INTERNATIONAL FINANCE: SPRING 2022
SOVEREIGNS AS LENDERS AND DEPOSITORS

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The next set of material I have usually provided in this class is an introduction to the eurodollar market, with the Libyan Arab Foreign Bank case as an illustration. In one way that case illustrates an issue relating to the ability (and limitations on the ability) of a state to enforce its laws, including sanctions measures, with respect to activity partly beyond its jurisdiction. So the case is relevant to issues of cross-border regulation. As I mentioned before, we will look at sanctions measures later.

The Libyan Arab Foreign Bank case also illustrates a state owned enterprise acting as a depositor, so I am expanding this section of the materials to include a focus on litigation involving states and state entities as lenders and depositors. The material illustrates that there are risks a sovereign faces in holding assets in a foreign jurisdiction. Recently this issue has also arisen with respect to assets in the US belonging to Afghanistan's central bank, Da Afghanistan Bank (DAB): an Executive Order in February 2022 blocked these assets and recognized the needs of the people of Afghanistan and claims by victims of terrorism.[2]

Competing Claims to Control Assets

In class I mentioned the litigation involving gold deposits by the Central Bank of Venezuela at the Bank of England, and issues that arose when the Central Bank of

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[2] Executive Order on Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan (Feb. 11, 2022).

Venezuela asked the Bank of England to return the gold. The request was made by the Board of the bank appointed by President Maduro, but Juan Guaidó had also appointed an ad hoc Board to the bank which claimed the right to receive the funds.[3] In the litigation that followed the Bank of England's rejection of the request of the Maduro Board, the High Court originally held that, as the UK government recognised Guaidó as Venezuela's interim President the "one voice" doctrine required the courts to adopt the same approach.[4] But the English courts could not adjudicate the validity of a Venezuelan statute,[5] or of the Guaido appointment of the ad hoc Board of the Central Bank,[6] because of the act of state doctrine. The Court of Appeal[7] concluded that the extent of the UK Government's recognition was unclear, but the UK Supreme Court disagreed, following the one voice principle in **Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela**.[8] Issues relating to the validity of the Venezualan legislation were remanded to the High Court. Here is an excerpt from the judgment:

91. The starting point is that it is for HMG to decide with which entities or individuals it will have dealings in the conduct of foreign relations. While its usual practice under the 1980 policy

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[3] After a disputed election, the National Assembly announced that Mr Guaidó was the interim President of Venezuela until elections could be held, and then passed a Transition Statute, which was signed by Mr Guaidó, as President of the National Assembly, two vice-presidents, a secretary and an under-secretary of the National Assembly, and bears the seal of Mr Guaidó as President of Venezuela. The Supreme Tribunal of Justice of Venezuela then held this statute was unconstitutional and of no legal effect.

[4] Deutsche Bank AG London Branch v Receivers Appointed By the Court & Ors [2020] EWHC 1721 (Comm), [2020] WLR(D) 382, ¶ 45 (02 July 2020) at http://www.bailii.org/ew/cases/EWHC/Comm/2020/1721.html ("Just as with governments, a person may be recognised by HMG as the de jure or de facto President (or any other head of state). When a person is so recognised the courts must accept him as President pursuant to the "one voice" doctrine.") The litigation also involves issues relating to a gold swap agreement between the Venezuelan Central Bank and Deutsche Bank.

[5] *Id.* at ¶ 73.

[6] *Id.* at ¶ 92.

[7] "Maduro Board" of the Central Bank of Venezuela v "Guaido Board" of the Central Bank of Venezuela [2020] EWCA Civ 1249, [2020] WLR(D) 541 (05 October 2020) at http://www.bailii.org/ew/cases/EWCA/Civ/2020/1249.html.

[8] Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela [2021] UKSC 57 (20 December 2021) at http://www.bailii.org/uk/cases/UKSC/2021/57.html .

statement is not to recognise foreign governments or heads of state, it reserves the right to do so where it considers it appropriate to do so in all the circumstances. In the present case it took that exceptional course and the certificate drew attention to this fact. It is the duty of the receiving court to interpret and to give effect to such a certificate in accordance with the one voice principle. What matters here is the subjective intention of the executive as disclosed by the certificate.

> "The practice of obtaining the Executive's certificate and the rationale supporting it cannot be justified, unless the courts take every possible step to ensure that their interpretation of the certificate accords with the Executive's intentions." (F A Mann, Foreign Affairs in English Courts (1986), p 57)

92. First, I consider that the Court of Appeal erred in concluding that the language of the certificate was ambiguous or less than unequivocal. It is necessary to seek to ascertain the intention of HMG from the words used in the certificate in the light of the request to which it responds. Here the letter dated 14 February 2020 from Robin Knowles J to the Foreign Secretary expressly asked who is recognised by HMG as the head of state of Venezuela and who is recognised by HMG as head of government of Venezuela. The answer was unequivocal. It referred to and set out the Hunt statement:

> "The United Kingdom now recognises Juan Guaidó as the constitutional interim President of Venezuela, until credible presidential elections can be held."

It said nothing about the recognition of Mr Maduro. There was no need for it to do so. The certificate was a clear and unequivocal recognition of Mr Guaidó as President of Venezuela. This recognition necessarily entailed that Mr Maduro was not recognised as President of Venezuela.

93. Secondly, the Court of Appeal erred in interpreting the certificate by reference to extrinsic evidence and in permitting that extrinsic evidence to found an argument that the certificate was ambiguous when no ambiguity was apparent on the face of the certificate. In its judgment ... the Court of Appeal referred to five extraneous factors which were clearly influential in its reasoning. These included the dealings of HMG with Mr Maduro prior to the recognition of Mr Guaidó, diplomatic relations with the Maduro regime and the absence of accreditation of Mr Guaidó's representative in London. It was not appropriate for the Court of Appeal to look beyond the terms of the certificate in this way. I agree with the submission on behalf of the Foreign Secretary that an interpretative approach which has regard to HMG's wider conduct is capable of undermining the very purpose of a certificate and the constitutional allocation of functions which is reflected in the one voice principle. The dealings which HMG may have had or may continue to have with different persons or entities within Venezuela are irrelevant to the question of recognition which turns on the intention of HMG as stated in the executive certificate. The matter was stated by Lord Reid in Carl Zeiss in the following terms ([1967] 1 AC 853, 901E):

> "It is a firmly established principle that the question whether a foreign state ruler or government is or is not sovereign is one on which our courts accept as conclusive information provided by Her Majesty's Government: no evidence is admissible to contradict that information."...

94. A striking example is provided by Duff Development where it was argued on behalf of the appellant that the statement in the letter of the Secretary of State for the Colonies must be held to be qualified by the terms of the documents enclosed with it and that, taking the information as a whole, the true result was that Kelantan was not an independent but a dependent state and that accordingly the Sultan was not immune from process in the English courts. This submission was unanimously rejected by the House of Lords, notwithstanding the contents of the documents enclosed with the certificate. Viscount Cave stated ([1924] AC 797, 808-809):

> "In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that government continues to recognize the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. If after this definite statement a different view were taken by a British court, an undesirable conflict might arise; and, in my opinion, it is the duty of the court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point."

Viscount Finlay stated (at pp 814-816):

> "In the present case it is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's Government. We were asked to say that it is for the court and for this House in its judicial capacity to decide whether these restrictions were such that the Sultan had ceased to be a sovereign. We have no power to enter into any such inquiry....
>
> While there are extensive limitations upon its independence, the enclosed documents do not negative the view that there is quite enough independence left to support the claim to sovereignty. But, as I have said, the question is not for us at all; it has been determined for us by His Majesty's Government, which in such matters is the appropriate authority by whose opinion the courts of His Majesty are bound to abide."

Similarly, Lord Carson (at p 830) expressed the view that if it was open to him to disregard the statements contained in the letter from the Secretary of State, he "would find great difficulty in coming to that conclusion of fact, having regard to the terms of the documents enclosed in the letter". However, he considered that the courts were bound to decide the issue in accordance with the evidence provided by the Crown.

95. In this regard it is necessary to say something about the recent decision of the Court of Appeal in Mohamed v Breish [2020] EWCA Civ 637 which appears to have influenced the

approach of the Court of Appeal in the present case (see Males LJ at para 75). The litigation arose out of competing claims by the appointees of rival governments in Libya to control the assets of the Libyan Investment Authority in this jurisdiction. Two formal letters were issued by the FCO for use in the litigation. In the first letter the FCO stated that HMG supported the Government of National Accord ("GNA") and the Presidency Council as the legitimate executive authorities of Libya. In the second it stated that it continued to recognise those appointed by the GNA. These letters did not use the word "recognise" in relation to the GNA itself. Popplewell LJ, delivering the judgment of the Court of Appeal considered (at paras 30-39) that the question whether there had or had not been an unequivocal recognition fell to be determined from the terms of the two FCO letters and the public stance HMG had taken in its statements and conduct, including the fact that "HMG has full diplomatic relations with representatives of the GNA and has maintained them throughout the relevant period" (para 38). On this basis, the Court of Appeal concluded (at paras 39) that there was "no room for any doubt that HMG has recognised the GNA as the executive arm of government with sole oversight of executive functions". (By contrast, the Foreign Secretary has maintained in the present proceedings that Breish was not a case in which HMG deliberately departed from the 1980 policy.)

96. On its face, the resort by the Court of Appeal in Breish to such extraneous materials is inconsistent with the one voice principle. The Guaidó Board submits, however, that this is not the case because the Court of Appeal in Breish was not concerned with the meaning of a certificate but with the logically prior question as to the status of the letters ie whether HMG had made a statement of recognition which engaged the one voice principle or merely a statement of political support. But, even if that is accepted, it leaves a further difficulty. The Court of Appeal seems to have engaged in a process of inferring recognition from the dealings between HMG and the relevant Libyan entities. For reasons developed below I consider it inappropriate for courts in this jurisdiction to rely on notions of implied recognition. If the FCDO has departed from its usual practice by issuing an express statement of recognition, any ambiguity in the statement should be resolved by a further request to the FCDO for clarification. In the absence of such an express statement of recognition by HMG, the issue of recognition does not arise and the courts are left to conduct an inquiry as to whether the entity in fact carries out the functions of a government in accordance with Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA.

97. Thirdly, the Court of Appeal erred in introducing the concept of implied de facto recognition and in addressing the possibility that HMG might recognise Mr Guaidó as President de jure, while also impliedly recognising Mr Maduro as President de facto.

98. Implied recognition is a concept of international law and its function on the international plane is widely acknowledged. However, there is no scope for the application of any notion of implied recognition by courts in this jurisdiction. In the present case, exceptionally, Her Majesty's Government departed from its 1980 policy and made an express statement in relation to the status of a person claiming to be head of state of Venezuela. That statement must be

interpreted and applied by the courts and is determinative. No question of implied recognition arises. Where there is no such express statement, Hobhouse J in Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA and Mance J in Kuwait Airways Corpn v Iraqi Airways Co (No 5) have demonstrated that it is not open to the courts to infer recognition from the conduct of HMG. Quite apart from the practical difficulties of doing so, to infer the intention of HMG in relation to recognition would be to trespass into an area which is constitutionally within the exclusive competence of the executive. In such circumstances recognition ceases to be the determinative criterion and the court must identify who may be the government or head of state by making its own findings of fact as indicated in Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA.

99. Reliance by the Court of Appeal on the concepts of de jure and de facto recognition was also misplaced. HMG has on occasions in the past used the terms de facto and de jure to describe concurrent recognition of two different authorities in situations where the de facto regime had usurped power against the will of the de jure sovereign, most notably during Italy's invasion and occupation of Ethiopia between 1935 and 1939 (Bank of Ethiopia v National Bank of Egypt; Haile Selassie v Cable and Wireless (No 2) [1939] Ch 182) and during the Spanish Civil War between 1936 and 1939 (Banco de Bilbao v Sancha; The Arantzazu Mendi). The Foreign Secretary has also drawn attention to periods of concurrent recognition of two governments in Greece in 1916 (Hansard (HC Debates), 14 November 1916, Vol 87, col 551) and in China between 1949 and 1950 (Civil Air Transport Inc v Central Air Transport Corpn [1953] AC 70, 86-89). In all of these instances the terms de jure and de facto were used expressly by HMG in formal statements of recognition. However, we have been told by the Foreign Secretary that by the time of the 1980 policy statement the terms de jure and de facto recognition were no longer in wide usage and that the more recent practice of HMG, on the exceptional occasions when it has accorded recognition to a government at all, has been to accord recognition only, without using these terms. I doubt, therefore, that the distinction between de facto and de jure recognition, in any of its forms, has a useful role to play any longer before courts in this jurisdiction.

100. The executive certificate in the present case did not include any reference to de jure or de facto recognition. On the contrary, its only statement of recognition was an express unequivocal statement that Mr Guaidó was recognised as the constitutional interim President. It was not appropriate for the Court of Appeal to infer from the statement in the certificate that "the oppression of the illegitimate, kleptocratic Maduro regime must end" that this might amount to the recognition by HMG of the Maduro regime as the de facto government of Venezuela. Still less was it appropriate for the Court of Appeal to infer from the references to Mr Guaidó as "constitutional interim President of Venezuela until credible elections could be held" that HMG might recognise Mr Guaidó as the person entitled to exercise all the powers of the President, while also recognising Mr Maduro as the person who does in fact exercise some or all of the powers of the President.

101. For these reasons, I consider that the certificate was an unambiguous and unqualified statement by the executive that it recognises Mr Guaidó as interim President of Venezuela. That statement is binding on courts in this jurisdiction.

The litigation also involves the act of state doctrine. Generally (but with exceptions) English courts do not adjudicate the validity of acts of a foreign state within its own territory, and will recognize the statutes and laws of a state with respect to acts within its territory. The appointment of the ad hoc board was such an act. However, English rules of private international law and public policy of the forum also involve recognition of the judgments of foreign courts, and the Commercial Court should consider this issue. Here is another excerpt:

153. ...it might appear that since Mr Guaidó is recognised by HMG as the President of Venezuela it is not open to UK courts to challenge the lawfulness or legality of his appointments to the board of the BCV. However, this reasoning fails to take account of the existence of judgments of the STJ to contrary effect...
155. Where it applies, the foreign act of state doctrine holds national courts incompetent to adjudicate upon the lawfulness or validity of the sovereign acts of a foreign state. However, within most modern states sovereign power is shared among the legislative, executive and judicial branches of government and it cannot be assumed that the conduct of the executive is the sole manifestation of sovereign power or that it should necessarily prevail over the position taken by the legislature or the judiciary. As a result, in seeking to respect the sovereignty of a foreign state, it will not always be appropriate for courts in this jurisdiction to focus exclusively on acts of the executive. In Belhaj [2017] AC 964 both Lord Neuberger and Lord Mance touched on the difficulties which can arise in this regard if sovereignty is equated with executive activity. Thus, Lord Neuberger explained... that where an executive act is unlawful by the law of the state concerned, a failure by a court in the United Kingdom to treat it as unlawful... might conflict with Rule 1 which requires courts in the United Kingdom to recognise and not question a foreign state's legislation and other laws which take effect within its territory. In a further passage ...he observed that if a confiscation was unlawful under the laws of the foreign state and its courts were so to hold, it was by no means obvious to him why it would be appropriate for the confiscation to be treated as valid by the courts of another state to which the property had been transferred. Similarly, Lord Mance... warned against equating sovereignty with executive activity.

> "In states subject to the rule of law, a state's sovereignty may be manifest through its legislative, executive or judicial branches acting within their respective spheres. Any excess of executive power will or may be expected to be corrected by the judicial arm. A rule of recognition which treats any executive act by the

> government of a foreign state as valid, irrespective of its legality under the law of the foreign state (and logically, it would seem, irrespective of whether the seizure was being challenged before the domestic courts of the state in question), could mean ignoring, rather than giving effect to, the way in which a state's sovereignty is expressed. The position is different in successful revolutionary or totalitarian situations, where the acts in question will in practice never be challenged. It is probably unsurprising that the cases relied upon as showing the second kind of foreign act of state are typically concerned with revolutionary situations or totalitarian states of this kind."

156. The present case is indeed unusual by comparison with other cases which raise issues of justiciability in that here both the executive and judicial branches within Venezuela have spoken. Mr Guaidó, recognised by HMG as the President of Venezuela, has made appointments to the board of the BCV which the STJ, as a part of the judicial branch of government, has declared to be unlawful and of no effect. As a result, this court is confronted with conflicting positions adopted by the executive and the judiciary of Venezuela. The question arises, therefore, whether in such circumstances the foreign act of state doctrine... requires courts in this jurisdiction to defer to acts of the executive of a foreign state, in priority to recognising the rulings of its judiciary. It should be noted in this regard that it is the pleaded case of the Guaidó Board that the STJ is not to be regarded by an English court as an independent court of law. That issue, however, falls outside the preliminary issues in this appeal and consideration of it, if necessary, would have to be deferred. At this stage of the proceedings we are concerned with the submission by the Guaidó Board that it is entitled to succeed on the basis of act of state, quite apart from the position in the municipal law of Venezuela.

157. Although judicial rulings of a foreign state are manifestations of state sovereignty, it is now clear that they do not themselves attract the operation of any rule of foreign act of state applicable in this jurisdiction and, as a result, are not entitled to the deference which may be shown to legislative and executive acts of a foreign state. So much was established by Lord Collins delivering the judgment of the Judicial Committee of the Privy Council in Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7; [2012] 1 WLR 1804, para 101:

> "The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in Buttes Gas & Oil Co v Hammer (No 3) …, is the basis of Lord Diplock's dictum in The Abidin Daver … and the decisions which follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it."

158. Rix LJ was able to build on this foundation when delivering the judgment of the Court of Appeal in Yukos, which held justiciable the issue whether judicial acts had been part of a "campaign waged by the Russian state for political reasons against the Yukos group and its former CEO" ... This difference of approach does not reflect any hierarchical inferiority of judicial acts but rather reflects a shared understanding of how courts should behave under the rule of law. As Lord Mance put it in Belhaj...:

> "If one believes in justice, it is on the basis that all courts will or should subscribe to and exhibit similar standards of independence, objectivity and due process to those with which English courts identify."

159. As a result, courts in this jurisdiction are more willing to investigate whether a foreign court is acting in a way that meets the standards expected of a court and whether there has occurred or is likely to a occur a failure of substantial justice. For this reason, foreign judgments fall to be assessed under different rules from those applicable to legislative and executive acts and are simply less impervious to review. The matter is admirably expressed by Rix LJ in Yukos... :

> "So the position is, to put the matter broadly, that whereas in a proper case comity would seem to require (at any rate as a principle of restraint rather than abstention) that the validity or lawfulness of the legislative or executive acts of a foreign friendly state acting within its territory should not be the subject of adjudication in our courts, comity only cautions that the judicial acts of a foreign state acting within its territory should not be challenged without cogent evidence. If then the question is asked - Well, why should acts of a foreign judiciary be treated differently from other acts of state, and what is the basis of that difference? - the answer, in our judgment, is that judicial acts are not acts of state for the purposes of the act of state doctrine. The doctrine in its classic statements has never referred to judicial acts of state, it has referred to legislative or executive (or governmental or official) acts of a foreign sovereign. … It is not hard to understand why there should be a distinction. Sovereigns act on their own plane: they are responsible to their own peoples, but internationally they are responsible only in accordance with international law and internationally recognised norms. Courts, however, are always responsible for their acts, both domestically and internationally. Domestically they are responsible up to the level of their supreme court, and internationally they are responsible in the sense that their judgments are recognisable and enforceable in other nations only to the extent that they have observed what we would call substantive or natural justice, what in the United States is called due process, and what internationally is more and more being referred to as the rule of law. In other words the judicial acts of a foreign state are judged by judicial standards, including international standards regarding jurisdiction, in accordance with doctrines separate from the act of state doctrine, even if the dictates of comity still have an important role to play. As

Lindley MR said in Pemberton v Hughes [1899] 1 Ch 781, 790:

> 'If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice'."..

In the result, the Court of Appeal therefore agreed with the holding of Hamblen J at first instance... that "there is no rule against passing judgment on the judiciary of a foreign country".

160. Similarly, the US act of state doctrine does not apply to foreign court judgments (Timberland Lumber Co v Bank of America, NT & SA, 549 F 2d 597, 608 (9th Cir 1976); The American Law Institute, Restatement of the Law Fourth, the Foreign Relations Law of the United States (2018), para 441, pp 313-314). The commentators to the US Restatement note that, were the rule otherwise, courts in the United States would face a significant conflict between the doctrines governing the recognition and enforcement of foreign judgments, on the one hand, and the act of state doctrine on the other. Philippine National Bank v United States District Court for the District of Hawaii (2005) 397 F 3d 768 (9th Cir) in which the act of state doctrine was applied to the judicial acts of a foreign court is disapproved in the US Restatement (at p 314) as confusing the question whether a foreign judgment could be an act of state with the question whether the existence of a foreign judgment would preclude a US court from giving effect to the foreign official act on which the judgment rested. It was not followed by the Court of Appeal of England and Wales in Yukos [2014] QB 458, paras 88-89, where Rix LJ noted that in Altimo Holdings [2012] 1 WLR 1804, para 102, Lord Collins cited a number of US federal court decisions in which allegations of impropriety against foreign courts had been adjudicated in the context of forum non conveniens and enforcement of judgments.

161. There is therefore no rule requiring an unquestioning acceptance by courts in the United Kingdom of the validity or legality of a foreign judgment. Rather, the status of a foreign judgment is left to be determined in accordance with domestic rules on the recognition and enforcement of foreign judgments.

162. Mr Andrew Fulton QC on behalf of the Guaidó Board submits that the correct approach in situations where such a conflict arises between the executive and the judiciary in a foreign state is to .. give effect to the executive act, subject only to the domestic public policy exception in cases where that applies. If the executive act is a sovereign act and if recognition of the act would not offend English public policy, then an English court should treat it as valid and effective under the act of state doctrine, without further inquiry. He submits that in the present case this requires effect to be given to the executive acts of Mr Guaidó and the Guaidó Board since there are no grounds of public policy which require UK courts to decline to do so. It does not necessarily follow, however, that when confronted with such conflicting positions by the executive and the judiciary of a foreign state, courts in this jurisdiction are required to accept

the lawfulness and validity of the executive act in preference to recognising the foreign judgment, save in cases where to do so would conflict with the public policy of the forum. No doubt situations will arise in which the act of the executive has been quashed by the foreign court on grounds which would also attract the operation of UK public policy, such as a gross violation of human rights. However, there are likely to be other situations in which the executive act has been quashed on some less egregious ground, such as a failure to follow the correct procedure, and it is not immediately obvious that effect should nevertheless be given to the executive act. In this regard, I note by way of analogy that in Oppenheimer v Cattermole [1976] AC 249 the House of Lords gave effect to a 1968 decision of the German Federal Constitutional Court both with regard to the discriminatory National Socialist decree which had purported to deprive the appellant of his German nationality, which it held to be "Unrecht" and not law, and with regard to the Federal Basic Law of 1949 (see Lord Hailsham LC at pp 262, 263; Lord Cross at pp 270-273). In this way the House of Lords followed a decision of the Federal Constitutional Court in order to determine the effect of a constitutional provision on prior legislation (see H W Baade, "The Operation of Foreign Public Law" (1995) 30(3) Texas International Law Journal 429, 461).

163. The question for consideration here is, to my mind, a more fundamental one. It is necessary to ask whether [the act of state rule] has any application to a situation in which an executive act of a foreign state has been quashed by the judiciary of that state. In order to answer this question, it is necessary to have regard to the rationale of that rule.

164. In Belhaj Lord Sumption noted ...that the English decisions had rarely tried to articulate the policy on which the foreign act of state doctrine is based and had never done so comprehensively. However, he discerned two main considerations underlying the doctrine. The first was what is commonly called "comity" but which he preferred to call "an awareness that the courts of the United Kingdom are an organ of the United Kingdom". Like any other organ of the United Kingdom, its judiciary must respect the sovereignty and autonomy of other states. Secondly, the act of state doctrine is influenced by the constitutional separation of powers, which assigns the conduct of foreign affairs to the executive. I agree.

165. As we have seen, the authorities supporting the existence of [the act of state rule], proceed on the basis that courts in this jurisdiction should not sit in judgment or adjudicate upon the lawfulness or validity of a foreign state's sovereign acts within its own territory. On closer examination it appears that what is considered objectionable in such a course of conduct is the intrusion into the internal affairs of a foreign state which such an examination or passing of judgment would involve. While international law does not in general require states to apply rules of act of state such as those identified here, there can be little doubt that such rules, where they exist, are rooted in the concept of mutual respect for the sovereignty and independence of states and are intended to promote international comity. This is apparent, for example, in the following observation of Diplock LJ in Buck v Attorney General [1965] Ch 745, 770, where the claimants sought to challenge the legality and validity of the Constitution of Sierra Leone, an

independent sovereign state:

> "As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, videlicet, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law.… For the English court to pronounce upon the validity of the law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rule of comity. In my view, this court has no jurisdiction so to do."

166. Similarly, in R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147, a case concerning a claim of immunity by General Pinochet, a former head of state of Chile, Lord Millett referred to the close relationship between state immunity ratione materiae (ie subject matter immunity) and the Anglo-American act of state doctrine. He observed...:

> "The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states: see Duke of Brunswick v King of Hanover (1848) 2 HL Cas 1; Hatch v Baez, 7 Hun 596; Underhill v Hernandez (1897) 168 US 250. These hold that the courts of one state cannot sit in judgment on the sovereign acts of another …"

167. In the same case, Lord Phillips explained that there were two explanations for immunity ratione materiae. The first was that to sue an individual in respect of the conduct of the state's business was indirectly to sue the state. He continued...:

> "The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have none the less, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine."...

169. The act of state principle under consideration would therefore prohibit courts in this jurisdiction from questioning or adjudicating upon the lawfulness or the validity of certain executive acts of a foreign state on the ground that to do so would constitute an objectionable

interference with the internal affairs of that state. This rationale can have no application, however, where courts in this jurisdiction merely give effect to a judicial decision whereby the courts of the foreign state concerned, acting within their proper constitutional sphere, have previously declared the executive acts to be unlawful and nullities. If a UK court were to give effect to such a foreign judgment, it would not itself be sitting in judgment on the executive act but giving effect to the view of it taken by the judicial branch of government within the foreign state. Lord Neuberger's [act of state rule] could therefore have no application to such a situation. Furthermore, although judicial acts of that foreign state do not enjoy before UK courts the protection of any such rule of non-justiciability, it may in certain circumstances nevertheless be appropriate to recognise or give effect to them in accordance with domestic rules of private international law. If, for example, an executive act of the US President were to be declared unconstitutional by a judgment of the US Supreme Court, recognition of that judgment (if it were otherwise entitled to recognition before UK courts) would not involve any investigation into or adjudication upon the internal affairs of the United States so as to bring the act of state principle into operation. The matter was neatly expressed by Males LJ in the Court of Appeal in the present case... :

> "There is, however, no want of comity in holding that the act of state doctrine does not require the English court to treat as valid and effective as a sovereign act of executive power that which the foreign court has held to be unlawful and therefore null and void, while recognition of the separation of powers should operate both ways. To recognise the decision of the foreign court, acting within its own sphere of responsibility under the constitution of the foreign state, is in accordance with principles of comity and the separation of powers."

170. The focus of the present case therefore shifts to the status of the judgments of the STJ on which the Maduro Board relies. These judgments do not themselves attract the protection of any act of state rule. The question becomes whether, and if so to what extent, they should be recognised or given effect by courts in this jurisdiction. These are matters which fall outside the preliminary issues and which have not been addressed in argument before us. It will, accordingly, be necessary to remit this issue for further consideration by the Commercial Court. One matter, however, is clear. Courts in this jurisdiction will refuse to recognise or give effect to foreign judgments such as those of the STJ if to do so would conflict with domestic public policy. On this appeal we have not been taken to the judgments in question and the Commercial Court will have to address this issue among others when the matter is remitted to it. It is important to note at this point, however, that the public policy of the forum will necessarily include the fundamental rule of UK constitutional law that the executive and the judiciary must speak with one voice on issues relating to the recognition of foreign states, governments and heads of state. As a result, if and to the extent that the reasoning of the STJ leading to its decisions that acts of Mr Guaidó are unlawful and nullities depends on the view that he is not the President of Venezuela, those judicial decisions cannot be recognised or given effect by

courts in this jurisdiction because to do so would conflict with the view of the United Kingdom executive.

In **Jimenez v Palacios**,[9] addressing competing claims with respect to the appointment of the Boards of Directors of PDV Holding, Inc, Citgo Holding Inc. And Citgo Petroleum Corporation, the Delaware Court of Chancery (VC McCormick) applied the political question doctrine and the act of state doctrine:

The political question doctrine requires courts to accept as binding the U.S. President's determination to recognize a foreign government. The act of state doctrine requires courts to assume the validity of an official act of a recognized foreign government performed within its own territory. Applying these doctrines, this decision accepts as binding the U.S. President's recognition of the Guaidó government and assumes the validity of the Guaidó government's appointments to the PDVSA board.

The plaintiffs raise myriad arguments in an effort to complicate this straightforward analysis. They parse the U.S. President's official statement recognizing the Guaidó government, arguing that Guaidó's authority as "interim" President is limited. They pit the internal affairs doctrine against the more potent political question and act of state doctrines, arguing that the former should override the latter. They invoke exceptions to the act of state doctrine, arguing that the Guaidó government lacks jurisdictional indicia of statehood and exceeded its territorial limitations when appointing directors to the PDVSA board. Not one of these arguments persuades, and this decision resolves these issues in favor of the defendants.

But this decision does not reach the ultimate question of who comprises the boards of the nominal defendants. The consents appointing the directors were provided to the plaintiffs as attachments to briefing and are not appropriately considered on a motion for judgment on the pleadings. This decision thus treats the defendants' motion as one for summary judgment and grants the plaintiffs an opportunity to submit an affidavit identifying disputed facts foreclosing summary judgment in the defendants' favor...

Although Venezuela's economy struggles, Venezuela's government lays claim to the largest proven oil reserves in the world. PDVSA is a Venezuelan company formed in 1975 by the President of Venezuela. Venezuela owns PDVSA, which indirectly owns CITGO Petroleum Corporation ("CITGO Petroleum"), a Delaware corporation headquartered in Houston and one of the largest operating petroleum refiners in the United States.

PDVSA owns CITGO Petroleum through two other Delaware corporations, PDV Holding, Inc. and CITGO Holding, Inc. (with CITGO Petroleum and PDV Holding, the "CITGO Entities"). Venezuela is the sole stockholder of PDVSA, PDVSA is the sole stockholder of PDV Holding,

[9] (Del. Ch 2019), aff'd 237 A 3d. 68 (Del. Supr. 2020).

PDV Holding is the sole stockholder of CITGO Holding, and CITGO Holding is the sole stockholder of CITGO Petroleum.

Historically, the President of Venezuela had the power to appoint the members of the board of directors of PDVSA by decree. Maduro last exercised that authority in October 2018...

On February 8, 2019, pursuant to the authority granted him under the Transition Statute, Guaidó appointed five individuals as the ad hoc Managing Board of PDVSA "for the purpose of carrying out all necessary actions to appoint a Board of Directors" for PDV Holding. On February 13, 2019, the National Assembly approved this action by resolution.

On February 14, 2019, Venezuela's Constitutional Court, a subdivision of the Supreme Tribunal, issued a decision finding the Transition Statute unconstitutional and declaring the Transition Statute and the National Assembly resolution null and void. The Constitutional Court found Guaidó's appointment of PDVSA's Managing Board unlawful and declared it a nullity...

On February 15, 2019, the Guaidó-appointed Managing Board, acting for PDVSA as the sole stockholder of PDV Holding took action by a written consent pursuant to Section 228 of the Delaware General Corporation Law ("DGCL") to elect a new board of PDV Holding.

Also on February 15, 2019, each member of the new PDV Holding board executed a unanimous written consent pursuant to Section 141(f) of the DGCL electing a new officer of PDV Holding. That officer then caused PDV Holding to act by written consent as the sole stockholder of CITGO Holding to elect a new board of CITGO Holding. The CITGO Holding board repeated the steps for CITGO Petroleum.

The defendants allege (and the plaintiffs dispute) that the written stockholder consents electing the new boards of the CITGO Entities became effective on February 18, 2019, when each consent was delivered to the respective CITGO Entity....

As Chief Executive, the President of the United States is the "sole organ of the federal government in the field of international relations[,]" and thus holds the exclusive power of recognition of a foreign government. "Recognition is a `formal acknowledgment' . . . `that a particular regime is the effective government of a state.'" "The very purpose of the recognition by our government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are." Recognition can be accomplished expressly through a statement of the Executive Branch or implicitly by receiving diplomatic representatives.

Given the exclusive nature of the Executive Branch's recognition authority, the Supreme Court of the United States has held that any decision by the Executive to recognize (or not recognize) a foreign government is a non-justiciable political question that federal and state courts must accept. The seminal Supreme Court decision on recognition of a foreign government, Oetjen v. Central Leather Co., addressed the seizure of animal hides in Mexico by General Francisco Villa, a representative of the revolutionary government of Venustiano Carranza. General Villa seized the hides to satisfy an assessment imposed by the revolutionary regime, and the hides were ultimately sold to the defendant. The plaintiff brought suit claiming that the defendant

lacked good title to the hides because General Villa had obtained them unlawfully. During the pendency of the action in the lower courts, the United States recognized the Carranza government as both the de facto and de jure government of Mexico, which proved dispositive on appeal. The Supreme Court held:

> Who is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.

Applying that principle, the Court held that the Carranza government "must be accepted as the legitimate government of Mexico" and gave that conclusion retroactive effect. The Court further invoked the act of state doctrine, a companion to the political question doctrine discussed more fully in the next section of this decision, to presume valid General Villa's actions in seizing the hides on behalf of the recognized Carranza government.

Oetjen is well-settled law. Multiple decisions of the Supreme Court and lower courts have applied its holding. Under Oetjen and its progeny, the applicable rule is clear: the Executive Branch's decision to recognize a foreign state "conclusively binds" all domestic courts, such that they must accept that decision.This decision calls for a straightforward application of that rule. On January 23, 2019, the Executive Branch issued a statement "officially recognizing the President of the Venezuelan National Assembly, Juan Guaido, as the Interim President of Venezuela." That statement also described the National Assembly as "the only legitimate branch of government duly elected by the Venezuelan people[.]" The word "only" means "alone in a category" or to the exclusion of others. Thus, no other elected branch of government in Venezuela— not Maduro nor the Constituent Assembly—is legitimate in the eyes of the Executive Branch. The determinations of the Executive Branch are unambiguous: Guaidó is recognized, the National Assembly is legitimate, and neither Maduro nor the Constituent Assembly are legitimate parts of the Venezuelan government...

At present... it cannot be disputed that Guaidó is the voice of Venezuela's sole effective government as recognized by the U.S. President. This Court is bound by that determination... Recognition of Guaidó's government has significant consequences in this litigation because foreign sovereigns are entitled to the benefits of the act of state doctrine.That doctrine confers presumptive validity on official acts of a foreign sovereign performed within its own territory. In this case, it means that Guaidó's creation of the Managing Board of PDVSA is valid.

A product of federal common law, the jurisprudential bases for the doctrine have evolved. The classic statement of the act of state doctrine is found in Underhill, which arose from a prior period of unrest in Venzuela. In that case, the plaintiff was a U.S. citizen working in the Venezuelan city of Bolivar. When revolution erupted, he was physically detained in Bolivar by revolutionary forces. Upon returning to the United States, he brought claims sounding in tort

against his captors. The revolutionary forces were ultimately successful and subsequently recognized by the United States. The Supreme Court of the United States held that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." Applying this rule, the Court found in favor of the defendant, holding that the decision to detain the plaintiff was a presumptively valid act of a recognized sovereign.
The Supreme Court of the United States reexamined and reformulated the act of state doctrine in Sabbatino. Sabbatino involved a dispute over the proceeds from the sale of sugar cargo, which had belonged to an American-owned company, but which the Cuban government confiscated while the cargo was in Cuban waters. The defendants argued that the act of confiscation violated international law and was thus not entitled to deference under the act of state doctrine. To address this argument, the Court revisited the jurisprudential bases of the doctrine.
Underhill and intervening cases had articulated the act of state doctrine as an expression of comity and international law.The Court in Sabbatino rejected that theory, recasting the doctrine as arising from "constitutional underpinnings," or "the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." As part of the family of theories derived from separation of powers principles, the act of state doctrine overrides otherwise binding law, including state and international law. The Sabbatino decision explained that the Judicial Branch

> will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

The Supreme Court of the United States had occasion to reexamine the act of state doctrine in W.S. Kirkpatrick, further clarifying its operation in two significant ways. The Court first distinguished the act of state doctrine from the political question and sovereign immunity doctrines, holding that "[t]he act of state doctrine is not some vague doctrine of abstention but a `principle of decision binding on federal and state courts alike.'" The Court next clarified the scope of official acts protected by the doctrine. Before W.S. Kirkpatrick, U.S. Supreme Court cases applying the act of state doctrine involved acts of expropriation by foreign governments, leaving open the question of whether the Court would apply the doctrine to other actions. In W.S. Kirkpatrick, the Supreme Court described the doctrine as applying to any "official act of a foreign sovereign performed within its own territory."
In sum, in its modern form, the act of state doctrine derives from the principle of separation of powers. It applies to a multitude of foreign acts performed by recognized sovereigns within territorial limits. Once applied, the doctrine requires the Court to assume the validity of the

official act in question.
In this case, the act of state doctrine resolves the question of who constitutes the PDVSA board. The Guaidó government's reconstitution of the PDVSA board was the official act of a recognized sovereign taken wholly within its own territory. Under the act of state doctrine, this Court must accept that action as valid without further inquiry...
The political question doctrine makes recognition of a foreign government "conclusive on all domestic courts, which are bound to accept that determination[.]" This well-settled pronouncement does not permit domestic courts to ignore the Executive Branch's de jure recognition based on its own assessment of a foreign sovereign's de facto control...
The act of state doctrine even extends to decrees by recognized governments in exile that control no territory...
A rule requiring courts to ignore de jure recognition and instead apply subjective criteria of statehood would invite courts to second guess the determinations properly vested within the Executive Branch. Such a rule would allow for multiple and potentially divergent rulings where this nation must speak with "one voice."...
The plaintiffs alternatively contend that the actions of Maduro's regime, which they characterize as "non-recognized" or "unrecognized," are equally entitled to presumptions of validity under the act of state doctrine. According to at least one articulation of black letter law, however, a "state derecognizes a regime when it recognizes another regime as the government." This concept is sound. Applying the act of state doctrine to the actions of multiple, competing sovereigns would undermine the purpose of recognition, which is to identify the singular authority with whom this nation and nationals may engage. Accordingly, recognition of one sovereign authority must exclude others, particularly when those other bodies have taken positions contrary to the recognized sovereign. Thus, the recognition of the Guaidó government effectively derecognized the Maduro regime, and the plaintiffs' arguments based on non-recognition fail...
In this case, the official act is the replacement of the PDVSA board. That act occurred within Venezuela's territorial boundaries and the plaintiffs do not contend otherwise. The knock-on effects of that act which took place outside of Venezuela do not render the original act extraterritorial.

How different are the approaches in these 2 cases? On the issue of recognition of Maduro and Guaidó, different countries have taken different approaches, and in only a few cases have countries that have recognized Guaidó ended diplomatic relations with the Maduro government.[10] In 2021 the EU referred to “Juan Guaidó, as well as other representatives of the democratic opposition” as “important actors and privileged

[10] Kristen Martinez-Gugerli, Interactive Map: Degrees of Diplomatic Recognition of Guaidó and Maduro (Oct 15, 2020) at https://www.venezuelablog.org/interactive-map-degrees-of-diplomatic-recognition-of-guaido-and-maduro/.

interlocutors and encourages the democratic opposition to take a unified stance with a view to an inclusive process of dialogue and negotiation."[11]

Financial Transactions under Duress: Russia and Ukraine

Another case currently before the UK Supreme Court[12] involves notes issued by Ukraine to Russia which Ukraine has argued should be treated as void or voidable due to duress: Law Debenture Trust Corporation plc v Ukraine. The following excerpts are from the decision of the Court of Appeal:[13]

3. The claimant, and respondent to the appeal, is The Law Debenture Trust Corporation p.l.c. (Law Debenture) as the trustee of Notes with a nominal value of US$3 billion and carrying interest at 5% pa (the Notes). The Notes were constituted by a trust deed dated 24 December 2013 (the Trust Deed) to which the named parties were Law Debenture and Ukraine. The Trust Deed is expressed to be governed by English law, with the English courts having exclusive jurisdiction. By the terms of the Trust Deed, Ukraine waived sovereign immunity. The judge helpfully summarised the material terms of the Trust Deed and ancillary documents in his judgment at [36] – [41] which need not be repeated here. The documentation included an agency agreement between Ukraine, Law Debenture and Citibank, N.A., London Branch (Citibank) and others, pursuant to which Citibank would act as Principal Paying Agent and Registrar in respect of the Notes (the Agency Agreement). The Agency Agreement provided inter alia that Law Debenture might, by notice in writing to Ukraine, require Ukraine to pay all subsequent payments in respect of the Notes to or to the order of the Law Debenture and not to the Principal Paying Agent, once the Notes became due and payable.

4. The sole subscriber of the Notes was the Russian Federation (Russia), acting by its Ministry of Finance. The subscription monies of US$3 billion were received by Ukraine on 24 December 2013. Although the Notes were listed on the Irish stock exchange and were fully tradeable instruments, Russia has retained the Notes since their issue. Again, the judge helpfully summarised in his judgment at [9] – [18] the structure of the arrangement and the mechanics for the creation and issue of the Notes and for the payment of the subscription monies by Russia.

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[11] Council of the EU, Council Conclusions on Venezuela (Jan. 25, 2021).

[12] Hearings took place on November 11, 2021: https://www.supremecourt.uk/cases/uksc-2018-0191.html .

[13] Ukraine v The Law Debenture Trust Corporation Plc (Rev 1) [2018] EWCA Civ 2026, [2019] QB 1121, [2019] 2 WLR 655, [2018] WLR(D) 583 (14 September 2018) at http://www.bailii.org/ew/cases/EWCA/Civ/2018/2026.html.

5. The interest on the Notes was payable biannually in arrears and, in the course of 2014-2015, Ukraine made three interest payments for the full amounts due on each occasion, totalling US$223,333,350. The principal amount of the Notes fell due for payment, together with the last instalment of interest, on 21 December 2015. Payment was not then made and Ukraine has since refused to make payment.

6. Law Debenture acts as trustee on behalf of the holder or holders of the Notes for the time being, and holds the benefit of the covenants, including the covenants to pay the principal of the Notes and interest, for such holder or holders. Russia has been the beneficial owner of the Notes at all times. Exercising powers conferred on it by the Trust Deed, Russia gave on 16 February 2016 a direction to Law Debenture to take enforcement proceedings in respect of the Notes. The present proceedings were issued by Law Debenture on 17 February 2016, claiming US$3.075 billion (being the principal and the last instalment of interest due on 21 December 2015) and continuing interest.

7. Ukraine has not challenged the jurisdiction of the English courts to determine the claim against it, but it served a defence and resisted the application for summary judgment on a number of grounds.

8. There is an important political background to the defences raised by Ukraine. As summarised by the judge in his judgment at [4], Ukraine's case as to the background to the subscription of the Notes by Russia was as follows:

> 4. "Ukraine's case is that Russia applied massive, unlawful and illegitimate economic and political pressure to Ukraine in 2013 to deter the administration led by President Viktor Yanukovych from signing an Association Agreement with the European Union, which was to have been signed at the Vilnius Summit on 28 November 2013, and to accept Russian financial support instead. The Notes were to be the first tranche of that support."

9. Further background is given by the judge at [19] – [20]:

> “19. Ukraine's case is that the [Cabinet of Ministers of Ukraine's] decision on 21 November 2013 to suspend preparation for Ukraine's signing of the EU Association Agreement resulted in mass protests in the Ukrainian capital, Kyiv. Following President Yanukovych's decision not to sign at the Vilnius Summit on 28 November 2013, these protests grew significantly in size. President Yanukovych is reported to have fled Kyiv on 21 February 2014.
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> 20. Shortly afterwards, Russia invaded Crimea. In addition to the invasion, Ukraine's case is that Russia has also fuelled and supported separatist elements in, interfered militarily in and succeeded in destabilising and causing huge destruction across eastern Ukraine."

10. In its defence, Ukraine alleges that the claim against it "forms part of a broader strategy of unlawful and illegitimate economic, political and military aggression by the Russian Federation against Ukraine and its people aimed at frustrating the will of the Ukrainian people to participate

in the process of European integration".

11. The defences relied on by Ukraine in opposition to the application for summary judgment were analysed by the judge in his judgment at [32] as falling under four heads. In addition, Ukraine submitted that, irrespective of its prospects of success, there were compelling reasons to proceed to trial because "the claim is in reality a tool of oppression which includes military occupation, destruction of property, the unlawful expropriation of assets, and terrible human cost" which should be the subject of a trial....

[on the question whether Ukraine had authority to issue the notes]

93. In the present case, the authority to effect borrowings on behalf of Ukraine is expressly set out in the Budget Code. This is a public document and Law Debenture does not suggest that it did not have knowledge or notice of it. Article 16.1 is clear that the Minister of Finance is authorised to effect internal and external borrowings on behalf of Ukraine, on conditions determined by the CMU. If loan notes are issued in accordance with article 16, the Minister of Finance and the CMU will be exercising express powers conferred on them, and there will be no room or need for recourse to the "usual" authority of either ministers of finance in general or the Minister of Finance of Ukraine in particular. If the Minister of Finance were to take steps to issue loan notes in circumstances where it was known (or, perhaps, should have been known) to the Trustee that the conditions had not been determined by the CMU, the Trustee would have knowledge or notice that he had acted beyond his authority. There would again be no room for recourse to his "usual" authority, as a basis for ostensible authority.

94. Article 16.1 expressly confines state borrowings to the limits determined in accordance with the Budget Law. Law Debenture does not suggest that it had neither knowledge nor notice of this general limitation on the borrowing powers of the government of Ukraine. We understood it to accept that, if it knew that an issue of loan notes would cause Ukraine's borrowings to exceed that limit, the issue would be voidable by Ukraine as having been made without authority. Equally, we understand Ukraine to accept (on the assumption that its case on capacity is rejected) that if Law Debenture neither knew nor had notice that an issue of loan notes caused Ukraine's borrowings to exceed the annual limit, the issue of loan notes would not be voidable on this ground. This underlines that the ostensible, as well as the actual, authority of the Minister of Finance and the CMU is to be derived from article 16, and not from some general notion of usual authority...

96. We are clear that the correct approach to the issue of authority in this case derives from the terms of article 16, in the way we have set out above...

100.... Ukraine had since 2003 issued tradeable bonds constituted by trust deeds with Law Debenture on 31 occasions. In every case, the loan notes were stated, in one way or another, to be issued with the authority of the Minister of Finance and the CMU. In every case, Ukraine had accepted and performed the obligations under the loan notes. There is no suggestion that the Minister of Finance in question had not been duly appointed to that office, nor that the members of the CMU had not been duly appointed. In our judgment, this combination of

circumstances is sufficient to establish that it is generally understood in the international debt markets that, based on the conduct of Ukraine, the Minister of Finance of Ukraine, if acting with the authority of the CMU, had by virtue of holding that office authority to issue loan notes such as the Notes in this case....

105. While the judge accepted for present purposes that the terms on which Ukraine relies were onerous and, for Ukraine, unusual, none of them is a term that self-evidently stands out as abnormal so as to put Law Debenture on enquiry and there was no evidence that they would have appeared abnormal to those regularly trading in the sovereign debt market. We do not consider that Ukraine has raised an arguable defence based on the terms of the Notes.[14]...

151... Ukraine maintains that it entered into the Notes by reason of duress exerted by Russia. On Ukraine's case the circumstances in which the Notes were entered into include the wider question of the steps which Russia took in late 2013 to dissuade Ukraine from entering into the Association Agreement with the EU. In effect, according to Ukraine, there was a carrot and a stick which were put into use in combination. Ukraine needed to borrow money. It hoped by entering into the Association Agreement to gain access to the European capital markets for that. Russia was unhappy with Ukraine entering into the Association Agreement and becoming close with the EU. Therefore, as well as making the threats which are the foundation of Ukraine's case in duress to dissuade it from entering into the Association Agreement, Russia sought to persuade Ukraine not to do so by agreeing to lend it US$15 billion to help with its public finances. The US$3 billion loaned by Russia to Ukraine under the Notes was the first tranche of this funding.

152. It should be emphasised that Law Debenture's claim at the direction of Russia is based purely upon the Notes. Russia has not brought an alternative restitutionary or unjust enrichment claim to recover the US$3 billion which was paid to Ukraine, should it transpire that the Notes are vulnerable to being avoided as a contract on grounds of duress. We were not given an explanation for this and there has been no exploration in the argument before us of what defences might be available to Ukraine in respect of such a claim. One of the benefits for Russia under the Notes (via the rights enjoyed by Law Debenture as trustee in relation to the Notes) is that they contain a no set off clause, which would not be applicable if the Notes are avoided by reason of duress and Russia sued under the law of unjust enrichment.

153. It should also be emphasised that there would be fora in which the dispute between Russia and Ukraine could be ventilated, including both its commercial and its international law aspects, if both states agreed to confer jurisdiction on them. They could agree to submit their dispute to an arbitral tribunal or they could both give consent for their dispute to be determined by the International Court of Justice ("ICJ"). It is because of the absence of agreement regarding

[14]There is a more detailed analysis of legal arguments relating to authority in the case, but the Court of Appeal found that Ukraine was bound by the ostensible authority of the Minister of Finance and the CMU (Cabinet of Ministers of Ukraine).

submission of their dispute to another tribunal or court with jurisdiction to deal with all aspects of it that the English courts have to decide whether summary judgment should be given on the current claim by Law Debenture. In the course of the hearing, Ukraine offered to undertake to agree to refer the present dispute to the ICJ. There was no indication that Russia would be willing to do this. Therefore, we have no option but to grapple with the issues which arise in the proceedings as brought by Law Debenture in the Commercial Court.

154. A convenient starting point in relation to the issue of duress is the judgment of Lord Neuberger of Abbotsbury PSC and Lord Sumption and Lord Hodge JJSC in Shergill v Khaira [2014] UKSC 33; [2015] AC 359, in their general treatment of the concept of non-justiciability at [41]-[43]. The subject matter of that case is very different from the present case, but the observations in it have wider significance. At [41] the President and Justices said:

> "41. There is a number of rules of English law which may result in an English court being unable to decide a disputed issue on its merits. Some of them, such as state immunity, confer immunity from jurisdiction. Some, such as the act of state doctrine, confer immunity from liability on certain persons in respect of certain acts. Some, such as the rule against the enforcement of foreign penal, revenue or public laws, or the much-criticised rule against the determination by an English court of title to foreign land (now circumscribed by statute and by the Brussels Regulation and the Lugano Convention) are probably best regarded as depending on the territorial limits of the competence of the English courts or of the competence which they will recognise in foreign states. Properly speaking, the term non-justiciability refers to something different. It refers to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter. Such cases generally fall into one of two categories.
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> 42. The first category comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers. Cases in this category are rare, and rightly so, for they may result in a denial of justice which could only exceptionally be justified either at common law or under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament. The first is based in part on the constitutional limits of the court's competence as against that of the executive in matters directly affecting the United Kingdom's relations with foreign states. So far as it was based on the separation of powers, Buttes Gas and Oil Co v Hammer (No. 3) [1982] AC 888, 935–937 is the leading case in this category, although the boundaries of the category of "transactions" of states which will engage the doctrine now are a good deal less clear today than they seemed to be 40 years ago. The second is based on the constitutional limits of the court's competence as against that of

> Parliament: Prebble v Television New Zealand Ltd [1995] 1 AC 321. The distinctive feature of all these cases is that once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable. Where the non-justiciable issue inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot fairly be tried: Hamilton v Al Fayed [2001] 1 AC 395.
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> 43. The basis of the second category of non-justiciable cases is quite different. It comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples include domestic disputes; transactions not intended by the participants to affect their legal relations; and issues of international law which engage no private right of the claimant or reviewable question of public law. Some issues might well be non-justiciable in this sense if the court were asked to decide them in the abstract. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable. The best-known examples are in the domain of public law. Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law: R (Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2777 (Admin); R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 1910 (Admin). As Cranston J put it in the latter case, at para 60, there is no "domestic foothold". But the court does adjudicate on these matters if a justiciable legitimate expectation or a Convention right depends on it: R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2003] UKHRR 76. The same would apply if a private law liability was asserted which depended on such a matter. As Lord Bingham of Cornhill observed in R (Gentle) v Prime Minister [2008] AC 1356, para 8, there are
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> 'issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the claimants have a legal right the courts cannot decide it. The defendants accept that if the claimants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude.'"

155. In the light of these observations, and taking paras. [43] and [42] in reverse order, three issues arise in relation to Ukraine's duress defence under ground 2:

i) Issue (1): Is there a domestic foothold - that is to say, a basis in legal analysis under English

law - which requires or permits the court to embark upon an examination of Ukraine's case that Russia made threats against it which were unlawful as a matter of international law or otherwise illegitimate?

ii) Issue (2): If there is a domestic foothold, is the issue nonetheless beyond the competence of the English courts to resolve? And

iii) Issue (3): If there is a domestic foothold but the issue is beyond the competence of the English courts to resolve, should the court grant an unlimited stay of proceedings or strike out Law Debenture's claim (which is a claim to vindicate Russia's rights as lender under the Notes), because as a result its claim under the Notes cannot fairly be tried?

156. If there is no domestic foothold for the claims by Ukraine that Russia has breached or threatened to breach norms of international law or other international standards of behaviour, then there would be no proper basis for granting a stay of proceedings or striking out Law Debenture's claim under the Notes. That is because there would then be no relevant defence under English law which is required to be tried fairly, such that the proceedings should be stayed or struck out by reason of that not being possible to achieve.

157. So far as the English law of duress is concerned, both sides proceeded on the basis that Cooke J accurately stated the law in Progress Bulk Carriers Ltd v Tube City IMS LLC [2012] EWHC 273 (Comm); [2012] 2 All ER (Comm) 855, at [21]—[35]. For a defence of duress to a contract claim to succeed, it is necessary to show that illegitimate pressure was applied and that this pressure caused the pressurised party to enter into the contract which he seeks to avoid: [23]. Cooke J relied in particular on the statements of principle by Steyn LJ in this court in CTN Cash and Carry Ltd v Gallaher Ltd [1994] 4 All ER 714 at 718-719. Cooke J accurately summarised the effect of this case as follows at [30]:

> "This is Court of Appeal authority for the proposition that the exertion of pressure by "lawful means" does not prevent the operation of the doctrine of economic duress. Whilst the particular examples in earlier cases, to which reference is made in the passage quoted above, do not take the matter much further, Steyn LJ refers to "the critical enquiry" as being "not whether the conduct is lawful but whether it is morally or socially unacceptable". He said in terms that that was the enquiry in which the court was engaged, although the Court should not set its sights too high and it might be a relatively rare care in which "lawful act duress" could be established, particularly in a commercial context."

158. The question of causation is in issue in these proceedings, but cannot be resolved for the purposes of summary judgment. However, Law Debenture contends that Ukraine is unable to show that it was subject to illegitimate pressure, because to do so would require examination of the conduct of Russia on the international plane, which is something an English court will not embark upon. Mr Howard primary argument for Law Debenture was that this feature of the case meant that there was no proper domestic foothold for the purposes of issue (1) above. In the alternative, he says that even if there is a domestic foothold the analysis required would take

the court into areas which are beyond its competence to resolve: issue (2) above.

159. In our judgment, Ukraine succeeds in showing there is a domestic foothold for the purposes of issue (1) in relation to the issue of illegitimate pressure. English law provides that a contract made as a result of illegitimate pressure will not be enforceable. Ukraine appeals to this substantive doctrine of duress in English law in its defence to Law Debenture's claim on the Notes. It is common ground that, for the purposes of the application for summary judgment (although Law Debenture reserves full argument on the point for trial), any relevant duress arguably exerted by Russia may be taken to affect the contractual rights relied upon by Law Debenture and hence would provide Ukraine with an arguable defence against Law Debenture in suing on the Notes. In our view, given the relevant concession for the purposes of the summary judgment application, Ukraine is entitled to seek to rely on this doctrine of domestic law in its defence for the purposes of resisting that application and, having done so, the court has to examine that defence to see if it is made out. This provides a sufficient foothold in English law at the stage of issue (1).

160. It is true that Russia and Ukraine are sovereign states, which means that the test for what might count as morally or socially unacceptable in the context in which they interact with each other is not the usual one appropriate to relations between private parties. But the authorities make it clear that the English law doctrine of duress does not turn on breach of domestic law as the criterion of illegitimate pressure. The notion of illegitimate pressure is wider than that. Although moral and social standards are more attenuated in the relations between states on the international plane than is the case in a purely domestic commercial context, international law sets out reasonably determinate standards of conduct applicable between states on the international plane. In our view, there is no reason why the law of duress should not treat these as providing an appropriate test of illegitimate pressure in the present case.

161. Mr Howard submitted that a domestic court has no authority to rule upon whether a foreign state has violated its obligations under international law and that this is a matter so remote from the court's competence that it could not be said that allegations of such violation could give rise to any issue in domestic law. We disagree. In our view, this submission confuses issue (1) and issue (2), and is appropriately addressed in the context of issue (2). In relation to issue (1), the submission is contrary to authority.

162. In the Buttes Gas case, the claimants sued the first defendant for defamation in relation to statements made by him to the effect that the claimants had conspired with the ruler of Sharjah for Sharjah to make unjustified territorial claims in respect of an oil-field in the Persian Gulf and then award oil concessions in respect of it to the claimants, thereby cheating the first defendant's company, the second defendant, out of an oil concession in respect of the same field granted by a neighbouring state, Umm al Qaiwain, which also laid claim to it. The pleaded defences were justification and fair comment. The defendants also counterclaimed for damages for alleged conspiracy between the claimants and the ruler of Sharjah and others to cheat and defraud them, relying on the same pleaded allegations as for their defences of justification and

fair comment. The issues raised covered a range of matters, including competing claims to the oil-field by a range of states and the conduct of international relations by the United Kingdom government in pursuit of its strategic interests. The House of Lords held that the domestic courts should abstain from deciding the issues raised for reasons of non-justiciability related to issue (2) above, and that all proceedings on the claim and on the counterclaim should be stayed as a result. Thus, far from saying that the defence of justification could not be raised at all (on the grounds of an absence of a domestic foothold under issue (1)), so that the claim in defamation must inevitably succeed, the House of Lords regarded the appropriate outcome as being that that claim should be stayed. As Lord Wilberforce said, after noting that the defendants' plea of justification could not be entertained by the court, "to allow [the claimants' libel action] to proceed but deny [the defendants] the opportunity to justify would seem unjust …" (p. 938E-F). Lord Wilberforce made this point although as it transpired the House of Lords did not have to decide that issue, because the claimants had offered to submit to a stay of their libel claim if the counterclaim were stayed, and the House of Lords held them to that offer.
163. Further, the formulation of principle by the Supreme Court in the Shergill v Khaira case at [43], set out above, expressly indicates that there may be a relevant foothold in domestic law in relation to issue (1) in a case involving issues of international law. This is contrary to the suggestion by Mr Howard that the mere fact that an issue of international law is raised by Ukraine in support of its defence in the present case shows that there is no domestic foothold. In fact, the domestic courts in England and Wales are quite often prepared to rule on issues of international law which are implicated by some relevant plea of domestic law: see, e.g., Re H [1998] AC 72, 87D-G, and Salomon v Commissioners of Customs and Excise [1967] 2 QB 116, 143E-G (reference to the United Kingdom's international obligations in order to resolve issues of statutory construction); R v Lyons [2002] UKHL 44, [13], AG v Guardian Newspapers (No. 2) [1990] 1 AC 109, 238 and Derbyshire County Council v Times Newspapers Ltd [1993] AC 534 (reference to unincorporated treaty obligations as relevant to the development of the common law); R v Secretary of State for the Home Department, ex p. Launder [1997] 1 WLR 839, HL, at 866-867, and R v Director of Public Prosecutions, ex p. Kebilene [2000] 2 AC 326, 341-342, 367, 375-376 (unincorporated treaty obligations relevant to pleas of legitimate expectation in domestic public law; see also R v (Corner House Research) v Director of the Serious Fraud Office [2008] UKHL 60; [2009] 1 AC 756, [43]-[47] per Lord Bingham and [62]-[68] per Lord Brown of Eaton-under-Heywood, who accepted that interpretation of such obligations by a domestic court could be embarked upon in an appropriate case); R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] AC 1355 and R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs [2018] EWCA Civ 1719 (whether a rule of customary international law exists and whether it has been adopted into the common law); and Kuwait Airways Corporation v Iraqi Airways Co. (Nos. 4 and 5) [2002] 2 AC 883 and Belhaj v Straw [2017] UKSC 3; [2017] AC 964 (issues of international law relevant to determination of tort claims). This was recognised by the Supreme Court in Serdar

Mohammed v Ministry of Defence [2017] UKSC 1; [2017] AC 649, [58] (Lord Mance JSC) and [79] (Lord Sumption JSC).

164. We turn, then, to issue (2). Despite there being a domestic foothold for reference to Russia's obligations under international law in relation to Ukraine, is there some supervening reason why Ukraine's plea of duress, invoking as it does alleged breaches of those obligations, should not be treated as justiciable by the domestic court? For the purposes of Ukraine's resistance to summary judgment being entered against it, the judge found there is a sufficient factual foundation for Ukraine's allegation of duress by reference to an alleged threat to use force against it and its territorial integrity if it did not repudiate the draft EU Association Agreement and enter into the Notes instead: [308(i)-(iv)]. This finding, so far as it is relevant for the purposes of Law Debenture's claim for summary judgment, has not been put in issue on this appeal. (It should be noted that Law Debenture and Russia deny the allegation and, if summary judgment is refused and the case proceeds to trial, would presumably seek to meet the allegation on the evidence called at trial).

165. It is common ground that the use of force by one state against another and also the threat of use of force by one state against another are in violation of a general norm of international law with the status of ius cogens (this is provided that no issue of self-defence arises, and none is raised here). The norm finds expression in Article 2(4) of the Charter of the United Nations, as follows:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

166. In addition to alleged violation of this ius cogens norm of international law, Ukraine relies on the alleged threats by Russia to violate Ukraine's territorial integrity as being contrary to Russia's obligations under the Budapest Memorandum on Security Assurances 1994 (the agreement pursuant to which Ukraine gave up nuclear weapons on its territory and hence relinquished a potentially important means of defending itself). Ukraine also relies on the imposition of restrictive trade measures by Russia against Ukraine in 2013 allegedly in violation of various treaty obligations governing trade between them under the Budapest Memorandum, the General Agreement on Tariffs and Trade 1994, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation 1997, and the Free Trade Agreement between Member States of the Commonwealth of the Independent States 2011, and further threats allegedly made by Russia to impose unlawful trading restrictions to damage Ukraine's economy.

167. ... The strongest aspect of Ukraine's case is in relation to the alleged breach of ius cogens by Russia, so the main focus has been on that. In relation to these further matters it suffices to say that if Ukraine establishes that it has an arguable defence of duress by reference to alleged breach of ius cogens – as we consider it does, for the reasons set out below – there is no part

of Ukraine's case in relation to these further matters which we were persuaded should be struck out as being unarguable either on the facts or on the law. On the contrary, in our judgment it is desirable that these further matters pleaded by Ukraine should be in issue for exploration at trial with the benefit of full findings of fact, both as independent aspects of the defence of duress and also as relevant factual background to allow the whole pattern of alleged threatening behaviour by Russia to be assessed in its full context.

168. Reverting to the primary aspect of Ukraine's duress defence, focusing on ius cogens, there is force in Mr Howard's submission that the court should grapple with the question of justiciability in relation to issue (2) at this stage, rather than leaving it to be explored at trial. That is because, on his argument, a major part of the reason why Ukraine's duress defence is non-justiciable is because it would be wrong for a domestic court to become involved in scrutinising such foreign acts of state, concerning matters of high policy of other nations, such as would inevitably be involved if the present case proceeds to trial.

169. The leading authority in relation to issue (2) is Belhaj v Straw [2017] UKSC 3; [2017] AC 964. The relevant claim concerned a Libyan citizen and his Moroccan wife who were detained overseas by officials in China, Malaysia and Thailand and then removed by US officials to Libya, where they were detained and claimed they had been tortured. The claimants alleged that ministers and officials of the United Kingdom government had participated in their unlawful removal to Libya and sued them for false imprisonment, trespass to the person, conspiracy to injure, misfeasance in public office and negligence. The defendants relied on a defence of foreign act of state. The defence was held not to apply in the circumstances of the cases in issue. The Supreme Court identified three different rules regarding non-justiciability in English courts of foreign acts of state (see [35]-[44] per Lord Mance JSC; [120]-[124] per Lord Neuberger of Abbotsbury PSC, with whom Baroness Hale of Richmond DPSC, Lord Clarke of Stone-Cum-Ebony JSC and Lord Wilson JSC agreed; and see also [227] per Lord Sumption JSC, with whom Lord Hughes JSC agreed). It was the third rule which was relevant in that case, as in this.

170. That rule is set out by Lord Neuberger at [123]:

> "The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states; "Obvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory": per Lord Pearson in Nissan v Attorney General [1970] AC 179, 237. Nissan was a case concerned with Crown act of state, which is, of course, a different doctrine and is considered in Mohammed (Serdar) v Ministry of Defence; Rahmatullah v Ministry of Defence [2017] AC 649, 787, but the remark is none the less equally apposite

> to the foreign act of state doctrine. Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs. It is also part of this third rule that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts. This third rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels: see Shergill v Khaira [2015] AC 359, paras 40, 42."

171. Lord Neuberger went on to give an account of the basis and scope of the third rule at [144]-[147], [151] and [153]-[157]. In view of the importance of Lord Neuberger's observations, we set them out in full here:

> "144. There is no doubt as to the existence of the third rule in relation to property and property rights. Where the Doctrine applies, it serves to defeat what would otherwise be a perfectly valid private law claim, and, where it does not apply, the court is not required to make any finding which is binding on a foreign state. Accordingly, it seems to me that there is force in the argument that, bearing in mind the importance which both the common law and the Human Rights Convention attach to the right of access to the courts, judges should not be enthusiastic in declining to determine a claim under the third rule. On the other hand, even following the growth of judicial review and the enactment of the Human Rights Act 1998, judges should be wary of accepting an invitation to determine an issue which is, on analysis, not appropriate for judicial assessment.
> 145. I believe that this is reflected in observations of Lord Pearson in Nissan v Attorney General [1970] AC 179. Immediately after the passage quoted in para 123 above, he said, at p 237:
> "Apart from these obvious examples, an act of state must be something exceptional. Any ordinary governmental act is cognisable by an ordinary court of law (municipal not international): if a subject alleges that the governmental act was wrongful and claims damages or other relief in respect of it, his claim will be entertained and heard and determined by the court."
> A little later, he explained that where the Doctrine applied:
> "the court does not come to any decision as to the … rightness or wrongness, of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it."
> And added that: "This is a very unusual situation and strong evidence is required to prove that it exists in a particular case."
> 146. In Yukos v Rosneft [2014] QB 458, para 66 Rix LJ suggested that "Lord Wilberforce's principle of 'non-justiciability' … has to a large extent subsumed

[the act of state Doctrine] as the paradigm restatement of that principle". If the foreign act of state principle is treated as including what I have called the first and second rules, then I do not agree. The third rule is based on judicial self-restraint and is, at least in part, concerned with arrangements between states and is not limited to acts within the territory of the state in question, whereas the first and second rules are of a more hard-edged nature and are almost always concerned with acts of a single state, normally within its own territory.

147. Having said that, I accept that it will not always be easy to decide whether a particular claim is potentially subject to the second or third rule. The third rule may be engaged by unilateral sovereign acts (e g annexation of another state) but, in practice, it almost always only will apply to actions involving more than one state (as indeed does annexation). However, the fact that more than one sovereign state is involved in an action does not by any means justify the view that the third rule, rather than the second, is potentially engaged. The fact that the executives of two different states are involved in a particular action does not, in my view at any rate, automatically mean that the third rule is engaged. In my view, the third rule will normally involve some sort of comparatively formal, relatively high level arrangement, but, bearing in mind the nature of the third rule, it would be unwise to be too prescriptive about its ambit. …

151. The third rule is based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving, as discussed by Lord Mance JSC in paras 40–45 and by Lord Sumption JSC in paras 234–239 and 244. It is purely based on common law, and therefore has no international law basis, although, as discussed below, its application (unsurprisingly) can be heavily influenced by international law. ...

Limits and exceptions to the Doctrine: public policy

153. It is well established that the first rule, namely that the effect of a foreign state's legislation within the territory of that state will not be questioned, is subject to an exception that such legislation will not be recognised if it is inconsistent with what are currently regarded as fundamental principles of public policy—see Oppenheimer v Cattermole [1976] AC 249, 277–278, per Lord Cross of Chelsea. This exception also applies where the legislation in question is a serious violation of international law—see Kuwait Airways Corpn v Iraqi Airways Co (Nos. 4 and 5) [2002] 2 AC 883, 1081, para 29, per Lord Nicholls of Birkenhead.

154. The circumstances in which this exception to the Doctrine should apply appear to me to depend ultimately on domestic law considerations, although generally accepted norms of international law are plainly capable of playing a

> decisive role. In his opinion in Kuwait Airways, p 1081, paras 28–29, Lord Nicholls emphasised "the need to recognise and adhere to standards of conduct set by international law" and held that recognition of the "fundamental breach of international law" manifested by the Iraqi decree in that case "would be manifestly contrary to the public policy of English law", like the Nazi German confiscatory decree in Oppenheimer. However, there is nothing in what Lord Nicholls said which suggests that it is only breaches of international law norms which would justify disapplication of the Doctrine. On the contrary: his reference to "the public policy of English law" supports the notion that the issue is ultimately to be judged by domestic rule of law considerations.
>
> 155. The point is also apparent from the opinion of Lord Hope of Craighead. At p 1109, para 139, he said that "the public policy exception" is not limited to cases where "there is a grave infringement of human rights", but is "founded upon the public policy of this country"—plainly a domestic standard.
>
> 156. The exception to the Doctrine based on public policy has only been considered by the courts in relation to the first of the four rules set out above. However, I cannot see grounds for saying that it does not apply similarly to the second rule, executive acts within the territory of the state concerned.

157. As to the third rule, dealings between states, (as well as the fourth rule—if it exists) it appears to me that in many types of case this exception may be applicable, but in some it may not. In the course of its judgment in R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2003] UKHRR 76 the Court of Appeal effectively suggested that the exception could be applied to the third rule. In paras 32 and 33, they said that "the English court will not adjudicate upon the legality of a foreign state's transactions in the sphere of international relations in the exercise of sovereign authority", but that this was subject to exceptions, as Oppenheimer and Kuwait Airways demonstrated. The court was accordingly prepared to hold that the detention of a UK citizen in Guantanamo Bay "subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal" was unlawful, despite his detention being an act of state on the part of the US—see paras 64, 66 and 107. (It is fair to add that, although expressed as if it involved transactions in the field of international relations, it is arguable that the issue before the Court of Appeal in Abbasi was not in fact concerned with the third rule, but the second)."

172. At [165], Lord Neuberger held that it is inherent in the nature of the third rule that it may apply to actions outside the territory of the state concerned. At [167]-[168] Lord Neuberger held that the acts complained of by the claimants did not fall within the third rule and also that, if the third rule did apply, the public policy exception would apply so as to deprive it of effect:

> "167. In my view, at least on the evidence available so far, and in agreement with Lord Mance and Lord Sumption JJSC, the acts complained of by Mr Belhaj

> and Mrs Boudchar [the claimants] do not fall within the third rule. There is no suggestion that there was some sort of formal or high-level agreement or treaty between any of the states involved which governed the co-operation between the executives of the various countries concerned. As already mentioned, the mere fact that officials of more than one country co-operate to carry out an operation does not mean that the third rule can be invoked if that operation is said to give rise to a claim in domestic law. It would be positively inimical to the rule of law if it were otherwise.
>
> 168. Having said that, even if the third rule otherwise applied, I would still hold that this was a case where, assuming that the claimants were detained, kidnapped and tortured as they allege, the public policy exception would apply. In that connection, Lord Sumption JSC's impressive analysis of the relevant international law is important in the present context because I consider that any treatment which amounts to a breach of jus cogens or peremptory norms would almost always fall within the public policy exception. However, as explained above, because the Doctrine is domestic in nature, and in agreement with Lord Mance and Lord Sumption JJSC, I do not consider that it is necessary for a claimant to establish that the treatment of which he complains crosses the international law hurdle before he can defeat a contention that the third rule applies."

173. In our view, it is clear that the third rule has prima facie application in the present case. The acts by Russia upon which Ukraine seeks to rely for the purposes of its defence of duress were acts of high policy by Russia in the sphere of international relations in the exercise of sovereign authority: see Belhaj at [157]. The question, then, is whether the public policy exception identified by Lord Neuberger applies, so that Ukraine is entitled to rely on the threats made by Russia.

174. In our judgment, Ukraine succeeds in its argument that the public policy exception applies. In that regard, six points should be made which have cumulative effect.

175. First, instead of dealing with Ukraine pursuant to a treaty governed solely by international law, Russia chose to structure its loan relationship with Ukraine in the form of a Eurobond,[15] with an English choice of law clause and a clause choosing the English court as the forum. The strong willingness of English courts to apply rule of law standards to do substantive justice between parties to a contract governed by English law is well known. At the point of contracting, Russia chose to submit by any claim by Law Debenture to the jurisdiction of the English court and hence has taken the risk with its eyes open that the court would apply the English law of duress as a substantive matter. This is a materially different context from one in which a third

[15] The Eurodollar material below is relevant to these instruments, though the content of that material more directly relates to the case in that section.

state has its actions called into question in litigation between two different parties, such as in Belhaj and Abbasi. Although we do not go so far as to say that the third rule cannot apply where the relevant state has chosen to submit to the jurisdiction of the English court, this is a factor which in our view makes the argument for self-restraint by the English court significantly weaker and correspondingly makes it easier to identify aspects of public policy in favour of the court deciding the issues before it according to their substantive merits. A similar point was made by this court in the context of enforcement against a state of an arbitration award resulting from an arbitration agreement contained in an unincorporated treaty: Republic of Ecuador v Occidental Exploration and Production Co. [2005] EWCA Civ 1116; [2006] QB 432, at [47]; and the force of this is greater in the present context, where the relevant relationship has been structured according to the domestic law of England and a specific choice of English jurisdiction has been made.

176. Secondly, insofar as the foreign act of state doctrine reflects to some degree a principle of respect by the domestic court for comity between states, it is relevant that in the present case comity points in both directions. Russia is a friendly state which wishes the court to exercise self-restraint, so as not to determine a matter which is relevant to the claim which Law Debenture brings on Russia's behalf. Ukraine is a friendly state which wishes the court to determine that matter, as a matter of justice between the parties, as part of its consideration of the merits of the claim which Law Debenture brings on Russia's behalf.

177. Thirdly, there is an aspect of comity between states which positively points in favour of the English court proceeding to determine Law Debenture's claim on Russia's behalf, including by scrutiny of Ukraine's defence of duress. This is because the only way in which Russia can benefit in relation to the claim in contract under the Notes is by directing Law Debenture to sue in the English court, and if the English court does not proceed to determine that claim on its merits (including by scrutiny of Ukraine's defence of duress) the result would be that the court would stay the claim: see the discussion of issue (3) below. Russia, by arranging for Law Debenture to bring this contractual claim, has indicated clearly to the court that it wishes the court to proceed to determine it according to the merits, including by dealing with any defences which the court finds are arguably available to Ukraine as a domestic foothold. If Russia's preference is that the court should not make a determination of the issues of international law raised by Ukraine as part of its defence of duress, the solution is in Russia's own hands: it could cause Law Debenture to withdraw the contract claim or agree to a stay of that claim. Thus the public policy reasons underlying the third rule of the foreign act of state doctrine can be met in that way. Conversely, as a matter of basic justice, it does not seem to us that Russia can expect to seek to have this contract claim vindicated in an English court without that court proceeding to scrutinise the defence of duress which is arguably available to Ukraine. The fact that Russia presses the court to determine the contract claim knowing that such a defence arises in relation to it again weakens the argument for self-restraint by the court and correspondingly makes it easier for the court to identify public policy reasons why an exception

to the third rule should apply. Indeed, in our view the need to do justice between the parties to the present claim and between Russia and Ukraine in a private law dispute between them is itself a reason of public policy why in this case the public policy exception should be found to apply.

178. Fourthly, there is nothing inherently non-justiciable or unmanageable in the legal standards which the English court would be called on to apply in determining whether Ukraine's duress defence is made out. English courts are well capable of construing treaty obligations and general obligations of states under international law and assessing their application: see the authorities above in this section of the judgment. This is not a case of an absence of "judicial or manageable standards by which to judge" the relevant issues, to use the language of Lord Wilberforce in Buttes Gas [1982] AC 888 at p. 938B. Ukraine's case is based on alleged threats to violate international treaties and obligations. There is no inherent insuperable difficulty in the court considering the evidence in relation to any threats made and assessing whether they were lawful or not according to the standards set out in those treaties and in the general norms of international law containing those obligations. The willingness of an English court to examine the position in international law where that is relevant to some issue in domestic law, even in respect of acts of the highest state policy such as in relation to war or the prosecution of armed conflict, is illustrated by the Kuwait Airways, Belhaj and Serdar Mohammed cases cited above.

179. Fifthly, there is no scope in this case for another aspect of public policy which underlies the third rule of foreign act of state, namely the constitutional concern that in a matter relating to the conduct of the United Kingdom's foreign affairs the courts should be astute not to usurp or cut across the proper role of the executive government, which has the primary responsibility for carrying on those affairs: see Shergill v Khaira at [42], set out above; also Buttes Gas [1982] AC 888 at p. 938A. In the present case, there have been statements by Ministers making clear that the United Kingdom regards the activities of Russia in seizing the Crimea and assisting military action by insurgents in Eastern Ukraine against the Ukrainian government as being in clear violation of Russia's obligations under international law, including in particular its obligations under the norm of ius cogens reflected in Article 2(4) of the UN Charter. The United Kingdom also gives effect in its law to EU sanctions imposed in response to such violation. These are matters which reflect in substance the alleged threats by Russia on which Ukraine seeks to rely in these proceedings, and it is not suggested that the United Kingdom government's attitude could be expected to be any different in relation to those alleged threats. Further, the United Kingdom government is on notice of the present proceedings and has had a full opportunity to intervene to draw to the court's attention any difficulty which their due resolution by the court might cause in the conduct of the foreign affairs of the United Kingdom. It has not sought to intervene or to suggest that any such difficulties might arise if the court accedes to Ukraine's submissions.

180. Sixthly, the public policy exception to the third rule is founded upon English public policy and is not restricted to cases of grave infringement of human rights: see Belhaj at [155], set out

above. In our judgment, there is an especially strong public policy in this country that no country should be able to take advantage of its own violation of norms of ius cogens. This was adverted to by Lord Neuberger in Belhaj at [168], set out above, albeit in the context of the particular claims in issue in that case. However, it is significant that Lord Neuberger did not confine his reasoning to the particular norms relevant in that case, but stated the position more widely by reference to the category of ius cogens itself. In our view, this is because domestic public policy here is informed by public policy inherent in international law when it identifies norms as peremptory norms with the character of ius cogens. Identification of norms as having that character indicates the strong international public policy which exists to ensure that they are respected and given effect. Domestic public policy recognises and gives similar effect to that strong public policy. There is no norm more fundamental to the system of international law and the principle of the rule of law than that set out in Article 2(4) of the UN Charter.

181. For these reasons, we consider that Ukraine succeeds in rebutting Law Debenture's arguments under issue (2). Ukraine has a good arguable case that the public policy exception has effect in this case so as to disapply the third rule of foreign act of state on which Law Debenture seeks to rely.

Ground 3: Stay

182. This means that in our view the issue of a stay of proceedings does not arise. However, since it was argued out before us we will set out our views in relation to it. If we were wrong in our conclusion on issue (2) above, our view is that the just conclusion in this case would be to order a stay of the proceedings. In so far as the judge came to a different view, we consider that he was wrong to do so.

183. Our reasons in relation to this part of the case largely reflect the discussion in relation to issue (2) above. The basic point is that Russia, through Law Debenture, is positively seeking to enforce contractual rights in private law against Ukraine. In our view, it can only fairly seek to do so if Ukraine is afforded a fair opportunity to defend itself by reference to any defence in respect of which there is a domestic foothold. As we have held above, there is a domestic foothold for Ukraine's defence of duress. It would be unjust to permit Law Debenture and Russia to proceed to seek to make good the contract claim without Ukraine being able to defend itself by raising its defence of duress at trial. Although Mr Howard is right to point out that the House of Lords did not decide the point regarding the stay of the libel claim ordered in Buttes Gas, it is clear that Lord Wilberforce was expressing his considered view at [1982] AC 888, 938E-F, referred to above, when he said that it would be unjust to allow the claimants to proceed with their claim in circumstances where the defence of justification could not be ventilated by reason of the application of the doctrine of foreign act of state. All the other Law Lords agreed with his speech.

184. Similarly, in our view the indication by the Supreme Court in Shergill v Khaira at [42], set out above, that if a claim cannot fairly be tried because of non-justiciability within the sense of

our issue (2) this may make it necessary to strike out an otherwise justiciable claim, points in favour of granting a stay in the present case. So does Hamilton v Al Fayed [2001] 1 AC 395, to which the Supreme Court referred.

185. There is a further reason why this is the just approach in this case. As noted above, there are other fora in which Russia could choose to litigate Ukraine's allegations against it of violation and threatened violation of international law. In particular, if both Ukraine and Russia agree, the ICJ can acquire jurisdiction to go into all relevant disputes between them arising under international law. At the hearing before us, Ukraine undertook to accept the jurisdiction of the ICJ in relation to the issues of alleged breach of international law by Russia as raised in its defence. Therefore, a possible way forward, if Russia wishes the contract claim to proceed in a manner which does not involve determination by the English court of the relevant points of international law but still allows for fair resolution of the contract claim, would be for Russia likewise to agree to accept the jurisdiction of the ICJ in relation to those matters and for this action to be stayed pending resolution of the disputed issues of international law. Russia, however, despite instructions being sought from it, gave no indication that it was willing to proceed in this way, even if the court ruled against it under issue (2) above.

186. That leaves the English court as the only available forum to determine these points of international law, if their determination is required as part of the examination of the defence of duress. This feature of the case also underlines that, if ground (3) arises, the just outcome is that the court should order a stay of the contract claim on the Notes. Russia is the party who has declined to have recourse to an alternative means of resolution of the international law issues which arise under Ukraine's defence of duress, so it is fair that it should take any risk of the English court not being able to determine those issues under issue (2).

Ground 5: Countermeasures

187. In case it fails in its other defences, Ukraine seeks to rely on a further defence grounded in international law. It maintains that even if the Notes are binding upon it as a matter of English law, nonetheless it is entitled by virtue of the international law doctrine of counter-measures to refuse to pay the sums due under the bond. It is convenient to deal with this defence at this point in the argument. Very little time was taken up at the hearing on this part of Ukraine's case, and for good reason.

188. The counter-measures doctrine in international law stipulates that in certain circumstances a state may retaliate against action in breach of international law taken by another state, by taking action itself in response which under other conditions would be a breach of international law. It is a doctrine related to ideas of self-help and self-defence.

189. In our judgment, the counter-measures doctrine does not assist Ukraine in this case, because of the lack of any relevant foothold in domestic law. Ukraine's submission based on the doctrine arises only if the court has determined that it has no available defence under domestic law. The doctrine operates only at the level of international law and in the absence of

a domestic foothold the English court has no proper role in examining it or in pronouncing upon the merits of the arguments put forward by Ukraine under this heading...

Ground 4: Implied terms

The implied terms alleged by Ukraine

196. Ukraine submitted that the judge was wrong to reject its case that Ukraine's obligation to make repayment was subject to implied terms to the effect that such repayment would not be due, or would not be demanded by Law Debenture, if Russia (the sole Noteholder) had taken deliberate or unlawful steps to seek to prevent or hinder Ukraine from making that repayment. The precise terms which Ukraine contended were to be implied into the Trust Deed and the Agency Agreement, were:

i) a term that the Notes would not be repayable if the Trustee or Russia "deliberately and/or unlawfully deprived Ukraine of the economic benefit of the loan …and/or frustrated the economic purpose of the loan";

ii) a term such that there would be no need for repayment if the Trustee or Russia "make it impossible or impracticable for Ukraine to comply with its obligations…or deliberately and/or unlawfully and/or unreasonably interfered with or took steps to prevent, hinder or delay its ability to do so";

iii) a term that the Notes would not be repayable if Russia "was in breach of its obligations towards Ukraine under public international law not to use force against Ukraine and/or not to intervene internally in the affairs of Ukraine"; and

iv) a term that the Notes would not be repayable if Russia engaged in the conduct set out in (iii) above, and "this had been a significant cause of loss to Ukraine and/or had deprived Ukraine of the economic benefit of the loan".

The judge's conclusion on implied terms

197. In summary, Blair J concluded that the legal test for the implication of terms was not satisfied and held that Ukraine's case to the contrary had no real prospect of success...

> "The court's conclusion is as follows... iv)... the general principle that a term is necessarily implied in a contract that neither party will prevent the other party from performing it is inapt where the subject matter of the contract is transferable financial instruments such as the Notes because transferees or potential transferees have to be able to ascertain the nature of the obligation they are acquiring (or considering acquiring) from within the four corners of the relevant contracts. v) The fact that Russia may have intended to retain the Notes does not impinge on their transferability. The fact that Russia has not transferred the Notes is not legally relevant, because the question of the implication of terms has to be decided at the time of contracting, and not ex post .... vi) The ambit of

> an implied term of this kind has to be defined by reference to the contract, and cannot be used to expand it... vii) In any case, on established principles as to implication, the proposed terms which Ukraine seeks to imply into the Trust Deed even in their minimal form would render the Notes unworkable and untradeable, and would thereby contradict their express terms. The Notes, in form and substance transferable, would effectively cease to be transferable. viii) The proposed terms are unnecessary to give business efficacy to the contract, which is effective without such terms, and are not capable of clear expression, and as pleaded (and even in the minimal form proposed in written submissions) are uncertain. ix) Additional to the above, the proposed terms relating to breaches of principles of international law are too uncertain to be incorporated by implication, and raise matters which for reasons set out above are non-justiciable. x) The legal test for the implication of terms is accordingly not satisfied, and references to the duty of good faith and/or the duty of cooperation do not alter that conclusion...."

Discussion and determination in relation to implied terms
204. In our judgment, the judge was right to conclude that the legal test for the implication of terms was not satisfied and accordingly we would reject Ukraine's arguments both under Ground 4(a) and under Ground 4(b). Our reasons may be briefly stated as follows.
205. The starting point for the court's consideration as to whether to imply terms into a contract is usefully summarised by Sir Thomas Bingham M.R. in Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] E.M.L.R. 472 at 481:

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties have themselves expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power . . .
>
> The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which can reflect the merits of the situation as they then appear. Tempting, but wrong . . .
>
> And it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of

> several possible solutions would without doubt have been preferred."

In other words, the court must proceed with caution. And, as has now been conclusively determined by the Supreme Court in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2015] UKSC 72; [2016] AC 742 at [21] – [31], the exercise of implication of terms is not to be classified as part of the exercise of interpretation, or construction, of the terms of a contract; it is a separate exercise.

206. The correct approach to the implication of terms as a matter of law was not substantively in dispute between the parties. The latest position is authoratively stated by Lord Neuberger (with whom Lord Sumption, Lord Hodge, and Lord Clarke of Stone-cum-Ebony JJSC agreed) in Marks and Spencer plc, supra at [16] – [21]. Effectively, the test is that articulated by Lord Simon of Glaisdale (speaking for the majority) in the Privy Council case of BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it goes without saying; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.";

but subject to the following six comments made by Lord Neuberger in Marks and Spencer plc at [21], viz:

> "First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two

> requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is vital to formulate the question to be posed by [him] with the utmost care, to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of absolute necessity, not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

207. Although in various different contexts the courts have been willing to imply into a contract a term prohibiting one party from "preventing" the performance of another (see e.g. Mackay v Dick (1881) 6 App Cas 251), we accept Mr Howard's submission that there is no general rule that such a term will be implied. Where there is some agreed precondition for performance that a party to a contract needs the other party's assistance to satisfy, an implied duty not to prevent performance of the condition by failing to provide assistance might follow (see, for example, Swallowfalls Ltd v Monaco Yachting and Technologies SAM [2014] EWCA Civ 186; [2014] 2 Lloyd's Rep 50, at [30]-[35] per Longmore LJ). But there is no general rule. The implication of such a term, and, perhaps more importantly, its scope, will depend on the contract under consideration, and in particular its express terms. As Cooke J stated in James E McCabe Ltd v Scottish Courage Ltd [2006] EWHC 538 (Comm) at [18]:

> "….. It is self-evident that any implied term of co-operation or prevention from performance can only be given shape in the light of the express terms which set out the obligations of the parties - see Mona Oil Equipment & Supply Co. Limited v Rhodesia Railways [1949] 2 AER 1014 at 1018, Luxor v Cooper [1941] AC 108 and Mackav v Dick (1881) 6 App Cas 251. A duty to co-operate in, or not to prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract and the law can only enforce a duty of co-operation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty of co-operation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself"

We agree with this statement....

208. Adopting the approach of the Supreme Court in Marks and Spencer plc, and that of Cooke J in James E McCabe Ltd, as quoted above, it is impossible in our judgment to conclude that "the necessities of the contract," or indeed any other applicable criteria for the implication of terms, require or support the imposition of the implied terms alleged by Ukraine.

209. First, and perhaps most importantly, the structure of Ukraine's debt obligations took the form of tradeable Eurobonds traded on the Irish Stock Exchange. In this context it is irrelevant, in our view, that Russia remained the holder of the Notes or even that it was anticipated that it was very likely that it would continue to do so. The character of the Notes as tradeable financial instruments gives rise to certain consequences which, in our view, are strong counter-indicators against the implication of Ukraine's suggested terms.

i) First, it is obvious that any implied terms have to be derived from the contractual documentation which would be available to subsequent holders of the Notes, as well as to the initial holder or holders, rather than from the background or matrix of facts specific to the circumstances in which the initial holder or holders purchased the Notes; see in this context BNY Mellon Corporate Trustee v LBG Capital [2016] UKSC 29; [2016] Bus LR 725, where the Supreme Court was concerned with the proper interpretation of certain "enhanced capital" loan notes issued by Lloyds, which were constituted by a trust deed. A question arose as to whether the Exchange Offer Memorandum and a letter from the issuer which accompanied it should be taken into account in construing the trust deed and the terms and conditions of the notes. Lord Neuberger noted that the extent to which other documents were to be taken into account was fact-dependent, but observed at [30] that "very considerable circumspection is appropriate before the contents of such other documents are taken into account"; and at [33] that it was necessary to look at what might have been in the minds not only of initial purchasers of the notes, but also of potential subsequent purchasers: Similarly, in In re Sigma Finance Corp [2009] UKSC 2; [2010] 1 All ER 571, Lord Collins JSC (with whom Lord Hope and Lord Mance JJSC agreed), observed that where a trust document secured the interests of a number of different creditors, the background or matrix of facts could only be relevant in the most generalised way; in that type of case, the express wording of the instrument was paramount and "The instrument must be interpreted as a whole in the light of the commercial intention which may be inferred from the face of the instrument and from the nature of the debtor's business"; see [36]–[37]. In Metlife Seguros de Retiro SA v JP Morgan Chase Bank [2016] EWCA Civ 1248, the Court of Appeal applied the reasoning in In re Sigma to tradeable loan notes, even though those notes had not been traded and were held by the sole purchaser to maturity: [46]. Although these cases were dealing with the interpretation of the relevant contracts, rather than implication of terms, similar principles apply. Thus, the notion that terms could be implied from the general circumstances surrounding Russia/Ukraine state relations at the time of the execution of the relevant agreements, relieving Ukraine from its payment obligations if the original Noteholder in the future conducted itself in a particular way in its international relations with Ukraine, so as to be binding on subsequent Noteholders, would be wholly contrary to such principles.

ii) Next, Russia as initial subscriber to the Notes was not a counterparty to the Trust Deed or to the Agency Agreement, notwithstanding that Law Debenture held the benefit of the Trust Deed upon trust for Noteholders and that, under the terms and conditions of the Notes, Noteholders

were entitled to the benefit of, were bound by and were deemed to have notice of, all the provisions of the Trust Deed and the Agency Agreement. Likewise, future holders of the Notes would neither be counterparties nor would have been present at the time the agreements were entered into. This is another reason why, in our view, it would be wholly inappropriate to import Ukraine's suggested implied terms into the Trust Deed or the Agency Agreement. Ukraine sought to rely on the decision in F&C Alternative Investments Ltd v Barthelemy (No 2) [2011] EWHC 1731 (Ch); [2012] Ch 613 (which concerned a tripartite contract where Sales J held, on the particular terms of the contract, there was an implied term that A would not prevent performance by B of a contractual obligation to C). By analogy, Ukraine argued that, in the case of a trustee structure, where the trustee's role was ministerial, the same principle ought to apply: the Trustee (A) should be prevented from enforcing the contractual obligation of Ukraine (B) to make payment at the behest of a Noteholder (C) who had sought to prevent or hinder performance of that obligation. But the analogy is not helpful. F&C Alternative Investments Ltd concerned a tripartite contract, where all of the counterparties were present when the contract was agreed and assented to its terms. However, as Mr Howard submitted, tradeable instruments are different, in that the holders of the instrument are not counterparties to the agreements, and future holders of the instruments will neither be counterparties nor will have been present at the time the agreements were entered into. It thus appears to us to be contrary to principle, and indeed to common sense, to imply into a Eurobond transaction between Ukraine, as issuer, and Law Debenture, as trustee, terms which relate to the relationship between Ukraine and Russia, which is a matter exterior to the contract as formulated.

iii) Finally under this head, the implication of Ukraine's suggested terms would, as the judge held, effectively render the Notes unworkable and untradeable and would, therefore, conflict with their express terms. As Mr Howard submitted, if Ukraine were right, any future purchaser would have to agree to accept a payment obligation that was conditional on the foreign policy and conduct of Russia in relation to Ukraine, as to which it had no insight, over which it had no control and which might be susceptible to various conclusions as to responsibility or culpability. No sensible person would agree to such an obligation as an express term, let alone as one that was not apparent on the face of the Agreements and was presented in the vague terms proposed by Ukraine. We accept Mr Howard's submission that the implied terms suggested by Ukraine are incompatible with the commercial purpose of the Agreements.

210. Secondly, we agree with the judge that the suggested implied terms are unnecessary. The Agreements work perfectly well without the suggested terms; they do not "lack commercial or practical coherence" without the inclusion of such terms. Nor do we consider that the judge's conclusion represents a misunderstanding of the business efficacy test as explained by Lord Neuberger in Marks and Spencer plc at [21], as quoted above, as Mr Thanki submitted. The question is not whether the implied terms create a commercially coherent result but rather whether the terms are so necessary or obvious that, without such terms, the contract would lack commercial or practical coherence. Despite the attempts by Ukraine to re-characterise the

arrangement as a bilateral loan, or a tri-partite agreement, the court must look at the terms of the actual contracts entered into. The Agreements were contracts between Ukraine and Law Debenture relating to the issue and terms of tradeable financial instruments. Given this reality, the suggested terms are not necessary for business efficacy.

211.Ukraine's obligations are clear. It is simply obliged to comply with its repayment obligations under the Agreements. As Mr Howard submitted, there is no express or implied agreement about co-operating or maintaining any identified state of affairs (whether the absence of armed conflict, invasion or anything else) as a precondition of Ukraine repaying the amount it borrowed under the Notes. In this context, we do not accept Mr Thanki's attempt to rely by way of an analogy on the case of Re Badische [1921] 2 Ch 331. On proper analysis, Re Badische was a frustration case involving trade between German and English businesses, which was prohibited and illegal, in circumstances where England and Germany were at war. Ukraine has never contended that the Agreements have been frustrated and accordingly the case is of no assistance.

212. Third, we agree with the judge that the terms are not capable of clear expression and are too vague and uncertain to be imported into the Agreements as implied terms. Thus, for example, we accept Mr Howard's submission that it is not clear what the parties would have understood by "the economic benefit of the loan" or "frustrated the economic purpose" of the loan (alleged implied term (i)), or that it was "impossible or impracticable" for Ukraine to comply with its obligations, or that the Trustee or Russia had "unreasonably interfered" with Ukraine's ability to repay or had acted so as to "prevent, hinder or delay its ability to do so" (alleged implied term (ii)). Alleged implied term (iii) leaves the relationship between the matters referred to and the performance by Ukraine of its obligations completely unspecified. Alleged implied term (iv) suffers from similar uncertainty as alleged implied term (i).

213. Fourth, although the judge did not expressly mention this point, the proposed implied terms do not satisfy the criteria of obviousness as articulated by Lord Simon of Glaisdale in BP Refinery (Westernport) Pty Ltd v Shire of Hastings supra. It is hard to imagine that – had Law Debenture or Russia been asked about these terms at the time of the Agreements – either of them would have agreed to their inclusion as express terms, especially in the vague and uncertain form in which they are framed by Ukraine. The reality is that, in a contract of this complexity, if any party had considered the suggested implied terms appropriate, it would have included them expressly in the written terms of the Agreements. It is even less plausible that a subsequent purchaser of the Notes would have considered these terms so obvious as to go without saying.

214. Fifth, Ukraine contended that its proposed implied terms were consistent with the "Risk Factors" relating to Ukraine-Russia relations highlighted in the Prospectus, and that this provided a further justification for the implication of such terms. We disagree. Even if it were relevant to have regard to these provisions, far from suggesting that, in the event Ukraine was unable to pay because of the conduct of Russia, Ukraine would be relieved from its obligations

to pay under the Notes, and thus would not be in breach, the Risk Factors, referred to in the Prospectus by reference to the wider relationship, were addressing the question of whether Ukraine would default under the Notes, i.e. in other words identifying the risk of it being unable to repay in accordance with its subsisting obligations as a result of Russia's conduct. Thus, these provisions provide no support for Ukraine's case on implied terms.
215. For all the above reasons, which to a considerable extent overlap with those of the judge, we accept Law Debenture's submissions and conclude that Ukraine's case in relation to implied terms has no real prospect of success. For completeness we add that, given that the legal tests for the implication of terms are not satisfied, recourse to submissions about the existence of a general duty of good faith or the duty of co-operation cannot alter that conclusion....
217.Accordingly we would dismiss Ukraine's appeal in relation to the judge's decision in respect of implied terms.

Is the approach of the Court of Appeal in this case consistent with the first two cases in this part of the materials, where the courts avoid political questions?

Eurodollars

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."[16]

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,

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

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....

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

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

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

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

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

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

instituted by President Johnson in January 1968.[17]

An article in the BIS Quarterly Bulletin for September 2004[18] 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.

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.[19]

Libor (London interbank offered rate) refers to the interest rate that applied to eurocurrency transactions in the London interbank market.[20] Originally, Libor was not one fixed rate of interest, but could vary to reflect the different costs which different

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[17] 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.

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

[19] 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.

[20] Because of problems involving manipulation of the Libor rate a decision has been taken to end the use of Libor in favor of other rates based on actual transactions that are less susceptible to manipulation. See, e.g., Andrew Ackerman, *U.S. Banks Urged to Stop Using Libor on New Loans by End of 2021*, Wall Street Journal (Nov. 30, 2020).

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 was supposed to reflect the lenders' cost of funds (the borrower under a loan agreement would pay Libor plus a margin where the margin is the lenders' profit on the loan). The use of Libor assumed that the lending banks would be funding their loan commitments from the interbank market rather than from deposits. Thus it was 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), and the rate was available to the markets via various information providers. During the financial crisis banks became nervous about transacting in the interbank 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.[21] Standardization of Libor meant that the rate was used as a component of interest rates not just in London but even in

[21] *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).")

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 came to manage ICE LIBOR, although the rate is now being wound down.[22] 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 .[23] IOSCO developed Principles for Financial Benchmarks,[24] and the Financial Stability Board published a Report on Reforming Major Interest Rate Benchmarks.[25] Central banks and regulators decided to move away from Libor and to move to risk free rates (RFRs)[26] based on transactions.[27] The US RFR is the Secured Overnight Financing Rate,[28] and the UK's is SONIA.[29] 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:

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

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

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

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

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

[27] *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).

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

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

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 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.[30]

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

Libyan Arab Foreign Bank v Bankers Trust (Staughton J)[31]

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

[30] 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.

[31] [1989] Q B 728

would have to be given before noon if they were to be carried out that day. In English practice it would, I think be described as a species of deposit account. The amount standing to the credit of that account at the close of business on 8 January 1986 was U.S.$131,506,389.93. There may be a small element of subsequent adjustment in that figure. But the point is not material. The Libyan Bank also had an account with Bankers Trust New York, again denominated in United States dollars. This was a demand account. No interest was paid on the balance, and no significant period of notice was required before instructions had to be complied with. But there was not, so far as I am aware, a cheque book. In England it would have been a current account. The amount standing to the credit of that account at the close of business on 8 January 1986 was U.S.$251,129,084.53.

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

"Section 1. The following are prohibited, except to the extent provided in regulations which may hereafter be issued pursuant to this Order: ... (f) The grant or extension of credits or loans by any United States person to the Government of Libya, its instrumentalities and controlled entities."

That order did not in itself have any great effect on the events with which this case is concerned. But there followed it at 4.10 p.m. New York time on 8 January a second order, reading as follows:

"I, Ronald Reagan, President of the United States, hereby order blocked all property and interests in property of the Government of Libya, its agencies, instrumentalities and controlled entities and the Central Bank of Libya that are in the United States that hereafter come within the United States or that are or hereafter come within the possession or control of U.S. persons including overseas branches of U.S. persons. The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to employ all powers granted to me by the International Emergency Economic Powers Act 50 U.S.C. 1701 et seq. to carry out the provisions of this Order. This Order is effective immediately and shall be transmitted to the Congress and published in the Federal Register.

Ronald Reagan
The White House
8 January 1986"

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

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

[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.

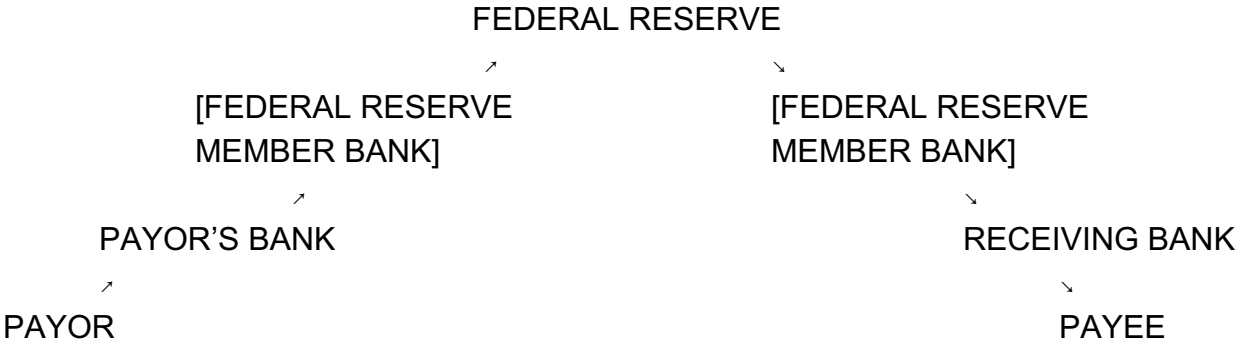
A further complication arises from the fact that a bank's obligation is to respond to a demand, and there are or may be various different kinds of demand which a customer is entitled to make. When the general doctrine of Dicey & Morris, The Conflict of Laws, is considered in the context of a bank account 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.[32]
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.



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

CHIPS[33] 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.[34]

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

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

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

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.