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EURODOLLAR DEPOSITS

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Eurocurrency deposits are deposits of currency outside the jurisdiction to which the currency belongs:

> 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."[2]

Originally eurocurrency deposits were denominated in US dollars because the dollar was the reserve currency and therefore many individuals and entities were interested in holding deposits denominated in dollars. Some depositors had an interest in holding dollars outside the US, either because they wanted to keep their accounts away from the control of the US Government or because they were interested in the higher rates of interest the eurocurrency deposit accounts would pay. 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. Later, eurocurrency deposits developed for other currencies.

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 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....
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> 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....
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> 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

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[2] “ BIS Quarterly Review, Sept 2004, p 68, note 2.

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 States, or "eurodollars", have grown exponentially, with London remaining at the centre of this market.

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[3] Milton Friedman, The Eurodollar Market: Some First Principles, Federal Reserve Bank of St. Louis Review 16-24 (Jul. 1971) at http://research.stlouisfed.org/publications/review/71/07/Principles_Jul1971.pdf.

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

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 (e.g. 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 were being lent to non-bank borrowers, mainly in the US.[5]

Libor (London interbank offered rate) refers to the interest rate on eurocurrency transactions in the London interbank market. 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 a 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. 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. Although Libor originally referred not to a standard rate but to rates established through somewhat artisanal mechanisms, over time it developed into a standardized rate through the work of the British Bankers Association (BBA) which was available to the markets via various information providers. During the financial crisis banks became nervous about transacting in the interbank

[5] Libor became 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.

market because they were uncertain about the financial condition of other banks. Although the interbank market was not functioning banks which were contributors of quotes to the BBA Libor setting process continued to quote as if they were able to borrow in the interbank market. It also became apparent that, quite separately from the crisis-related issues, people who were involved in the BBA Libor-setting process were not submitting quotes as the process imagined. BBA Libor definitions provided “Every contributor bank is asked to base their bbalibor submissions on the following question: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?"” However, regulators concluded that some of the submitters of quotes were trying to manipulate Libor to their own advantage.[6] Standardization of Libor meant that the rate was used as a component of interest rates not just in London but even in domestic loans in the US. So, the issue of fixing problems associated with Libor was seen as important. HM Treasury established the Hogg Tendering Advisory Committee for Libor and the Committee opened the tendering process for a new Libor administrator in February 2013. As a result of the tendering process, the Intercontinental Exchange now manages ICE LIBOR.[7] The Libor problem, together with other issues of financial market misconduct led the UK Treasury, the Bank of England, and the Financial Conduct Authority to carry out a broader review: The Fair and Effective Markets Review .[8] IOSCO developed Principles for Financial Benchmarks,[9] and the Financial Stability Board published a Report on Reforming Major Interest Rate Benchmarks.[10] Central banks and regulators have decided to move away from Libor, which is scheduled to be

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[6] See, e.g., The Wheatley Review of Libor: Final Report (September 2012) at 5 (“Since 2009, the Financial Services Authority (FSA), together with regulators and public authorities in a number of different jurisdictions – including the United States, Canada, Japan, Switzerland and the European Union – has been investigating a number of institutions for alleged misconduct relating to LIBOR and other benchmarks, including EURIBOR (the Euro Inter-Bank Offered Rate) and TIBOR (the Tokyo Inter-Bank Offered Rate).”)

[7] See https://www.theice.com/iba/libor.

[8] Fair and Effective Markets Review: Final Report (Jun. 2015)

[9] IOSCO, Principles for Financial Benchmarks: Final Report (Jul. 2013).

[10] Financial Stability Board, Reforming Major Interest Benchmarks (Jul. 22, 2014) .

discontinued in 2021, and to move to risk free rates (RFRs)[11] based on transactions.[12] The US RFR is the Secured Overnight Financing Rate,[13] and the UK's is SONIA.[14] Because these rates are based on transactions they are backwards looking rather than forward looking as Libor is, so that in times of rising interest rates they would not reflect the actual cost of funds. The manipulation risk is addressed, but other risks remain.

Market participants worried in the early days that it might become illegal for the banks to make eurodollar loans, or that problems might develop in the London interbank market. Here are examples of provisions addressing these issues:

3.02 Illegality.

If any Lender determines that any Law has made it unlawful, or that any Governmental Authority has asserted that it is unlawful, for any Lender or its applicable Lending Office to make, maintain or fund Loans whose interest is determined by reference to the Eurodollar Base Rate, or to determine or charge interest rates based upon the Eurodollar Base Rate, or any Governmental Authority has imposed material restrictions on the authority of such Lender to purchase or sell, or to take deposits of, Dollars in the London interbank market, then, on notice thereof by such Lender to the Company through the Administrative Agent, (i) any obligation of such Lender to make or continue Eurodollar Rate Loans or to convert Base Rate Loans to Eurodollar Rate Loans shall be suspended and (ii) if such notice asserts the illegality of such Lender making or maintaining Base Rate Loans the interest rate on which is determined by reference to the Eurodollar Base Rate component of the Base Rate, the interest rate on which Base Rate Loans of such Lender, shall, if necessary to avoid such illegality, be determined by the Administrative Agent without reference to the Eurodollar Base Rate component of the Base Rate, in each case until such Lender notifies the Administrative Agent and the Company that the circumstances giving rise to such determination no longer exist. Upon receipt of such notice, (x) the Borrowers shall, upon demand from such Lender (with a copy to the Administrative Agent), prepay or, if applicable, convert all of such Lender's Eurodollar Rate Loans to Base Rate Loans (the interest rate on which Base Rate Loans of such Lender shall, if necessary to avoid such illegality, be determined by the Administrative Agent without reference

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[11] One issue with Libor is that it includes a component of risk relating to the quoting bank's credit risk.

[12] *See, e.g.*, Chris Salmon, Executive Director, Markets, Bank of England, The Bank and Benchmark Reform, Speech at the Roundtable on Sterling Risk-Free Reference Rates, London (Jul. 6, 2017).

[13] https://apps.newyorkfed.org/markets/autorates/sofr

[14] https://www.bankofengland.co.uk/markets/sonia-benchmark.

to the Eurodollar Base Rate component of the Base Rate), either on the last day of the Interest Period therefor, if such Lender may lawfully continue to maintain such Eurodollar Rate Loans to such day, or immediately, if such Lender may not lawfully continue to maintain such Eurodollar Rate Loans and (y) if such notice asserts the illegality of such Lender determining or charging interest rates based upon the Eurodollar Base Rate, the Administrative Agent shall during the period of such suspension compute the Base Rate applicable to such Lender without reference to the Eurodollar Base Rate component thereof until the Administrative Agent is advised in writing by such Lender that it is no longer illegal for such Lender to determine or charge interest rates based upon the Eurodollar Base Rate. Upon any such prepayment or conversion, the Borrowers shall also pay accrued interest on the amount so prepaid or converted.

3.03 Inability to Determine Rates.
If the Required Lenders determine that for any reason in connection with any request for a Eurodollar Rate Loan or a conversion to or continuation thereof that (a) Dollar deposits are not being offered to banks in the London interbank eurodollar market for the applicable amount and Interest Period of such Eurodollar Rate Loan, (b) adequate and reasonable means do not exist for determining the Eurodollar Base Rate for any requested Interest Period with respect to a proposed Eurodollar Rate Loan or in connection with an existing or proposed Base Rate Loan, or (c) the Eurodollar Base Rate for any requested Interest Period with respect to a proposed Eurodollar Rate Loan or in connection with a Eurodollar Rate Loan does not adequately and fairly reflect the cost to such Lenders of funding such Loan, the Administrative Agent will promptly notify the Company and each Lender. Thereafter, (x) the obligation of the Lenders to make or maintain Eurodollar Rate Loans shall be suspended and (y) in the event of a determination described in the preceding sentence with respect to the Eurodollar Base Rate component of the Base Rate, the utilization of the Eurodollar Base Rate component in determining the Base Rate shall be suspended, in each case until the Administrative Agent (upon the instruction of the Required Lenders) revokes such notice. Upon receipt of such notice, the Borrowers may revoke any pending request for a Borrowing of, conversion to or continuation of Eurodollar Rate Loans or, failing that, will be deemed to have converted such request into a request for a Borrowing of Base Rate Loans in the amount specified therein.[15]

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

[15] Syndicated Loan Agreement between International Assets Holding Corporation and Bank of America and other Lenders (October 1, 2010) available at http://www.sec.gov/Archives/edgar/data/913760/000118143110053284/rrd289999_33283.htm.

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 (Staughton J)[16]

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

[16] [1989] Q B 728

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....

[Libyan Arab Foreign Bank brought a number of claims that Bankers' Trust should have paid them many millions of dollars. The claims involved different theories about what actions Bankers' Trust should have taken at different times. In addition they brought claims based on breach of contract and of a duty of confidence]
... The issues thus raised... 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 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.... 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. ...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....

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.... 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...

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....

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 $161m., 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. ...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...

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... :

"...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....

... 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 ..raises only the .. 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 ... 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.

... 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.... 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....

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....

(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... 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)...

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...

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 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 .. 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. ..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.... 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......

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.

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?

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.[17] 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.

FEDERAL RESERVE

↗ ↘

[FEDERAL RESERVE MEMBER BANK] [FEDERAL RESERVE MEMBER BANK]

↗ ↘

PAYOR'S BANK RECEIVING BANK

↗ ↘

PAYOR PAYEE

CHIPS[18] 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.

Since the financial crisis policy-makers have been thinking about risks in "Financial Market Infrastructures" (FMIs) of which payment systems are an example. The Committee on Payment and Settlement Systems and the Technical Committee of IOSCO published **Principles for Financial Market Infrastructures** in April 2012.[19]

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[17] *See* https://www.frbservices.org/financial-services/wires/index.html.

[18] *See* https://www.theclearinghouse.org/payment-systems/chips.

[19] *See* http://www.bis.org/publ/cpss101a.pdf.

Here is an outline of the Principles:

General organisation
Principle 1: Legal basis. An FMI should have a well-founded, clear, transparent, and enforceable legal basis for each material aspect of its activities in all relevant jurisdictions.
Principle 2: Governance. An FMI should have governance arrangements that are clear and transparent, promote the safety and efficiency of the FMI, and support the stability of the broader financial system, other relevant public interest considerations, and the objectives of relevant stakeholders.
Principle 3: Framework for the comprehensive management of risks. An FMI should have a sound risk-management framework for comprehensively managing legal, credit, liquidity, operational, and other risks.
Credit and liquidity risk management
Principle 4: Credit risk. An FMI should effectively measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes. An FMI should maintain sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence. In addition, a CCP that is involved in activities with a more-complex risk profile or that is systemically important in multiple jurisdictions should maintain additional financial resources sufficient to cover a wide range of potential stress scenarios that should include, but not be limited to, the default of the two participants and their affiliates that would potentially cause the largest aggregate credit exposure to the CCP in extreme but plausible market conditions. All other CCPs should maintain additional financial resources sufficient to cover a wide range of potential stress scenarios that should include, but not be limited to, the default of the participant and its affiliates that would potentially cause the largest aggregate credit exposure to the CCP in extreme but plausible market conditions.
Principle 5: Collateral. An FMI that requires collateral to manage its or its participants' credit exposure should accept collateral with low credit, liquidity, and market risks. An FMI should also set and enforce appropriately conservative haircuts and concentration limits.
Principle 6: Margin. A CCP should cover its credit exposures to its participants for all products through an effective margin system that is risk-based and regularly reviewed.
Principle 7: Liquidity risk, An FMI should effectively measure, monitor, and manage its liquidity risk. An FMI should maintain sufficient liquid resources in all relevant currencies to effect same-day and, where appropriate, intraday and multiday settlement of payment obligations with a high degree of confidence under a wide range of potential stress scenarios that should include, but not be limited to, the default of the participant and its affiliates that would generate the largest aggregate liquidity obligation for the FMI in extreme but plausible market conditions.
Settlement
Principle 8: Settlement finality. An FMI should provide clear and certain final settlement, at a

minimum by the end of the value date. Where necessary or preferable, an FMI should provide final settlement intraday or in real time.
Principle 9: Money settlements. An FMI should conduct its money settlements in central bank money where practical and available. If central bank money is not used, an FMI should minimise and strictly control the credit and liquidity risk arising from the use of commercial bank money.
Principle 10: Physical deliveries. An FMI should clearly state its obligations with respect to the delivery of physical instruments or commodities and should identify, monitor, and manage the risks associated with such physical deliveries.
Central securities depositories and exchange-of-value settlement systems
Principle 11: Central securities depositories. A CSD should have appropriate rules and procedures to help ensure the integrity of securities issues and minimise and manage the risks associated with the safekeeping and transfer of securities. A CSD should maintain securities in an immobilised or dematerialised form for their transfer by book entry.
Principle 12: Exchange-of-value settlement systems. If an FMI settles transactions that involve the settlement of two linked obligations (for example, securities or foreign exchange transactions), it should eliminate principal risk by conditioning the final settlement of one obligation upon the final settlement of the other.
Default management
Principle 13: Participant-default rules and procedures. An FMI should have effective and clearly defined rules and procedures to manage a participant default. These rules and procedures should be designed to ensure that the FMI can take timely action to contain losses and liquidity pressures and continue to meet its obligations.
Principle 14: Segregation and portability. A CCP should have rules and procedures that enable the segregation and portability of positions of a participant's customers and the collateral provided to the CCP with respect to those positions.
Principle 15: General business risk. An FMI should identify, monitor, and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialise. Further, liquid net assets should at all times be sufficient to ensure a recovery or orderly wind-down of critical operations and services.
Principle 16: Custody and investment risks. An FMI should safeguard its own and its participants' assets and minimise the risk of loss on and delay in access to these assets. An FMI's investments should be in instruments with minimal credit, market, and liquidity risks.
Principle 17: Operational risk. An FMI should identify the plausible sources of operational risk, both internal and external, and mitigate their impact through the use of appropriate systems, policies, procedures, and controls. Systems should be designed to ensure a high degree of security and operational reliability and should have adequate, scalable capacity. Business continuity management should aim for timely recovery of operations and fulfilment of the FMI's

obligations, including in the event of a wide-scale or major disruption.
Access
Principle 18: Access and participation requirements. An FMI should have objective, risk-based, and publicly disclosed criteria for participation, which permit fair and open access.
Principle 19: Tiered participation arrangements. An FMI should identify, monitor, and manage the material risks to the FMI arising from tiered participation arrangements.
Principle 20: FMI links. An FMI that establishes a link with one or more FMIs should identify, monitor, and manage link-related risks.
Efficiency
Principle 21: Efficiency and effectiveness. An FMI should be efficient and effective in meeting the requirements of its participants and the markets it serves.
Principle 22: Communication procedures and standards. An FMI should use, or at a minimum accommodate, relevant internationally accepted communication procedures and standards in order to facilitate efficient payment, clearing, settlement, and recording.
Transparency
Principle 23: Disclosure of rules, key procedures, and market data. An FMI should have clear and comprehensive rules and procedures and should provide sufficient information to enable participants to have an accurate understanding of the risks, fees, and other material costs they incur by participating in the FMI. All relevant rules and key procedures should be publicly disclosed.
Principle 24: Disclosure of market data by trade repositories. A TR should provide timely and accurate data to relevant authorities and the public in line with their respective needs.