International Finance, Spring 2024
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Jurisdiction and Enforcement of Judgments in International Financial Transactions: Materials for Class on Wednesday April 3 2024

The materials for the last class looked at issues relating to the territorial application of law, and, in particular, the US Supreme Court's approach to the presumption against the extraterritorial effect of federal legislation.

One idea underlying the cases we looked at is that when investors choose to invest in securities in a particular jurisdiction they are making a choice about what legal rules will protect them. Investors who choose to invest in securities listed on a US exchange will expect that US securities regulation applies. Investors who choose to buy securities listed in a foreign jurisdiction do not have the same expectations. In an article in the Wisconsin Law Review in 2009 (an article Justice Scalia cited in his opinion in Morrison) Professors Choi and Silberman[2] argued for a bright-line rule:

> We argue for a clear bright-line rule tracking the exchange on which the transaction is executed for when U.S. prescriptive jurisdiction is appropriate. Under an exchange-based rule, foreign investors who transact in foreign securities on an exchange outside the United States would be presumptively excluded from rule 10b-5 litigation. Such a rule allows those who wish to avoid the U.S. regime to do so; although it may be unlikely that they will do so, parties who wish to opt into the U.S. regime are able to do so predictably. Such a rule also reduces the role of judges as decision makers on individual determinations of jurisdictional issues.

It is more likely that issuers of securities would like to avoid risks of US fraud liability than that investors would wish to avoid the protections of US fraud rules. But it is not clear that investors think about the risks of fraud when they decide to invest. Sophisticated parties to large value transactions who are advised by lawyers will be encouraged to think of the implications of where their transactions are located and what law applies to any contracts, but that does not mean that investors generally think about all the legal implications of where their investments are located. We might ask, for example, whether investors in shares in the US are sensitive to the jurisdiction in which the companies they invest in are incorporated. Do investors think about the implications of Nevada corporate law, with liability rules for directors and officers that are much

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[2] Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-action Lawsuits*, 2009 Wisc. L. Rev 465.

less demanding than those of Delaware?[3] Managers clearly do care.

Although IOSCO (the International Organization of Securities Commissions) has developed international standards of securities regulation, it has not developed any harmonized standards for fraud liability. IOSCO has sometimes focused on issues relating to securities fraud, for example in a report in 2005 after "a series of very high-profile financial scandals involving large publicly-traded companies appeared to create doubts in the minds of investors throughout the world about the integrity of global capital markets."[4] The report identified ways in which regulators could prevent frauds of this type, including corporate governance requirements, auditor independence and audit standards and issuer disclosure requirements.[5] In 2023, IOSCO published a report on conduct in retail securities markets, in which it identified some issues with cross-border frauds:

> Some EU members.. drew attention to subsidiaries of intra-EU investment firms offering products and investment services to clients located in the EU, whereby it become difficult for the retail client to identify the legal entity which ultimately offers and provides the products or investment services via the digital platform. Off-shore entities marketing retail brokerages present a challenge for effective supervision and enforcement. Regulators experience practical and legal difficulties where entities structure themselves in a manner that scatters mutually dependent operations across jurisdictions...Cross border offerings also continue to be an issue, particularly in the context of self-directed trading and gamification. Some members highlighted the relevance of increasing retail interest in gambling type products and behavior. This creates a regulatory hook problem when such products are offered on a cross-border basis by firms that are located in other countries. The regulator of the jurisdiction where products are offered is not always the competent authority and the lack of regulatory reach to firms that offer trading apps continues to be an issue in various jurisdictions... Some frauds that were reported blend more traditional human fraud with online fraud that also includes a cross border element. One example provided explains how a fraudster will try to lure the target emotionally, by supposed friendship or romance, establishing trust, and then later recommending, as an example, an overseas OTC

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[3] *Cf. Adam* Chodorow & James Lawrence, *The Pull of Delaware: How Judges Have Undermined Nevada's Efforts to Develop Its Own Corporate Law*, 20 NEVADA L. J. 401 (2020) at: https://scholars.law.unlv.edu/nlj/vol20/iss2/2 (arguing that Nevada state and federal courts have inappropriately applied Delaware law to Nevada corporations, not giving appropriate effect to the Nevada statute).

[4] IOSCO, Technical Committee, Strengthening Capital Markets Against Financial Fraud (Feb. 2005) at ii. The scandals referred to included the collapses of Enron, Tyco and Worldcom.

[5] *Id.*

derivatives service provider, which is in reality a scam.[6]

Different jurisdictions rely on different mechanisms to enforce required standards of conduct. In the US the idea of private rights of action to allow enforcement by private attorneys general has been a feature of the enforcement landscape, although it is often criticized by business groups.[7] US federal securities fraud law has characteristics that make investor lawsuits more attractive than the law in other jurisdictions, such as the fraud on the market presumption which allows investors in securities traded in efficient markets to argue that their reliance on statements made to the market can be presumed, because the statements will have been incorporated into the securities' market price.[8] But, as we saw in Morrison, US courts are not always open to cases with foreign elements.[9]

As we saw, the Morrison approach does not just apply to transactions in listed securities, and so courts need to decide whether they are faced with investors who acquired shares in "domestic transactions." The complexities of transactions may make it hard for the parties, and the courts, to identify whether the transactions are domestic or not.

Here are some examples, discussed by William Dodge:

> even when the governing law is clear, the answer may not be. In Cavello Bay Reinsurance Ltd. v. Shubin Stein, a Bermudan corporation bought shares in a Bermudan holding company headquartered in New York. The seller sent a subscription agreement from New York to Bermuda where the buyer signed and returned it. The seller then signed the agreement in New York and mailed an executed copy to Bermuda. Title to the shares passed at the closing in Bermuda. The subscription agreement provided that it was governed by New York law. But the parties disagreed about whether, under New York law, the agreement became binding when it was signed by the seller or only when it was received in Bermuda. "Here, the place of transaction is difficult to locate," the Second Circuit noted, "and impossible to do without making state law."...
> Further complications arise when a transaction may be cancelled or is subject to approval. In Choi v. Tower Research Capital LLC, plaintiffs bought futures on the

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[6] IOSCO, Retail Market Conduct Task Force, Final Report, FR/05/2023 (Mar. 2023), at 35-36.

[7] Third party litigation funding has been a recent focus of concern. *See*, *e.g.*, https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/.

[8] *See*, *e.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014).

[9] *Cf.* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1086 (2015) ("in the name of preserving separation of powers, international comity, and defendants' convenience, courts have developed broad rules that exclude substantial amounts of litigation that the United States has a sovereign interest in keeping in U.S. courts").

"night market" of a Korean exchange. Orders placed in Korea when the exchange was closed were matched with counterparties on a trading platform in Illinois and then settled in Korea the next day. The defendant argued that irrevocable liability was not incurred when the trades were matched in the United States because the exchange could cancel transactions in case of errors. But the Second Circuit held that the parties incurred irrevocable liability in the United States because, absent error, the parties were bound when the trades were matched. In Giunta v. Dingman, plaintiff invested in defendant's business in the Bahamas after a series of meetings in New York. The district court agreed with the defendant that irrevocable liability was not incurred in New York because Bahamian authorities still had to approve the issuance of shares. But the Second Circuit reversed, holding that the existence of "a condition subsequent does not mean that either party was effectively free to revoke its acceptance, or change its mind until the approval of the shares abroad." But these two cases do not exhaust the factual situations in which transactions are subject to cancelation or approval. If the investors had reserved the right to cancel in Choi, or if regulatory approval had been a condition precedent rather than a condition subsequent in Giunta, those cases might have turned out differently." [10]

The analysis in these cases reflects a recurrent need for courts to identify what law applies to a particular claim or governs a particular transaction. In large international financial transactions the parties will typically include provisions determining the law that will govern the transaction (choice of law) and the courts in which proceedings relating to the transaction may be brought (choice of jurisdiction). Generally speaking, courts will tend to give effect to contracting parties' choice of law, although there are some differences of approach relating to validity, enforceability and interpretation which can lead to uncertainty.[11] The Hague Principles on Choice of Law in International Commercial Contracts, a soft law instrument, reflect a liberal approach to the idea of party autonomy in choice of law in the context of commercial contracts.[12]

The contracting parties' choice of law governs the contract in which the choice of law

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[10] William S. Dodge, Extraterritorial Application of Federal Securities Law: What Hath Morrison Wrought? (April 20, 2023). New York University Journal of International Law and Politics (Forthcoming), Available at SSRN: https://ssrn.com/abstract=4437497 at 6-7 (footnotes omitted).

[11] *See*, *e.g.*, Gary Born & Cem Kalelioglu, *Choice-of-Law Agreements in International Contracts*, 50 GA. J. INT'L & COMPAR. L. 44, 46 (2021).
Available at: https://digitalcommons.law.uga.edu/gjicl/vol50/iss1/3

[12] *See*, *e.g.*, Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comment*, 61 AM. J. COMP. L. 873–900 (2013) https://doi.org/10.5131/AJCL.2013.0005. See id. At 876 (noting that in some jurisdictions, for example in Latin America, the principle of party autonomy may not be recognized.) Symeonides notes that "the noble principle of party autonomy can become a euphemism for taking advantage of weak parties." *Id.* at 878.

provision is included, but the wording of the choice of law clause may affect what a court understands it to cover. And, with respect to an international contract, litigation may be commenced in different fora (the choice of jurisdiction clause may identify 1 or more jurisdictions or arbitral fora in which litigation or arbitration may be brought, but parties may try to initiate litigation elsewhere), and these fora may have different approaches to interpretation, leading to uncertainty. Some jurisdictions may be disinclined to displace the rules of law that would apply without the contractual choice of law, and some jurisdictions have mandatory rules or rules of ordre public that apply even where the contractual choice of law is generally effective.[13] It may be possible for litigators to identify claims that are not caught by the contractual choice of law and jurisdiction clauses. Born and Kalelioglu argue that: "choice-of-law agreements (i) should not be subject to any "reasonable relationship" requirement, (ii) should be presumptively valid where a non-national legal system is selected and (iii) should be unenforceable on public policy grounds only in exceptional circumstances."[14]

Many international financial contracts are governed by New York law or by the law of England and Wales.[15] Both jurisdictions have developed substantive law that takes account of commercial considerations and have courts with expertise in deciding commercial, and in particular, financial cases.

In **Libyan Arab Foreign Bank v Bankers' Trust**,[16] Mr Justice Staughton in the English High Court was faced with a question about how to think about the applicability of US sanctions against Libya to a dollar denominated bank account the Libyan Arab Foreign Bank held with Bankers' Trust.[17] The facts about the banking relationship were very complicated and the LAFB had been concerned to ensure that it was able to make US dollar denominated payments, through and account with Bankers' Trust in New York, but that its deposits were mostly in London in an account with the London based branch of Bankers' Trust. The LABF was determined that as little

[13] *Cf.* Michael Joachim Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the Unidroit Principles*, 23 UNIFORM L. REV. 15, 18 (2018) ("at least in proceedings before a domestic court, the terms of the contract are binding only to the extent that they do not conflict with the mandatory rules of the otherwise applicable domestic law.") Mandatory rules of contract law tend to be implicated in consumer transactions rather than in transactions between sophisticated commercial parties. *See*, *e.g.*, *id.* at 26.

[14]Gary Born & Cem Kalelioglu, *supra* note ?, at 46.

[15] *See*, *e.g.*, Raymond M. Auerback, *Governing Law Issues in International Financial Transactions*, 27 THE INT'L LAWYER 303, 305 (1993) ("Most English and U.S. lawyers consider it a happy coincidence that virtually all documentation in the major financial markets is governed either by English law or by the laws of one U.S. state or another."); Steven L. Schwarcz, *Sovereign Debt Restructuring and English Governing Law*, 12 BROOK. J. CORP. FIN. & COM. L. 73, 76 (2017) ("Most sovereign debt contracts are governed either by the debtor-state's law or by New York or English law.")

[16] [1989] Q B 728.

[17] A eurodollar account.

as possible of its money should be kept in New York:

“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....
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... Mr. Ronai of Bankers Trust New York wrote to the Libyan Bank as follows:
"... 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...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."
... 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. l 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. 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... 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....It was, as I find, a term of that arrangement that all the

Libyan Bank's transactions should pass through New York.... 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....
... Before very long Bankers Trust took the view that the remuneration which they received from the relationship... was insufficient reward for their services...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....”[18]

In January 1986 Ronald Reagan issued an Executive Order imposing economic sanctions on Libya:

“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.

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[18]They subsequently formalized the arrangement in line with what Bankers’ Trust had been doing.

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.

Making payments to LAFB was illegal for Bankers' Trust under New York law (as a foreign branch of a US bank),[19] but not under English law. Mr Justice Staughton held that performance of the contract could be excused if it were illegal under the proper law (the governing law) of the contract, or by the law of the place of performance:

"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...

[19] Whether sanctions apply to foreign branches depends on the drafting of the sanctions measure.

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....

(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....
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...:
"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..:

> "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...

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

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 .. the.. 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...
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.. 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...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... 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) 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...:

> "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..:

> "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.

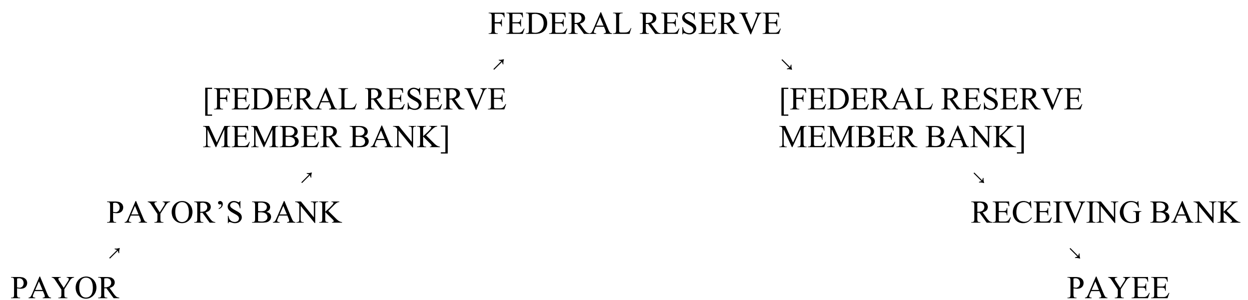
It remains to be considered whether there is a true or business option (see Chitty, para. 1387), such that payment in dollars is the primary or basic obligation but the debtor may choose to pay in sterling if it suits him to do so. Or are there alternative methods of performance, with the consequence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

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.[20] 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.



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

CHIPS[21] 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.

Notes and Questions:

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 skeptical about some of the expert evidence?
Do you think Staughton was thinking about the interests of London as a financial center in this decision? Should he have been thinking about these interests?
Would Bankers' Trust be happy or not about this decision?

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."[22]

Originally eurocurrency deposits were denominated in US dollars because the dollar was the reserve currency and therefore many individuals and entities were interested in holding deposits denominated in dollars. Some depositors had an interest in holding dollars outside the US, either because they wanted to keep their accounts away from the control of the US Government or because they were interested in the higher rates of interest the eurocurrency deposit accounts would pay. Interest rates for eurodollar deposits in London were higher than domestic interest rates in the US largely because domestic regulation of interest rates in the US did not apply in London. Later, eurocurrency deposits developed for other currencies.

Milton Friedman described eurodollars as follows:
"..Euro-dollars ... are deposit liabilities, denominated in dollars, of banks outside the United States. ...Funds placed with these institutions may be owned by anyone- U.S. or foreign residents

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

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

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."[23]

An article in the BIS Quarterly Bulletin for September 2004[24] 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

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[23] 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.

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

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.[25]

Libor (London interbank offered rate) referred to the interest rate that applied to eurocurrency transactions in the London interbank market.[26] Originally, Libor was not one fixed rate of interest, but could vary to reflect the different costs which different banks might incur in borrowing money in the interbank market. Loan agreements used to specify a process for calculating Libor for a particular loan, which would involve specifying which banks would be involved in quoting rates for Libor for different interest periods under the loan. Libor 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 reflected the lenders' cost of funds. Rates at which banks actually lend money to each other during any day will vary. A bank which sought to borrow money in the interbank market would need to pay a level of interest which reflected 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

[25] 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.

[26] Because of problems involving manipulation of the Libor rate a decision was 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).

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.[27] Standardization of Libor meant that the rate was used as a component of interest rates not just in London but even in domestic loans in the US. So, the issue of fixing problems associated with Libor was seen as important. HM Treasury established the Hogg Tendering Advisory Committee for Libor and the Committee opened the tendering process for a new Libor administrator in February 2013. As a result of the tendering process, the Intercontinental Exchange came to manage ICE LIBOR, although the rate is now being wound down.[28] 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 .[29] IOSCO developed Principles for Financial Benchmarks,[30] and the Financial Stability Board published a Report on Reforming Major Interest Rate Benchmarks.[31] Central banks and regulators decided to move away from Libor and to move to risk free rates (RFRs)[32] based on transactions.[33] The US RFR is the Secured Overnight

[27] *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).")

[28] See https://www.theice.com/iba/libor ("ICE Benchmark Administration® Limited ("IBA") is being compelled by the UK Financial Conduct Authority ("FCA") to publish the 1-, 3-and 6-Months USD LIBOR settings, and the 3-Month GBP LIBOR setting, in each case using an unrepresentative "synthetic" methodology. The FCA intends that these "synthetic" settings will cease after a temporary period of publication. All other LIBOR® settings have ceased to be published.")

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

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

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

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

[33] *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).

Financing Rate,[34] and the UK's is SONIA.[35] Because these rates are based on transactions they are backwards looking rather than forward looking as Libor is, so that in times of rising interest rates they would not reflect the actual cost of funds. The manipulation risk is addressed, but other risks remain.

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

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

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

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

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.[36]

[36] 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.