintiff sued for, inter alia, the tort of wrongful conversion. The defendants contended that because the plaintiff's "wrongful conversion claim related to goods and alleged obligations which were the subject of the [Agreement] . . . that claim 'arose out of or in connection' with the Agreement and must, therefore, be resolved by an appropriate German court [as specified by the forum selection clause]." ... The WMW Machinery court agreed and enforced the clause...

The contrast between WMW Machinery and the current case is evident. In WMW Machinery, although the complaint asserted a tort claim, it did not alter the fact that the plaintiff was seeking redress for having been denied benefits guaranteed to it by the exclusive distribution agreement containing the forum selection clause. Here, by contrast, plaintiffs' claims do not derive from entitlements or benefits granted in the Sale Contract--quite the opposite. Further, the origin of the current dispute was not a contractual relationship as it was in WMW Machinery, but rather a pre-existing comprehensive scheme by the defendants to defraud plaintiffs, of which the signing of the Sale Contract was merely one important aspect.

The Court notes that similar reasoning has been used in the context of a choice of law clause. In Telemedia Partners Worldwide Ltd. v. Hamelin Ltd ..(S.D.N.Y. Feb. 2, 1996), the court held that a limited choice of law clause did not apply to a RICO claim "based on allegations of mail and wire fraud antedating the existence of the agreement and which goes beyond issues merely of construction and enforcement of the Agreement." .. The same reasoning applies here, where the alleged fraud is much broader than the sale contract at issue, and allegedly predates it.

B. THE FORUM SELECTION CLAUSE DOES NOT DEFEAT VENUE IN THIS DISTRICT BECAUSE PLAINTIFFS ALLEGE THAT THEIR AGREEMENT TO THE CLAUSE WAS INDUCED BY FRAUD.

Even if the Forum Selection Clause did apply to this dispute, it would not bar the present action

from proceeding because plaintiffs have properly alleged that they were fraudulently induced to agree to the Clause. A forum selection clause is not enforceable if "the inclusion of that clause in the contract was the product of fraud . . .." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 ...(1974). A forum selection clause will not be enforced unless it was the product of an "arms length negotiation" and the clause was "a 'vital part of the agreement' so as to make it believable that the parties conducted their negotiations with the clause in mind." Full-Bright Indus. Co., Ltd. v. Lerner Stores, Inc. ...(S.D.N.Y. May 14, 1991)...

Plaintiffs, by alleging facts supporting the conclusion that the Forum Selection Clause was not an arms length transaction have made a "prima facie showing . . . [that] would support the court's exercise of jurisdiction." New Moon Shipping, 121 F.3d at 29. Plaintiffs have set forth facts in the complaint that suggest that similar transactions of this type normally contain non-exclusive forum selection clauses... Plaintiffs also assert that an initial draft of the agreement provided for New York law to govern, and contained no forum selection clause, until Rossi directed Armco's lawyers to switch forms to one that made use of exclusive U.K. forum and choice of law clauses. Because plaintiffs allege that Rossi, who was charged with protecting plaintiffs' interests in the contract negotiations, was secretly working with the other defendants in this action to defraud plaintiffs, it is not unreasonable to infer that Rossi may have included the Forum Selection Clause in order to further the alleged fraud. Similarly, if, as defendants suggest, Wingfield's attorneys first suggested the inclusion of the Forum Selection Clause, it is not unreasonable to assume that Rossi and Stinson agreed to the Clause's inclusion in order to further their alleged fraud.

The Court therefore finds that the allegations that the Forum Selection Clause was the product of fraud provides an alternative basis for its conclusion that the Clause does not prevent this suit from proceeding in New York. the motion to dismiss premised on the Forum Selection Clause is DENIED.

III. FORUM NON CONVENIENS

Moving Defendants move to dismiss the claims against them based on the doctrine of forum non conveniens, contending that England is the more appropriate forum for the resolution of this dispute... A district court has broad discretion in deciding whether to dismiss an action on forum non conveniens grounds...

There is a strong presumption in favor of a U.S. plaintiff's choice of a U.S. forum. To prevail on a motion to dismiss based on forum non conveniens, a defendant must demonstrate (i) that an adequate alternative forum exists and (ii) that considering the relevant private and public interest factors, "the balance of convenience tilts strongly in favor of trial in the alternative forum" because a trial would lead to "oppressiveness and vexation to defendant . . . out of all proportion to plaintiff's convenience." ESI, Inc. v. Coastal Power Production Co., 995 F. Supp. 419, 425 (S.D.N.Y. 1998).. Although trial in England would be an adequate alternative forum, the court concludes that the relevant private and public factors indicate that litigating this case in the United States is completely appropriate. Permitting this trial to proceed in New York would be neither oppressive nor vexatious to defendants.

The public and private factors a court must consider in evaluating a forum non conveniens motion were set forth by the Supreme Court in Gulf Oil Corp. v. Gilbert, 330 U.S. 501.. (1947). Among the private factors to be considered are: (i) ease of access to proof, (ii) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining those witnesses, (iii) all other factors that make a trial of a case easy, expeditious, and inexpensive...

First, it will be noted that not a single Moving Defendant is a resident of England, nor is any plaintiff. The two Individual Moving Defendants, Rossi and Stinson, are residents of Ohio, two corporate Moving Defendants are Ohio corporations, and two other corporate Moving Defendants are Jersey corporations controlled by Rossi and Stinson. Two of the major English defendants, NAIC and Atkins, have settled with plaintiffs, and a third, Donohue, is not actively participating in the litigation and, in any event, resides in Singapore. Additionally, all but one of the plaintiffs are U.S. corporations, and assert that the majority of their relevant documents are located in the United States.
Defendants assert that many of their witnesses are located in England. Even if this were true," the unavailability of witnesses [is] not a sufficiently weighty concern to require forum non conveniens dismissal because any testimony [that the defendant] needs from witnesses whose attendance cannot be compelled can be obtained, for example, through the use of letters rogatory." United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd., 976 F. Supp. 207, 213 (S.D.N.Y. 1997) (denying defendant's motion to dismiss for forum non conveniens). Moving Defendants do not assert that letters rogatory are unavailable with respect to their witnesses currently residing in England.
Further, plaintiffs allege that the secret fraudulent scheme perpetrated by defendants was planned, to a significant extent, at meetings that took place in New York. Witnesses testifying as to these meetings would likely be found in New York. Additionally, the Sale Contract was executed in New York, and non-party witnesses with respect to the negotiation and execution of that contract will likely be found in New York.
Among the public factors to be considered by a Court in evaluating a forum non conveniens motion are (i) court congestion, (ii) interest of forums in deciding local disputes, (iii) interest in issues of foreign law being decided by foreign tribunals. See Gulf Oil, 330 U.S. at 508-509... It is beyond doubt that "the United States has an interest in ensuring that fraud does not occur within its borders . . .." Bank of Crete, S.A. v. Koskotas... (S.D.N.Y. Dec. 20, 1991). Further, the statements of the English courts themselves suggest that the U.S. interest in this action is greater than the English interest. The English court involved in related Armco litigation concluded the following:

> In my view England is not the natural "centre of gravity" for these claims, which have worldwide connections. There are a large number of strands that lead to this conclusion. First the alleged conspiracy is said to have originated in meetings in the U.S. and culminated in a secret written agreement of the group of four in New York in April 1991. Further, the alleged breaches of fiduciary duty by Mr. Donohue to the Armco companies (incorporated and operating in the USA) are said to have taken place in the USA, or at least not in England. Secondly, only one of the alleged conspirators, Mr. Atkins, resides in England . . .. Wingfield and CIHSL are Jersey companies, but with no obvious connections with England. Fourthly, four of the Armco companies . . . are incorporated in American states . . .. Further, none of the Armco companies carries on business in England . . .. Sixthly, the key witness on the Armco side . . . Atkins, although a resident of England, has agreed to give evidence in New York . . . Seventhly, the RICO statute claims can only be brought in the USA...

The English court went on to state that:

> the connections with England are slim . . .. It seems likely that English substantive law will be of marginal significance in the NY Proceedings .. In this case most of the key witnesses are not to be found in England...

This Court concludes that this action, involving U.S. plaintiffs, mostly U.S. or non-English defendants, and a fraudulent scheme that allegedly arose in New York, is far removed from the facts of those cases where courts granted the extraordinary remedy of forum non conveniens. See, e.g., Piper Aircraft, 454 U.S. at 255-60 (dismissing case on basis of forum non conveniens where the action involved a plane crash and (i) the victims of the crash were Scottish, (ii) the accident occurred in Scottish airspace, (iii) a large portion of relevant evidence was in Scotland, and (iv) the ability to implead other defendants supported holding trial in Scotland). The motion to dismiss based on the doctrine of forum non conveniens must therefore be DENIED.

Compare **Thunder Marine v Brunswick** 2006 US Dist Lexis 45949 (MD Fl. 2006): "Here, the claims of unfair competition, violation of fair trade, and breach of fiduciary duty, rather than being dependant upon the contractual relationship existent for the sale of marine products between Thunder Marine and Brunswick's subsidiaries, are purportedly based on an entirely new venture--a partnership between Thunder Marine and Brunswick for the purchase and development of waterfront real estate. Furthermore, although Brunswick may very well have a program that encourages dealers of its subsidiaries to share with Brunswick proposals for the acquisition of waterfront property, no facts support the premise that a dealer-manufacturer relationship is required in order to enter into a joint venture with Brunswick for the acquisition of real estate. No facts show that Brunswick would not partner with any entity regarding a waterfront real estate purchase if it saw fit to do so. So, the mere fact that the dispute would not have occurred but for the contractual relationship between Brunswick's subsidiaries and Thunder Marine is not enough to frame the causes of action as dependant upon the contractual relationship. See Armco, Inc...(finding that the scope of the forum selection clause did not encompass the claims where the "gist" of the claims was not dependant upon the terms or relationship embodied in the contract)."

Cf. also *Forrest* v. *Verizon Communications Inc*., 805 A.2d 1007 (DC 2002)
"like the trial court, we conclude that even if the clause is ambiguous, it is still applicable to all of appellant's claims. We follow the number of courts that have held that non-contract claims that involve the same operative facts as a parallel breach of contract claim fall within the scope of a forum selection clause. See Terra...119 F.3d at 695; Lambert ...983 F.2d at 1121-22; Lawler v. Schumacher Filters Am., 832 F. Supp. 1044, 1052 (E.D. Va. 1993)... Courts should not "reward attempts to evade enforcement of forum selection agreements through 'artful pleading of [non-contract] claims' in the context of a contract dispute.""

Did the Armco decision reward artful pleading?

In ***Donohue* v *ARMCO***[37] the UK's House of Lords was faced with the question of whether to grant an anti-suit injunction to restrain the pursuit of proceedings in New

[37] [2001] UKHL 64, [2002] 1 All ER 749 (HL)

York. The contracts which gave rise to the litigation were contracts for the sale and purchase of shares in an insurance group. The contracts contained exclusive jurisdiction clauses as Lord Bingham of Cornhill described in his judgment in the case :

[7] ... each of the three agreements contained an express stipulation that the contract was governed by English law, made provision for service on a nominated agent of the vendor's solicitors in England and, most importantly, provided for the exclusive jurisdiction of the English court. In the sale and purchase agreement it was provided that 'the parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which may arise out of or in connection with this Agreement'....

Donohue brought proceedings in the English courts relying on the exclusive jurisdiction clauses and seeking an anti-suit injunction in relation to the New York proceedings. The House of Lords held that the anti-suit injunction should not be granted. The following excerpt is from the judgment of Lord Bingham of Cornhill (a majority of the Law Lords concurred):

[13] On the first summons, the judge held that an injunction restraining proceedings in New York should not be granted to Mr Donohue. In reaching that conclusion he made two important findings. The first was expressed in paras 42 and 43 of his judgment ([2000] 1 All ER (Comm) 425 at 439):

> '42. I have decided that the claims raised in the NY proceedings based on a pre-existing conspiracy to defraud Armco are not claims that "arise out of" either the SPA [sale and purchase agreement] or the transfer agreements. They "arise out of" the agreement to conspire against Armco to defraud it. I have also concluded that the claims concerning the collection agreement did not arise out of or in connection with the SPA or the transfer agreements. I doubt the trust fund claims come within the EJCs [exclusive jurisdiction clauses] too, but I was told that the trust fund claims may not be relevant now that the NNIC/NAIC disputes have been settled subject to ratification by the Court. Thus at least the issues raised in counts 1 to 8 and 9 to 12 [of the amended complaint in the New York proceedings] are not within the EJCs.
> 43. This means that much of the disputes raised in the NY proceedings are outside the scope of the EJCs.'

The second important finding was that Armco Inc had never succeeded to the rights and obligations of AFSEL under the transfer agreement and the sale and purchase agreement to which AFSEL had been party and so had never become bound by the exclusive jurisdiction clause in those agreements... The judge accordingly approached Mr Donohue's application by considering whether the New York proceedings against him were vexatious and oppressive and concluded that they were not ... All three members of the Court of Appeal disagreed with these two findings...The Court of Appeal held that these errors vitiated the judge's exercise of discretion and so entitled the Court of Appeal to exercise its discretion afresh...
[14] The Court of Appeal's conclusions on these two points have not been in issue before the House. Armco Inc accepts that as the successor to AFSEL it is bound by the exclusive

jurisdiction clauses in the transfer agreement to which AFSEL was party and in the sale and purchase agreement to the extent that AFSEL would itself have been bound had it not been dissolved. Armco Inc also asserts that as the ultimate victim of the alleged conspiracy it has claims independent of those derived from AFSEL, an assertion challenged by Mr Donohue and the PCCs. On the scope of the clauses, the Armco companies accept that the clauses cover claims based on the conspiracy which preceded the making of the agreements as well as the misrepresentations and concealment which procured them to be made. The scope of the clauses was not the subject of argument before the House and I do not think it appropriate to give detailed consideration to this aspect of the case. The exclusive jurisdiction clause in the sale and purchase agreement, quoted above, was in wide terms. The practice of the English courts is to give such clauses, as between the parties to them, a generous interpretation.
[15] The Court of Appeal granted an injunction against the first three Armco defendants ... restraining them from commencing or continuing proceedings against any of the claimants ... in any court other than those of England and Wales regarding any dispute arising out of the management buy-out... The injunction was expressed to apply in particular to the Armco companies' New York proceedings already referred to, and to the numbered counts which were held to cover the 1991 management buy-out. Thus the injunction did not apply to [companies] the joinder of which ...had been disallowed, and was limited to the causes of action held to fall within the exclusive jurisdiction clauses. But the benefit of the exclusive jurisdiction clauses was extended to ... four PCCs who were not party to them ... The object of the injunction was plainly to give effect to the exclusive jurisdiction clauses and to ensure trial in England of the issues arising out of or connected with the management buy-out between all the parties involved.
[16] The grant of an anti-suit injunction, as of any other injunction, involves an exercise of discretion by the court. To exercise its discretion reliably and rationally, the court must have the fullest possible knowledge and understanding of all the circumstances relevant to the litigation and the parties to it. This is particularly true of an anti-suit injunction because, as explained below, the likely effect of an injunction on proceedings in the foreign and the domestic forum and on parties not bound by the injunction may be matters very material to the decision whether an injunction should be granted or not. Thus although the two main issues before the House cannot be regarded entirely independently of each other, it is preferable to consider the issue of joinder of the PCCs before considering the grant of an anti-suit injunction more generally.

Joinder of the PCCs
[17] CISHL was party to each of the transfer agreements. Wingfield was party to the sale and purchase agreement. All three agreements contained an English exclusive jurisdiction clause. Both companies have been sued by Armco in New York. Both have claims ... entitling them to seek leave to serve proceedings out of the jurisdiction... the court has power to add these companies as claimants if it considers it desirable to do so. Thus if the court should consider it desirable to do so there is no jurisdictional objection to the grant of leave to add CISHL and Wingfield as claimants in Mr Donohue's action and to give leave (if it were needed) to CISHL and Wingfield to serve AFSIL and Armco Inc ... out of the jurisdiction. The basis of their claim is in principle the same as that of Mr Donohue, but since they seek to be added to existing proceedings they must persuade the court that it is desirable to add them. The decision whether it is desirable to add them will be heavily influenced by the decision whether to join the other PCCs and whether Mr Donohue upholds his claim to the grant of an anti-suit injunction.
[18] The other four PCCs (Messrs Rossi and Stinson and their respective companies) are in a

different position. None was a party to either transfer agreement or to the sale and purchase agreement and so none has the benefit of the English exclusive jurisdiction clause. It is common ground that none has any cause of action which would entitle the court to give leave to serve proceedings out of the jurisdiction... and thus none could bring independent proceedings against any Armco company in England unless that company submitted to the jurisdiction. But these PCCs rely on the broad power of the court under RSC Ord 15, r 6 and CPR Pt 19, which is said to be unconstrained by the rules on service out of the jurisdiction, and it is said to be desirable to add them because they have a substantial cause of action entitling them to seek an anti-suit injunction. The Armco companies reply that a foreign party, even if already properly sued within the jurisdiction, may not be subjected to a claim for which leave to serve out could not be granted and further that, in the absence of any contractual right to rely on an exclusive jurisdiction clause, these PCCs have on the material before the House no cause of action entitling them to seek an anti-suit injunction. The first issue between the parties is whether these PCCs can show any cause of action which would entitle them to claim an injunction.

[19] The jurisdiction of the English court to grant injunctions, both generally and in relation to the conduct of foreign proceedings, has been the subject of consideration by the House of Lords and the Privy Council in a series of decisions in recent years which include ..The Siskina...[1979] AC 210; Castanho v Brown & Root (UK) Ltd ...[1981] AC 557; British Airways Board v Laker Airways Ltd ...[1985] AC 58...SNI Airospatiale v Lee Kui Jak ..[1987] AC 871... Those decisions reveal some development of principle ... But certain principles governing the grant of an injunction to restrain a party from commencing or pursuing legal proceedings in a foreign jurisdiction, in cases such as the present, as between the Armco companies and these PCCs, are now beyond dispute. They were identified by Lord Goff of Chieveley giving the opinion of the Judicial Committee of the Privy Council in the SNI Airospatiale case ...[1987] AC 871 at 892: (1) the jurisdiction is to be exercised when the ends of justice require it; (2) where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed; (3) an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy; and (4) since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.

In the SNI Airospatiale case the issue was whether proceedings in Texas should be restrained in favour of Brunei, and Lord Goff summarised the guiding principles:

> 'In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff is he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however,

> as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction on appropriate terms, just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate can likewise often be solved by granting a stay on terms.'...

[20] If these principles are applied to the present case it is in my opinion plain that an anti-suit injunction could not properly be granted in favour of these PCCs. The judge... concluded that England was not the natural forum for these proceedings, that the connections with England were slim and that the New York proceedings were not vexatious and oppressive ... Stuart-Smith LJ observed that if this were an alternative forum case he would not necessarily disagree with the judge ... Brooke LJ considered that the convenient forum for the resolution of all disputes between Messrs Rossi and Stinson and their former employers was clearly situated on the other side of the Atlantic ... Judge Schwartz concluded that: 'Permitting this trial to proceed in New York would be neither oppressive nor vexatious to defendants' and further said:

> 'This Court concludes that this action, involving US plaintiffs, mostly US or non-English defendants, and a fraudulent scheme that allegedly arose in New York, is far removed from the facts of those cases where courts granted the extraordinary remedy of forum non conveniens.'

The Armco companies are incorporated in Ohio, Delaware, Wisconsin and (in the case of APL) Singapore. Messrs Rossi and Stinson and their companies have no English links. The dispute between them and the Armco companies concerns the alleged breach of the fiduciary duty they owed to their employers. It is plain that England is not the natural forum for resolution of this dispute and that the New York proceedings by the Armco companies against these PCCs are neither vexatious nor oppressive.

[21] There is another more technical objection to the joinder of these PCCs. In stating the third of his basic principles in the SNI Aerospatiale case, Lord Goff made reference to 'a party who is amenable to the jurisdiction of the court'. This echoed the language of Lord Diplock in his important statement of principle in The Siskina ... which has been understood to mean that the court may only grant an injunction where it has personal jurisdiction over the defendant in the sense that he could be served personally or under RSC Ord 11 (other than sub-r (i))... These PCCs could not, as already noted, have obtained leave to serve out of the jurisdiction on any of the Armco companies in independent proceedings. Service on APL and NNIC has been set aside. Does the amenability of Armco Inc, AFSC and AFSIL to the jurisdiction of the English court by virtue of their contractual relationship with Mr Donohue enable these PCCs to take advantage of that relationship to effect service on the solicitors nominated by those companies pursuant to the transfer and sale and purchase agreements, and thus to prosecute a claim which could not otherwise have been prosecuted in this forum? In my opinion it does not. Since Holland v Leslie [1894] 2 QB 450 the view has prevailed that the court should refuse to allow an amendment of proceedings which would introduce a new cause of action against a foreign defendant in respect of which the court would have refused leave for service out of the jurisdiction ... This view seems to me to accord with principle. The jurisdiction of the English court is territorial. A party resident abroad may be subjected to the jurisdiction of the court to the extent (and only to the extent) that statute or rules made under statute permit... It would be

wrong in principle to allow these PCCs to use Mr Donohue's action as a Trojan horse in which to enter the proceedings when they could have shown no possible ground for doing so in their own right.
[22] The majority of the Court of Appeal were in my opinion wrong to allow the joinder of these four PCCs, and I would accordingly set aside that order and refuse joinder.

The grant of an injunction to Mr Donohue
[23] My Lords, I turn to the question whether an anti-suit injunction should be granted to Mr Donohue, recognising that as between him and the first three Armco appellants... there is a contractual obligation to submit any dispute which may arise out of or in connection with the sale and purchase agreement to the exclusive jurisdiction of the English court. It is plain that while some of the claims made by the Armco companies in the New York proceedings fall outside the scope of this clause, some claims central to the Armco companies' complaint fall within it. In this situation, exercise of the broad discretion conferred on the court by s 37 of the Supreme Court Act 1981 to grant an injunction in all cases in which it appears to the court to be just and convenient to do so is controlled by principles to be derived from a substantial line of authority here and abroad.

[24] If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in The Eleftheria [1969] 2 All ER 641 at 645-646... Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see the SNI Airospatiale case.. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case.)
[25] Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause... A similar approach has been followed by courts in the United States, Canada, Australia and New Zealand..:

[26] The Fehmarn [1958] 1 All ER 333 ..shows that this is not an invariable result. This was one of the earlier cases in the modern series. The Russian exclusive jurisdiction clause was a condition in a bill of lading, no doubt part of a standard form, and certainly not the subject of negotiation between the parties to the eventual dispute. That was between English owners of the bill and German owners of the vessel. The dispute was held to have a much closer connection with England than with Russia, and it was thought that the German owners did not object to the dispute being decided in England if they could avoid giving security. On those grounds, the judge having declined to stay the proceedings in England, the Court of Appeal upheld his decision.
[27] The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions. These decisions are instructive. In Evans Marshall & Co Ltd v Bertola SA [1973] 1 All ER 992, [1973] 1 WLR 349 there was a tripartite dispute but only two of the parties were bound by a clause conferring exclusive jurisdiction on the court in Barcelona. Kerr J at first instance was impressed by the undesirability of there being two actions, one in London and the other in Barcelona ... The Court of Appeal took a similar view .. Sachs LJ thought separate trials particularly inappropriate where a conspiracy claim was in issue... In Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria [1981] 2 Lloyd's Rep 119 the primary dispute was between cargo interests and the owner of the vessel, both parties being bound by a clause in the bill of lading conferring exclusive jurisdiction on the courts of Egypt. But the cargo interests had also issued proceedings against the Mersey Docks and Harbour Co, which was not bound by the clause. The Court of Appeal upheld the judge's decision refusing a stay. In the course of his leading judgment in the Court of Appeal Brandon LJ said (at 128):

> I agree entirely with the learned Judge's view on that matter, but would go rather further than he did in the passage from his judgment quoted above. By that I mean that I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries...

Citi-March Ltd v Neptune Orient Lines Ltd [1996] 2 All ER 545, [1996] 1 WLR 1367 also involved third party interests and raised the possibility of inconsistent decisions. Colman J regarded separate trials in England and Singapore as not only inconvenient but also a potential source of injustice and made an order intended to achieve a composite trial in London despite a Singaporean exclusive jurisdiction clause...The MC Pearl [1997] 1 Lloyd's Rep 566 again involved third parties and raised the possibility of inconsistent findings. Despite a clause conferring exclusive jurisdiction on the courts of Seoul, Rix J refused to stay proceedings in England. He regarded the case as on all fours with the Citi-March case .. and observed..:

> It seems to me that so far the plaintiffs have shown strong cause why the jurisdiction clause should not be enforced. This is indeed a paradigm case for

> the concentration of all the relevant parties' disputes in a single jurisdiction. If in such a case a host of different jurisdiction clauses were to be observed, the casualty at the root of the action would become virtually untriable. The action would fragment and reduplicate, at vast cost.'

A similar approach is discernible in Bouygues Offshore SA v Caspian Shipping Co... in which the disputes involved four parties only two of whom were bound by an English exclusive jurisdiction clause. Although the effect of the clause was described by Evans LJ as 'near-conclusive' .. an injunction to restrain proceedings in South Africa was refused...Evans LJ said:

> 'In my judgment, two questions arise, one a matter of principle. First, should the Court, when deciding whether or not to enforce the exclusive jurisdiction clause by means of an injunction which prevents Bouygues from continuing with its proceedings against Ultisol in South Africa, take into account the effects of such an injunction on persons who are not parties or entitled to enforce the contract containing the jurisdiction clause, Portnet and Caspian here, but who are both necessary and proper parties to the litigation wherever it is held? In my judgment, the clear answer to this question is "yes". Mr. Justice Clarke did so in his judgment and the contrary has not been argued before us. The relevance of the potential effects on third parties has been recognised in other authorities . . .'

Sir John Knox also held that proceedings should be allowed to continue in South Africa because, among other reasons.. 'this is the only way in which to minimize, if not avoid altogether, the risk of inconsistent decisions in different jurisdictions'.
[28] Not all cases can be so neatly categorised. In Credit Suisse First Boston (Europe) v MLC (Bermuda) Ltd [1999] 1 All ER (Comm) 237 Rix J dealt with a case in which there were four potential parties and three different agreements (or classes of agreement) but only two of the parties were bound by an English exclusive jurisdiction clause under one of the agreements. There were proceedings by C against A (the two parties to the clause) in England and proceedings by A against C, B and D in New York alleging statutory breaches relating to the agreement containing the clause and also under an agreement not containing an exclusive jurisdiction clause, and including other claims such as a claim for conversion. The judge gave leave, on their application, for B and D to be joined to C's action against A in England (at 248). A's application to stay the proceedings by C in England was not pursued, but if it had been it would have failed (at 257). On an application by C, B and D for an injunction to restrain A suing them in New York, the judge granted an injunction but only to restrain the prosecution of claims covered by the exclusive jurisdiction clause... The judge was confronted in this case with a difficult procedural and jurisdictional tangle which permitted no wholly satisfactory solution. It was, however, important to his decision that he did not judge it possible to make an order which would ensure trial of all proceedings arising out of all the agreements in one forum. He said..

> (5) An important fact in this case, as it seems to me, is that, whether I enforce [the exclusive jurisdiction clause] or not, I cannot ensure that all litigation between [A] and [B, C and D] is carried forward in one jurisdiction unless I would be prepared to extend my injunction to all the claims against [B, C and D] in New

> York. That is because [the exclusive jurisdiction clause] does not bind [B and D]. That remains the case even if I assume that all the claims against [C] come within [the exclusive jurisdiction clause], but I have already stated that in my judgment that is not the case. It follows that unless I am prepared not only to enforce [the exclusive jurisdiction clause] but also to injunct [A's] claims against [B and D] and [A's] claims against [C] outside [the exclusive jurisdiction clause], [A's] complaint in New York will continue in any event. On the other hand [counsel] has not pursued [A's] application for a stay of [C's] action, but if he had, it would fail for the reasons for which [counsel] cited British Aerospace plc v Dee Howard Co [1993] 1 Lloyd's Rep 368. Thus the continuation of the proceedings in England is inevitable too.
> (6) I would not, however, injunct the claims against [B and D] because, however undesirable it is in principle to have parallel litigation in two jurisdictions, it seems to me the duplication of litigation does not in itself make it in the interests of justice to injunct the New York proceedings in so far as claims against [B] and [D] are concerned.

[29] In seeking to apply this body of authority to the present case the first point to be made is that Mr Donohue has as against the first three Armco appellants a strong prima facie right not to be the subject elsewhere than in England of claims by those companies falling within the scope of the clause. Some of the claims made against him by those companies in New York do fall within the clause. This is an important and substantial, and not a formal or technical, right. At an earlier stage of this English litigation Armco sought to impeach the exclusive jurisdiction clauses on the ground that they had been induced by the fraud of the four conspirators. The judge not only rejected the contention that Armco executives had been misled but also found that Armco's English and US lawyers had known all about the clauses and their consequences and that Armco had had its own good reasons for inserting English law and jurisdiction clauses in the contracts ... There was no appeal against these conclusions. Thus Armco, having agreed to these clauses to serve their own ends, are now seeking to be released from their bargain. To permit them to do so exposes Mr Donohue to an obvious risk of injustice. This risk does not derive from the venue alone: Mr Donohue might, as a United Kingdom citizen, prefer to be sued in London rather than New York if he has to be sued anywhere, but to him, as a resident of Singapore, New York is not in itself an obviously more inconvenient forum than London. A more substantial objection may be founded on the perceived procedural disadvantages to him of being sued in New York: as the evidence suggests, the cost would be greater, trial would be by jury and costs would be very largely irrecoverable even if he were to succeed. But there are always points of this kind to be made when comparing one forum with another, and the standing, authority and expertise of the forum in which the New York proceedings are being pursued cannot be questioned. Much more significant, from Mr Donohue's viewpoint, are the RICO claims made against him. They could not be pursued against him in England. They could, if established in New York, lead to the award of swingeing damages against him. On agreement of the exclusive jurisdiction clause he could reasonably have felt confident that no RICO claim arising out of or in connection with the agreements could be pursued against him and it would represent an obvious injustice if he were now to be exposed to those claims.
[30] There is, as always, another side to the coin. All five Armco appellants have a clear prima facie right to pursue against Messrs Rossi, and Stinson and their respective companies any

claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. There is, as I have already concluded, no ground upon which this court could properly seek to restrain those proceedings. It would not be appropriate for the English courts to form any judgment, however tentative, on the merits of the Armco companies' claims, beyond noting that lack of merit was not one of the grounds on which the PCCs invited Judge Schwartz to dismiss the proceedings in New York. It must be assumed that the claims made by the Armco companies against their former employees Messrs Rossi and Stinson, including the RICO claims, are serious and substantial claims. There is nothing whatever to suggest that these claims will not proceed in New York whether or not an injunction is granted to Mr Donohue.

[31] It must further be noted that APL and NNIC have a clear prima facie right to pursue against Mr Donohue, Wingfield and CISHL also any claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. I have already recorded that service of the English proceedings on APL and NNIC has been set aside. There is no ground upon which the English court could properly restrain their proceedings in New York. It appears.. that the claims of APL and NNIC relate to the collection agreement and the trust fund withdrawals rather than the allegedly fraudulent management buy-out, but these claims also cannot be treated as lacking merit. They are proceeding in New York, and everything suggests that they will continue in New York whether or not the English court grants an injunction to Mr Donohue.

[32] Similarly, the first three Armco appellants have a clear prima facie right to pursue against Mr Donohue, Wingfield and CISHL any claim not covered by the exclusive jurisdiction clauses in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. To the extent that the claims of these Armco companies do not arise out of or in connection with the transfer agreements and the sale and purchase agreement, they fall outside the exclusive jurisdiction clauses, and there is no ground upon which the English court could properly restrain these proceedings. Everything suggests that they will continue in New York whether or not the English court grants an injunction to Mr Donohue.

[33] Thus Mr Donohue's strong prima facie right to be sued here on claims made by the other parties to the exclusive jurisdiction clause so far as the claims made fall within that clause is matched by the clear prima facie right of the Armco companies to pursue in New York the claims mentioned in the last three paragraphs. The crucial question is whether, on the fact of this case, the Armco companies can show strong reasons why the court should displace Mr Donohue's clear prima facie entitlement. If strong reasons are to be found (and the need for strong reasons is underlined in this case by the potential injustice to Mr Donohue, already noted, if effect is not given to the exclusive jurisdiction clauses) they must lie in the prospect, if an injunction is granted, of litigation between the Armco companies on one side and Mr Donohue and the PCCs on the other continuing partly in England and partly in New York. What weight should be given to that consideration in the circumstances of this case?

[34] I am driven to conclude that great weight should be given to it. The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Messrs Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of course be necessary for any court making that determination to consider any contemporary documentation and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such court to form a judgment on the honesty and motives

of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.

[35] Stuart-Smith LJ ... regarded the subject matter of the collection agreement complaints as 'quite different' from that involving the first three Armco appellants in relation to the transfer agreements and the sale and purchase agreement. He discounted the significance of the trust fund withdrawal claims on the ground that they had almost certainly been settled ... although it is noteworthy that the settlement agreement made with NAIC expressly preserved the right of NNIC to pursue claims against Messrs Rossi, Stinson, Donohue and Atkins, ITRS, IROS, Wingfield, NPV and CISHL in the New York proceedings. It is true that the collection agreement and the trust fund withdrawals give rise to different grounds of claim. But the principal actors are the same, and Armco contends, rightly or wrongly, that these were further manifestations of the plot made by the four conspirators to enrich themselves at the expense of Armco. I cannot for my part accept that the ends of justice would be well served if Armco's allegations concerning the transfer and sale and purchase agreements were determined in England and its allegations concerning the collection agreement and trust fund withdrawals were determined in separate proceedings in New York. The judgment made of the motives and honesty of the four alleged conspirators in the one context would plainly have an important bearing on the judgment made in the other.

[36] In my opinion, and subject to an important qualification, the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York, and accordingly I find strong reasons for not giving effect to the exclusive jurisdiction clause in favour of Mr Donohue. In New York proceedings Mr Donohue will be entitled to claim that the sale and purchase agreement is governed by English law. And Lord Grabiner, representing Armco, has accepted that Armco's breach of contract in suing elsewhere than in the contractual forum could found a claim by Mr Donohue for any damage he has suffered as a result. The qualification is that he should be protected against liability under the RICO claims made against him because of the obvious injustice to him which such liability would in the circumstances involve. But before considering whether such a protection can and should be afforded to Mr Donohue it is necessary to address an important preliminary question.

[37] The discretion whether or not to grant an injunction was in the first instance that of the judge. His exercise of discretion was entitled to be respected unless, on grounds of his error or misdirection, the Court of Appeal was entitled to exercise its discretion afresh. The Court of Appeal held, rightly, that such grounds existed, and did exercise its discretion afresh. But the exercise of discretion is not at large in this House: the Court of Appeal's exercise of discretion must in its turn be respected unless on grounds of error or misdirection the House is entitled to exercise its own discretion. Having regard to the long and closely-reasoned leading judgment of Stuart-Smith LJ, I would not lightly disregard the majority's conclusion.

[38] I am, however, persuaded that the discretionary judgment made by the Court of Appeal is fundamentally vitiated by an incorrect view of the future shape of this litigation. In his judgment, Stuart-Smith LJ considered the grant of an injunction to Mr Donohue before considering whether Messrs Rossi and Stinson and their respective companies should be joined as

claimants, and this enabled Mr Donohue to contend in argument that the Court of Appeal's decision on grant of an injunction should stand despite its conclusion, incorrect as I have held it to be, on joinder. But this reading of Stuart-Smith LJ's judgment cannot in my opinion be sustained. I think it is plain, in particular from para 42 of his judgment ... that Stuart-Smith LJ contemplated that all disputes between the Armco companies and Messrs Donohue, Rossi and Stinson relating to the transfer and sale and purchase agreements would be resolved in the English forum. This enabled him to say:

> The issues in the claim of AFSC, AFSIL and the derivative claim of Armco Inc in relation to the MBO [management buy-out] are whether there was the secret agreement alleged, whether Mr Rossi and Mr Stinson were beneficially interested in Wingfield at the time, whether S30m was an excessive sum and whether S10m worth of AFSEL's assets were secretly and fraudulently transferred. If these allegations are made out, Mr Donohue, Mr Rossi, Mr Stinson and Wingfield will be liable . . .

He was not there recognising the possibility that different conclusions might be reached in the cases of Mr Rossi and Mr Stinson on the one hand and Mr Donohue and Wingfield on the other, a very unlikely event in the case of a single composite trial but an entirely possible outcome if parallel trials relating to the management buy-out took place in both England and New York. This incorrect view was in my opinion compounded by his treatment of the collection and trust fund withdrawal claims as different and separate from the management buy-out claims. For reasons already given I cannot accept this view. Had Stuart-Smith LJ reached the view which I have reached on the joinder of Messrs Rossi and Stinson and their companies, I feel sure that he would have been gravely concerned at the prospect of the same issue being determined in different tribunals, with the obvious and highly undesirable risk of inconsistent findings and decisions. For these reasons I am of the opinion that members of the House are entitled and bound to exercise their discretion afresh.
[39] The interests of justice are in my judgment best served if an anti-suit injunction is denied to Mr Donohue but an undertaking proffered on behalf of the Armco companies (defined to include the five Armco appellants) is accepted in the following terms:

> The Armco companies . . . confirm that they undertake not to enforce against Mr Donohue, Wingfield or CISHL any multiple or punitive damages awarded in the New York proceedings whether awarded pursuant to the RICO statute or common law.
> For the avoidance of doubt, the above undertaking (i) shall not restrict the Armco companies from seeking to enforce any award made in the New York proceedings for damages which are not multiple or punitive; (ii) shall relate only to enforcement; and (iii) as against any defendant in the New York proceedings other than Mr Donohue, Wingfield or CISHL, shall have no effect whatsoever in respect of the Armco companies pursuing or enforcing any claim or award in the New York proceedings whether for multiple or punitive damages or otherwise.

If there were any doubt about the efficacy of this proffered undertaking in relation not only to Mr Donohue but also Wingfield and CISHL, I would order the joinder of those companies. But I am

satisfied that this is an unnecessary step which would serve no useful purpose. I would accordingly refuse the application of these parties to be joined as claimants in the present action. In the result, I would allow the appeal, on the undertaking just recited, and set aside the orders of the Court of Appeal joining the PCCs as claimants and granting an injunction to Mr Donohue.

In 2005 a **Hague Convention on Choice of Court Agreements** was concluded, although it is not yet in force.[38] The Convention contains the following provisions:

Article 5 Jurisdiction of the chosen court
1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
3. The preceding paragraphs shall not affect rules -
a) on jurisdiction related to subject matter or to the value of the claim;
b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6 Obligations of a court not chosen
A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -
a) the agreement is null and void under the law of the State of the chosen court;
b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
e) the chosen court has decided not to hear the case.

This approach does not necessarily resolve the Armco issue.

In a decision in 2004[39] the English Court of Appeal insisted that a non-exclusive jurisdiction clause meant exactly that. The case arose out of a swap transaction using the ISDA standard form agreement with an English choice of law clause and a non-

[38] *See* http://www.hcch.net/index_en.php?act=conventions.text&cid=98 .

[39] *Royal Bank of Canada* v *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] EWCA Civ 07, [2004] All ER (D) 216

exclusive choice of jurisdiction in England. The Court of Appeal said that this did not preclude litigation in New York.

Within the EU choice of forum clauses may turn out to be ineffective. The EU's Regulation on Jurisdiction and Enforcement of Judgments (cited above at note 21) sets out the rules for which courts have jurisdiction in relation to different categories of dispute. However, the European Court of Justice (ECJ) has held that courts in one Member State may not rule that the courts in another Member State do not have jurisdiction over a dispute because of the need for mutual trust between courts in the EU. So, in **Turner v Grovit**,[40] the ECJ said:

24. At the outset, it must be borne in mind that the Convention[41] is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments...
25. It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them..
26. Similarly, otherwise than in a small number of exceptional cases listed in the first paragraph of Article 28 of the Convention, which are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction that are not relevant here, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State..
27. However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.
28. Notwithstanding the explanations given by the referring court and contrary to the view put forward by Mr Turner and the United Kingdom Government, such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment runs counter to the principle of mutual trust which... underpins the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from

[40] *See* http://www.bailii.org/eu/cases/EUECJ/2004/C15902.html .

[41] The case involved the Convention which preceded the Regulation.

reviewing the jurisdiction of the court of another Member State.
29. Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention... However, that result would follow from the grant of an injunction of the kind at issue which.. has the effect of limiting the application of the rules on jurisdiction laid down by the Convention.
30. The argument that the grant of injunctions may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the Convention for cases of lis alibi pendens and of related actions. Second, it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting state. Similarly, the possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.
31. Consequently, the answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

In **Allianz SpA v West Tankers Inc**,[42] the ECJ held that the same result should apply in relation to an arbitration clause.

19 By its question, the House of Lords asks, essentially, whether it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof.
20 An anti-suit injunction, such as that in the main proceedings, may be directed against actual or potential claimants in proceedings abroad. As observed by the Advocate General in point 14 of her Opinion, non-compliance with an anti-suit injunction is contempt of court, for which penalties can be imposed, including imprisonment or seizure of assets.
21 Both West Tankers and the United Kingdom Government submit that such an injunction is not incompatible with Regulation No 44/2001 because Article 1(2)(d) thereof excludes arbitration from its scope of application.
22 In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings ... More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to

[42] http://www.bailii.org/eu/cases/EUECJ/2009/C18507.html .

protect...
23 Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.
24 However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.
25 It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.
26 In that regard, the Court finds... that, if, because of the subject-matter of the dispute..., that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.
27 It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.
28 Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.
29 It follows, first... that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it ... It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State ... That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction ...
30 Further, in obstructing the court of another Member State in the exercise of the powers

conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based ...
31 Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.
32 Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001.
33 This finding is supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
34 In the light of the foregoing considerations, the answer to the question referred is that it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

The ECJ thus rejects the idea that national courts can use injunctions to impede the effect of the “Italian Torpedo”. This rejection has been criticized:

...it does seem to me to be a pity that the ECJ has set itself against the anti-suit injunction with quite such determination. Why not adopt the sensible compromise suggested by Advocate General Leger ... (and not expressly commented upon by the ECJ), namely that the solution is to allow the court second seised to continue to exercise jurisdiction provided that it could establish the existence and application of the agreed choice of jurisdiction clause in a rigorous manner and beyond any possible doubt—any risk of contradictory decisions being thereby largely avoided?
I hope that one of these days the ECJ might be willing to consider some of these considerations. After all there is now a good deal of academic comment to the effect that its present approach can be said to legitimise the use of a procedural device whose purpose is to frustrate the proper determination of disputes. This is the device which has become known as 'the Italian Torpedo': see Delaygua, Choice of Court Clauses: Two Recent Developments [2004] ICCLR 15 (9) 288 at 295. It is an approach which can be compared with the French courts' approval of their own use of anti-suit injunctions... The French introduction of the anti-suit injunction might be thought to support the conclusion that this type of injunction is not anti-pathetic to civilian jurisdictions. It might also help to persuade the ECJ to give serious consideration to its approval as part of the armoury of all member states' courts as a necessary

procedural device in order to ensure that the Brussels-Lugano regime is not abused.[43]

[43] The Rt Hon Sir Anthony Clarke, Master of the Rolls, The differing approach to commercial litigation in the European Court of Justice and the courts of England and Wales Institute of Advanced Legal Studies, Russell Square, London, 23 February 2006 at http://www.judiciary.gov.uk/publications_media/speeches/2006/sp230206.htm.